

**UTAH MEDIA LAW HANDBOOK
AND GUIDE TO OPEN GOVERNMENT**

Utah Headliners Chapter
Society of Professional Journalists
Utah Foundation for Open Government

With support from

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ABOUT THE EDITORS

Putting together the Utah Media Law Handbook was a labor of love for many people who believe that strengthening the mutual understanding between the press and the bar in Utah will improve both journalism and the administration of the law. In that respect, this project is doubly beneficial to the people of Utah.

Jeffrey J. Hunt regularly represents Utah publishers and broadcasters in state and federal courts. He also serves as Utah counsel for several national news media organizations. Mr. Hunt counsels clients on defamation, privacy and various other First Amendment issues. He earned a Bachelor of Arts degree in Journalism and Mass Communication from Iowa State University and a Juris Doctor from the University of Utah College of Law. He worked as a copy editor for *The Des Moines Register* and a news reporter for the *Quad-City Times* and the *Deseret News*. In 1992, Mr. Hunt founded the Utah Freedom of Information Hotline, operated by Mr. Hunt's law firm, Parr Waddoups Brown Gee & Loveless. The Hotline offers free legal assistance to Utah journalists. Mr. Hunt is a recipient of the Roy B. Gibson Freedom of Information Award from the Utah chapter of the Society of Professional Journalists, and he was recognized as an Honorary Publisher by the Utah Press Association.

Michael Patrick O'Brien is an experienced and accomplished employment attorney, media lawyer and courtroom litigator. He has received the highest possible peer reviews from rating services such as Martindale - Hubbell (AV rating) and Chambers USA ("famed practitioner"). He is the chairman of the firm's Litigation Department and the leader of its Employment Law and Media Law practice groups. The Utah State Bar recently named him as its Employment Lawyer of the Year. Mike works with the local and national Society for Human Resource Management (SHRM) and serves as the legal and legislative director for Utah SHRM and Salt Lake SHRM. For such services, National SHRM honored him with its prestigious Capital Award, given annually to one of SHRM's 170,000 members worldwide.

Mike partners with employers in many industries to prevent and solve employment problems. He counsels employers on how to minimize and manage risks, including those involving: civil rights, discrimination, the Americans With Disabilities Act (ADA), sexual harassment, other harassment, retaliation, the Fair Labor Standards Act (FLSA), payment of wages, overtime pay and exemptions, employee benefits, drug and alcohol testing, workplace violence, the Family and Medical Leave Act (FMLA), the Equal Employment Opportunity Commission (EEOC), affirmative action, unemployment compensation, employee misconduct, investigations, unions, unfair labor practices, the National Labor Relations Board (NLRB), employment contracts, defamation, torts, wrongful discharge, mediation and arbitration. He also represents employers when disputes become lawsuits. He has successfully handled hundreds of cases before administrative agencies, trial courts, juries, arbitrators, mediators and appeals courts. He regularly works with clients regarding preventive employment law activities, such as investigations, supervisor and employee training, policy and handbook reviews, job descriptions, human resource audits and counseling on day-to-day employee problems. Mike has published numerous articles on employment law topics. He is a popular public speaker, frequently addressing the news media and local and national employer groups on

various employment law trends and issues. He also serves as an arbitrator and mediator in employment law disputes.

Mike is also a recognized media and First Amendment lawyer. He assists news and publishing organizations in obtaining access to places and records (FOIA and Utah GRAMA), and in minimizing risks (and responding to claims) of defamation, invasion of privacy, tort and other matters related to publishing. His clients have included The Salt Lake Tribune, the Associated Press, the Newspaper Agency Corporation, Newsweek, the Society of Professional Journalists, KUTV News and KSL-TV. He is a member of the Society of Professional Journalists.

Mike was born in Orleans, France and attended schools in Ogden, Utah. He holds degrees from the University of Notre Dame and the University of Utah College of Law, where he has served as an Adjunct Professor of Law. He is admitted to practice before all Utah State and Federal Courts, the Tenth Circuit Court of Appeals and The United States Supreme Court. Mike is a member of the employment sections of the Utah State Bar Association and the American Bar Association. He is active in a wide variety of community affairs, currently serving on the board of Wasatch Homeless Healthcare, Inc. and St. Vincent de Paul School.

The editors sincerely thank those who made the Utah Media Law Handbook possible, including members of the Utah Headliners Chapter of the Society of Professional Journalists and the National Freedom of Information Coalition. Among others who contributed to the project are Utah Supreme Court Chief Justice Christine Durham, the Utah Attorney General's Office, the Administrative Office of the Courts, Donald W. Meyers, Joel Campbell, David C. Reymann, Edward L. Carter, and Emily Harwood.

THE MEDIA AND THE FIRST AMENDMENT – AN INTRODUCTION

By Jeffrey J. Hunt
Parr Waddoups Brown Gee & Loveless
and
Michael P. O'Brien
Jones Waldo Holbrook & McDonough
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The First Amendment to the United States Constitution is unique among constitutional provisions in that it singles out a particular industry – by virtue of the prohibition on laws “abridging the freedom of . . . the press”¹ – for constitutional protection from government interference. The existence of the Press Clause demonstrates that the Framers envisioned a critical role in American society for journalists. Former U.S. Supreme Court Justice Potter Stewart believed that the Press Clause was not merely a redundant afterthought to the prohibition on laws abridging freedom of speech generally:

[By] including both [the speech and press] guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two. [In] setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. [The] primary purpose of the constitutional guarantee of a free press was [to] create a fourth institution outside the Government as an additional check on the three official branches. [The] relevant metaphor is that of the Fourth Estate. [The first amendment thus protects] the institutional autonomy of the press.²

Police, prosecutors and courts, including those in Utah, sometimes fail to appreciate the constitutional role of the press. The journalism industry does not gratuitously seek special status under the law that makes it exempt from generally applicable laws. However, in order to fulfill their constitutionally appointed role as government watchdogs, journalists must be free from government interference and harassment. Without the right to gather news, the right to publish or broadcast news has little meaning.³ Yet government officials sometimes attempt to curtail newsgathering, and that is when journalists should know not only what the law entitles them to do but also what the law should – in order to comply with the First Amendment – entitle them to do.

This Handbook describes multiple areas in which journalists sometimes face legal and official government hurdles in their attempts to act as “agent[s] of the public at

¹ U.S. CONST. amend. I.

² GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 9-14 (1999) (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633-34 (1975) (alterations in original)).

³ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

large”⁴ and gather news of public interest. These areas include threats of defamation lawsuits, attempts to uncover confidential sources or use journalists as discovery tools in civil and criminal litigation, copyright law, access to government meetings and records, access to court documents and proceedings, and claims of privacy invasion.

Additionally, the Handbook seeks to help journalists understand the legal system and the roles of those who function in that system. In exploring these areas, the Handbook aims to help journalists, on one hand, and lawyers, judges, police, government officials and private individuals, on the other hand, develop improved mutual understanding and appreciation. Although an adversarial relationship may still be necessary, journalists and those who administer the law will both benefit from better information about each other and better communication with each other.

Most of all, the Handbook seeks to assist both journalists and legal professionals to carry out more effectively their respective roles in serving the public. In the end, a freer press and a more open government will allow and encourage the public to exercise its rights and duties to govern itself in the way it sees fit. Ultimately, the Press Clause protects “the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner.”⁵

Justice Stewart observed that history has vindicated the Framers’ decision to allow the press – not the government – to determine what should be published: “Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that ‘fairness’ was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.”⁶

⁴ *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

⁵ *Pell v. Procunier*, 416 U.S. 817, 839 (1974) (Douglas, J., dissenting).

⁶ *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 145-46 (1973) (Stewart, J., concurring).

JOURNALISTS AND THE JUDICIAL PROCESS – A VIEW FROM THE BENCH

By The Hon. Christine Durham
Chief Justice, Utah Supreme Court
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Judges and journalists seem sometimes to perceive themselves as “natural enemies,” despite the fact that they revere the same professional goal: truth-seeking in the public interest. Judges supervise the judicial process, a major forum for the protection of rights and the preservation of liberties in our constitutional system. Journalists explain the process, trying to make it understandable to the community whose interest it serves. Conflicts and tension arise when the methods of reporting and disclosure themselves threaten the integrity of the judicial process. Journalists occasionally resent the efforts of judges to keep courtroom proceedings free from the potential “taint” of widespread publicity, and judges likewise resent the inaccuracies and sensationalism that sometimes accompany such publicity.

The Constitution of the United States and the Utah Constitution guarantee freedom of expression and freedom of the press. They likewise guarantee to criminal defendants the right to a fair and public trial, and to civil litigants the right to an impartial jury. Judges are concerned with making sure that the administration of justice is open, efficient and fair. Of those three values, fairness is paramount, and will sometimes require compromises of the other two. When journalists, as well as judges and other participants in the adjudication process, maintain their focus on the demands of fairness, less friction and more problem-solving should characterize their interactions.

Some of the friction that occurs when journalists report on court proceedings is inadvertent and unnecessary. It results from a lack of familiarity with courtroom protocol and judicial expectations. Like any good lawyer, a journalist who comes to court regularly should be educated about the system if he or she expects to function in it effectively. Judges have considerable control over their individual courtrooms and can structure the proceedings according to their preferences. It therefore makes a great deal of sense to learn in advance what can and cannot be done in a particular court. The best sources of information on such subjects are courtroom personnel – the bailiff, the court clerk, and the reporter. These people are generally on the permanent personal staff of the judge; they know him or her well, and they can predict with considerable accuracy the judge’s responses to various situations and requests. On occasion, they may even influence that response. For example, rude or unduly demanding behavior with the judge’s staff never pays positive dividends, and it can sometimes ensure a journalist’s status as *persona non grata* in a particular court. Courteous behavior, on the other hand, generally elicits useful information on scheduling, use of the courtroom, and even access to the judge when appropriate. This latter privilege should be used sparingly, however, particularly if it concerns a matter currently pending before the judge or one still on appeal. Judges are prohibited, as a matter of professional ethics, from commenting on the merits of any issue which is currently in litigation. Likewise, they are always extremely wary of saying anything for publication which might influence a current sitting jury or which might be construed as expressing their personal views on the merits of an ongoing controversy.

Although it is appropriate for judges to contribute to the public's and the press' understanding of procedural matters and the context of litigation, most judges are uncomfortable discussing pending cases, and therefore may refuse to see journalists while a case is proceeding. Thus, any questions directed to a judge about a pending case should be confined to procedure, scheduling, or other matters which are unrelated to the issues being tried. In a lengthy and highly complex case, judges may agree to schedule occasional briefing statements or meetings, but such arrangements are a heavy burden for judges and unlikely to be routine.

The best source of information about a trial is, of course, the trial itself. Journalists should not expect judges to provide summaries or critiques of evidence that has been offered. Appropriate background information and explanations may be sought from the lawyers handling the case and occasionally from witnesses. However, extraordinary circumstances may sometimes require limits on access by the press to witnesses. These situations are rare and should be limited by the judge to cases where the fairness of the trial process would otherwise be jeopardized. For example, all jurors and some witnesses are frequently ordered by the trial judge to refrain from discussing any aspect of the case with anyone until the trial is completed. This is aimed at keeping jurors impartial and preventing witnesses from having their testimony influenced by other evidence or testimony offered at trial. Trial participants subject to such an order are prohibited from discussing the case with anyone, including members of the press, and must abide by the order or challenge it through appropriate legal channels.

Most trial judges are concerned about their courtrooms as places where important aspects of the public's business are conducted. They expect and demand a certain degree of respect and deference to the sanctity of the judicial process. That explains why all persons rise when the court convenes and when it adjourns, why lawyers stand when addressing the bench and the jury and when questioning witnesses, and why disturbances of any kind are disapproved. A journalist who wants to be an integral part of the system in order to report on it fully and accurately does not further his or her cause by doing anything disruptive or that demonstrates disrespect for the court. Examples of what *not* to do include: attending court in inappropriate attire, entering and leaving noisily, talking or using cellular telephones during court sessions, using obtrusive and distracting equipment, moving around unnecessarily, or trying to pass in front of the "bar," where only lawyers and witnesses are permitted.

Judges sometimes validly complain that journalists convey an attitude of arrogance about their work, namely, the notion that courtroom proceedings should be tailored to the needs of the communication media. From a judge's point of view, representatives of the press in the courtroom are in the same position as members of the public generally. They have a right and are welcome to attend so long as they do not interfere with or hinder the trial or hearing process. Special arrangements may occasionally be in order, but they should be carefully planned and screened in advance with court personnel and the judge.

Special problems attend the pervasive reliance on electronic media and, specifically cameras, in reporting on the legal system. The courts in Utah have (somewhat grudgingly, it must be conceded) permitted the use of cameras in courtrooms: still cameras in the trial courts, and video recording equipment in the appellate courts. One of the chief objections over time to such access has been the degree of disruption of

the courtroom proceedings themselves – trails of wires across the aisles, camera-holders jockeying for good shot angles, the noise of the equipment’s operation, the coming and going of camera personnel during sessions – but most of those technical problems have been solved with up-dated courtroom facilities and the advent of the “wired” courtroom. Rule 4-401 of the Utah Code of Judicial Administration governs the logistics of and limitations on the use of cameras in courtrooms, and as we increase our experience with them, logistical problems are diminishing.

Judges perform a very specific and quite circumscribed role in the litigation process. They supervise highly-structured, carefully designed processes – trials and hearings – that are closely governed by legal standards of reliability and fairness. The legal rules that control such processes (such as the rules of evidence) are often much more restrictive than the ones most of us observe when making decisions in ordinary life. They exist for good reason; they have developed over centuries of experience with human disputes, and in many cases they are an integral part of our American constitutional system (such as the privileges against self-incrimination). They do not always seem to the outside observer, however, to be based on “common sense,” nor are they usually inclusive of all the kinds of information that circulate in “the courts of public opinion.” In a system based on the rule of law, that is as it should be. Journalists covering legal proceedings, however, face the daunting task of translating legal standards and constitutional rules into language the public can understand.

In the long run, good relations between journalists and judges depend greatly on credibility. Unfortunately, many judges have been “burned” by unprofessional conduct by some members of the press, such as: misquotes, inaccurate reporting, and distorted coverage of an event with which they are connected. Judges have high standards for accuracy and tend to lose respect for a process which compromises or distorts it. Whenever possible, journalists covering court-related events should attempt to double check their information and the manner in which it has been described or reported. Knowledge of the rules of procedure and a modest vocabulary of legal terms, at a minimum, should be mastered by any journalist writing about the courts. There are many pamphlets, brochures, and simplified texts available that can provide non-lawyers with an adequate background in the judicial process and legal terminology. Whenever possible, a good journalist will run a finished piece past someone knowledgeable who can spot omissions, errors or inaccuracies. Such attention to detail and concern for accuracy are certainly an appropriate attribute of a profession dedicated to the public’s “right to know,” and will go far to gain the confidence and respect of the judiciary.

Confidence and respect – these two terms summarize the relationship which ought to exist between judges who supervise the judicial process and journalists who explain it to the public. They are values which require effort and vigilance to create and maintain, but which, in the end, are well worthwhile. The following comments made by Fred W. Friendly, veteran broadcast journalist and educator, are extremely apposite:

While those who labor in crowded courtrooms, fight congested calendars, and are overworked and understaffed, may despair of a public mood that can be both skeptical and ignorant, the same is true of those who toil in cluttered newsrooms, fight excruciating time pressures, and try to

honor their call to public service while fending off the exigencies of deadlines and “going with what you’ve got.” Without ever becoming cozy, the symbiosis between these two institutions grows daily. That familiarity can breed contempt, hostility, and claims from both sides that the chill factor is rising; or, that close association can be utilized to make the public aware of and responsive to the mutual goals of the press and judiciary, even when they seem to be on a collision course. Only when the two sides lay down the swords that they now seem to have poised over each other, can we expect to have true order in the courtroom and freedom in the newsroom. As the late federal judge Harold Leventhal said in his final public speech, an address given to a society of newspaper editors, “We can have both . . . freedom in the newsroom and order in the courtroom. In fact we cannot have one without the other.”

CODE OF ETHICS – SOCIETY OF PROFESSIONAL JOURNALISTS

www.spj.org

Preamble

Members of the Society of Professional Journalists believe that public enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty. Professional integrity is the cornerstone of a journalist's credibility. Members of the Society share a dedication to ethical behavior and adopt this code to declare the Society's principles and standards of practice.

Seek Truth and Report It

Journalists should be honest, fair and courageous in gathering, reporting and interpreting information.

Journalists should:

- Test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
- Diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.
- Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability.
- Always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.
- Make certain that headlines, news teases and promotional material, photos, video, audio, graphics, sound bites and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.
- Never distort the content of news photos or video. Image enhancement for technical clarity is always permissible. Label montages and photo illustrations.
- Avoid misleading re-enactments or staged news events. If re-enactment is necessary to tell a story, label it.
- Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story
- Never plagiarize.
- Tell the story of the diversity and magnitude of the human experience boldly, even when it is unpopular to do so.
- Examine their own cultural values and avoid imposing those values on others.
- Avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status.
- Support the open exchange of views, even views they find repugnant.

- Give voice to the voiceless; official and unofficial sources of information can be equally valid.
 - Distinguish between advocacy and news reporting. Analysis and commentary should be labeled and not misrepresent fact or context.
 - Distinguish news from advertising and shun hybrids that blur the lines between the two.
 - Recognize a special obligation to ensure that the public's business is conducted in the open and that government records are open to inspection.
-

Minimize Harm

Ethical journalists treat sources, subjects and colleagues as human beings deserving of respect.

Journalists should:

- Show compassion for those who may be affected adversely by news coverage. Use special sensitivity when dealing with children and inexperienced sources or subjects.
 - Be sensitive when seeking or using interviews or photographs of those affected by tragedy or grief.
 - Recognize that gathering and reporting information may cause harm or discomfort. Pursuit of the news is not a license for arrogance.
 - Recognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention. Only an overriding public need can justify intrusion into anyone's privacy.
 - Show good taste. Avoid pandering to lurid curiosity.
 - Be cautious about identifying juvenile suspects or victims of sex crimes.
 - Be judicious about naming criminal suspects before the formal filing of charges.
 - Balance a criminal suspect's fair trial rights with the public's right to be informed.
-

Act Independently

Journalists should be free of obligation to any interest other than the public's right to know.

Journalists should:

- Avoid conflicts of interest, real or perceived.
- Remain free of associations and activities that may compromise integrity or damage credibility.

- Refuse gifts, favors, fees, free travel and special treatment, and shun secondary employment, political involvement, public office and service in community organizations if they compromise journalistic integrity.
 - Disclose unavoidable conflicts.
 - Be vigilant and courageous about holding those with power accountable.
 - Deny favored treatment to advertisers and special interests and resist their pressure to influence news coverage.
 - Be wary of sources offering information for favors or money; avoid bidding for news.
-

Be Accountable

Journalists are accountable to their readers, listeners, viewers and each other.

Journalists should:

- Clarify and explain news coverage and invite dialogue with the public over journalistic conduct.
 - Encourage the public to voice grievances against the news media.
 - Admit mistakes and correct them promptly.
 - Expose unethical practices of journalists and the news media.
 - Abide by the same high standards to which they hold others.
-

The SPJ Code of Ethics is voluntarily embraced by thousands of writers, editors and other news professionals. The present version of the code was adopted by the 1996 SPJ National Convention, after months of study and debate among the Society's members.

Sigma Delta Chi's first Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984, 1987 and 1996.

DEFAMATION AND THE MEDIA

“Freedom of speech is not only the hallmark of a free people, but is, indeed, an essential attribute of the sovereignty of citizenship.”

– *Cox v. Hatch*, 761 P.2d 556, 558 (Utah 1988)

By Jeffrey J. Hunt
Parr Waddoups Brown Gee & Loveless

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Free speech promotes the search for truth, facilitates self-governance, and is necessary to self-fulfillment and individual autonomy.¹ Additionally, free speech checks the “government’s monopoly of legitimized violence”² and acts as a safety valve in that it “provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society.”³ Given these important functions of free speech in American society, the United States has long had a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁴

Due to the importance of speech to societal well-being and progress, the law creates breathing space by prohibiting liability for defamation if the statements in question are true or substantially true. Further, even false statements are given some constitutional protection because American society recognizes that it has a compelling interest in promoting the uninhibited flow of ideas and in preventing undue self-censorship by the press. Thus, false statements made about public officials and public figures may not be the basis for defamation liability unless the plaintiff can show actual malice, a high degree of fault, on the part of the speaker.⁵ Similarly, false statements about private individuals on matters of public concern will not subject a speaker to liability unless the plaintiff can show negligence. In addition to those federal constitutional protections, Utah law provides several absolute and qualified privileges that protect speakers from defamation liability. The following discussion examines the elements that must be shown by a civil defamation plaintiff in Utah: “that defendants published the statements [of fact] concerning him, that the statements were false, defamatory, and not subject to any privilege, that the statements were published with the requisite degree of fault, and that their publication resulted in damage.”⁶

¹ GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 9-14 (1999).

² *Id.* at 15 (citation omitted).

³ *Id.* (citation omitted).

⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁵ This discussion focuses on civil defamation claims, but the constitutional degree-of-fault requirements have also been applied to criminal libel statutes. In 2002, the Utah Supreme Court declared that Utah’s criminal libel statute, in effect since at least 1876, was unconstitutionally overbroad because it did not meet the actual malice standard required by the United States Supreme Court. *See I.M.L. v. Utah*, 2002 UT 110, 61 P.3d 1038 (Utah 2002). However, Utah has a second criminal defamation statute that may or may not meet the constitutional actual malice requirement. *See UTAH CODE ANN.* § 76-9-404.

⁶ *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994).

PUBLICATION

The defamatory statement must be published. “Publication” simply requires that the defendant communicate the defamatory statement to a third person – that is, to someone other than the person defamed.⁷ A defamatory statement that is read or heard only by the plaintiff cannot be the basis for liability.

STATEMENT OF FACT

To be actionable, the statement complained of must allege an objectively verifiable fact, rather than mere opinion. The Utah Supreme Court has held that expressions of opinion merit constitutional protection under Article I, Sections 1 and 15 of the Utah Constitution. The Court based its holding on the following rationale:

Opinions are inherently incapable of verification; they embody ideas, not facts. Editorial review, no matter how stringent, cannot ensure that an opinion will not harm the recipient’s reputation. More importantly, expressions of opinion are the mainstay of vigorous public debate. Without opinion, such debate is virtually nonexistent. Thus, if expressions of opinion could serve as the basis for defamation actions, the press would be forced to choose between publishing opinions knowing that no amount of editorial oversight could protect it from exposure to civil liability or ceasing altogether to publish expressions of opinion. Given the importance of opinion in the marketplace of ideas, either alternative would constitute significant abridgement or restraint of the press.⁸

However, the Court recognized that speakers and authors often describe facts as they perceive them in order to convince listeners and readers that an opinion is logical.⁹ Because assertions of fact can be objectively verified and are perceived to pose greater danger of harming reputation, the Court held that an action for defamation is proper when false and defamatory facts are stated or implied along with an opinion.¹⁰

There is often a fine line between statements of fact, which are subject to liability, and statements of opinion, which are constitutionally protected. The Utah Supreme Court has adopted the following non-exhaustive list of factors for determining whether a statement constitutes fact or opinion: “(i) the common usage or meaning of the words used; (ii) whether the statement is capable of being objectively verified as true or false; (iii) the full context of the statement – for example, the entire article or column – in which the defamatory statement is made; and (iv) the broader setting in which the statement appears.”¹¹ Although the Utah Supreme Court has not adopted a categorical

⁷ See RODNEY A. SMOLLA, LAW OF DEFAMATION § 478 (2d ed. 1999).

⁸ *West*, 872 P.2d at 1014-15 (internal citations omitted).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1018 (citing *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984)). When the statement contains an allegedly defamatory *implication*, “the objectively verifiable element essentially breaks down into two questions. . . . First, could a reasonable fact finder conclude that the underlying statement conveys

rule shielding statements on newspaper editorial pages, the fact that a statement appears on an editorial page is important in considering the overall circumstances and militates against liability.¹²

OF AND CONCERNING PLAINTIFF

Not only must the allegedly defamatory statement be factual rather than an opinion, but the statement must also be “of and concerning” the person bringing the defamation claim.¹³ In other words, the defamatory statement must refer to the plaintiff and the reference must be reasonably understood by a recipient.¹⁴

FALSITY

In all defamation cases, the “truth of matters charged as defamatory exempts the publisher from liability.”¹⁵ Although truth is often referred to as an absolute defense to defamation,¹⁶ the law does not require the defendant to prove truthfulness; rather, the plaintiff bears the burden of proving falsity in all cases where the defamatory statement involves a public figure or a matter of public concern.¹⁷

To avert liability, the statement need only be substantially true. “Minor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge can be justified.’”¹⁸ As long as the statement is “‘true in substance,’” it is “‘not necessary to prove the literal truth of the precise statement made.’”¹⁹ In other words, “the statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’”²⁰

DEFAMATORY

Under Utah Code Annotated § 45-2-2, a communication is defamatory if it tends to “blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.” Because defamation law aims to protect individual reputation,²¹ the guiding principle for determining whether a statement is defamatory “‘is the statement’s tendency to injure in the eyes of its audience’ when

the allegedly defamatory implication? . . . Second, if so, is that implication sufficiently factual to be susceptible of being proven true or false?” *West*, 872 P.2d at 1019 (internal citations omitted).

¹² *West*, 872 P.2d at 1020 n.36.

¹³ SMOLLA, LAW OF DEFAMATION § 4:39.

¹⁴ *See id.*

¹⁵ *Williams v. Standard-Examiner Publishing Co.*, 27 P.2d 1, 13 (Utah 1933).

¹⁶ *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222, 224 (Utah 1976).

¹⁷ *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986).

¹⁸ *Masson v. New Yorker Magazine*, 501 U.S. 496, 516-17 (1991) (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (Cal. Ct. App. 1936) (internal citations omitted)).

¹⁹ *Auto West, Inc. v. Baggs*, 678 P.2d 286, 290 (Utah 1984) (quoting *Crellin v. Thomas*, 247 P.2d 264, 266 (Utah 1952)).

²⁰ *Masson*, 501 U.S. at 517 (quoting R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980)).

²¹ *West*, 872 P.2d at 1008.

viewed in the context in which it was made.”²² The relevant audience is a “substantial and respectable minority” of society rather than just the plaintiff, the “hypothetical reasonable person,” or “society at large.”²³

For the publication to be actionable, reasonable persons must be able to reasonably infer a defamatory meaning from the communication.²⁴ Under Utah law, a “publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff. Thus, an embarrassing, even though false, statement that does not damage one’s reputation is not actionable as libel.”²⁵ For example, where postal workers were portrayed as supporters of Orrin Hatch’s Senate campaign, the Utah Supreme Court held that no reasonable person could infer a defamatory meaning from such a representation.²⁶ Even though the representation was untrue and offensive to the postal workers personally, it was not defamatory.²⁷

The context in which the statement was made is another important consideration in determining whether the statement is defamatory. For example, a statement which is not defamatory on its face may still give rise to a defamation-by-implication claim when viewed in context. As one commentator explained:

Words that appear at first blush to convey a defamatory meaning may be explained away as innocuous when their context is made clear. Conversely, words innocent on their face may, when explained in context, convey a defamatory meaning. The classic example is the statement that John Smith was seen walking into a hotel room with Mary. On its face, the statement does not communicate anything intending to injure reputation. If, however, there is added to the statement the fact the John Smith is married to someone other than Mary, the inference that the ordinary reasonable recipient may draw – that John is involved in an adulterous relationship with Mary – becomes defamatory.²⁸

In sum, under Utah law, a statement is defamatory if the statement could reasonably damage the plaintiff’s reputation in the eyes of a substantial and respectable minority of the statement’s audience given the context in which the statement was made.

PRIVILEGES

To prevail on a claim for defamation, the plaintiff must show that the defendant’s statements are not subject to any privilege. Privileges protect persons who publish otherwise defamatory statements from liability.²⁹ Privileges to defamation recognize “that ‘conduct which otherwise would be actionable is to escape liability because the

²² Mast v. Overson, 971 P.2d 928, 932 (Utah Ct. App. 1998) (quoting West, 872 P.2d at 1008-09).

²³ West, 872 P.2d at 1009 n.16 (citing Restatement (Second) of Torts § 559 cmt. e (1972)).

²⁴ Cox v. Hatch, 761 P.2d 556, 561 (Utah 1988).

²⁵ Id.

²⁶ See id.

²⁷ See id.

²⁸ West, 872 P.2d at 1008 (quoting RODNEY A. SMOLLA, LAW OF DEFAMATION § 4.05[1] (1994)).

²⁹ See Price v. Armour, 949 P.2d 1251, 1256 (Utah 1997).

defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."³⁰ There are two types of privileged communication: (1) absolute; and (2) qualified or conditional.

Absolute Privileges

"Absolute privileges are granted to persons whose special position or status requires that they be as free as possible from fear that their actions in their position might subject them to legal action."³¹ Unlike qualified or conditional privileges, absolute privileges cannot be overcome by a showing of improper motives, knowledge or reckless disregard of the falsity of the statements, or excessive publication. Utah law grants an absolute privilege to otherwise defamatory statements made in the following contexts: (1) in the discharge of an official duty; and (2) in a legislative, judicial or other official proceeding.

A. Official Duty

Utah law grants an absolute privilege to otherwise defamatory statements made in "the proper discharge of a public duty."³² The Utah Code does not define what it means by "public duty."

B. Legislative, Judicial or Other Proceedings

Utah law grants an absolute privilege to otherwise defamatory statements "made in any legislative or judicial proceeding, or in any other official proceeding authorized by law."³³

Legislators have an absolute privilege to publish defamatory statements in communications arising from their legislative activities. This absolute privilege is granted "not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal."³⁴ The legislative privilege also protects legislative witnesses.³⁵ In 2002, the Utah Supreme Court held that a lawyer who voluntarily testified before a Utah House of Representatives committee and implied that another lawyer had bribed the sponsor of a bill was shielded from defamation liability by the legislative witness privilege.³⁶ The Court construed the legislative witness privilege broadly, holding that it was not necessary that the witness be

³⁰ *Allen v. Ortez*, 802 P.2d 1307, 1311 (Utah 1990) (quoting W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 114 (5th ed. 1984)).

³¹ *Allen*, 802 P.2d at 1311.

³² UTAH CODE ANN. § 45-2-3(1).

³³ UTAH CODE ANN. § 45-2-3(2).

³⁴ *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951) (citation omitted).

³⁵ SMOLLA, *THE LAW OF DEFAMATION* § 8:26 (2d ed. 1999).

³⁶ *Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128 (Utah 2002).

responding to a subpoena or be speaking under oath; additionally, the statement need only have *some* relationship to the legislative proceeding.³⁷

Similarly, the absolute privilege for judicial proceedings “is premised on the assumption that the integrity of the judicial system requires that there be free and open expression by all participants and that this will only occur if they are not inhibited by the risk of subsequent defamation suits.”³⁸ For the judicial proceedings privilege to apply, each of the following three elements must be satisfied: “First, the statement must have been made during or in the course of a judicial proceeding. Second, the statement must have some reference to the subject matter of the proceeding. Finally, the one claiming the privilege must have been acting in the capacity of a judge, juror, witness, litigant, or counsel in the proceeding at the time of the alleged defamation.”³⁹ The absolute privilege for judicial proceedings also includes quasi-judicial proceedings.⁴⁰ The Utah Supreme Court has recognized that the absolute privilege for judicial proceedings may apply to communications made preliminary to a judicial proceeding, such as settlement discussions and letters.⁴¹

Qualified Privileges

“The publication of a defamatory statement is conditionally or qualifiedly privileged in certain situations in which a defendant seeks to vindicate or further an interest ‘regarded as being sufficiently important to justify some latitude for making mistakes. . . .’”⁴² If a qualified privilege applies, the plaintiff may only recover if he or she can prove that the defendant abused the privilege by acting with common law malice.⁴³ In this context, malice means simply “‘an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that publication was excessive.’”⁴⁴

A. Fair Comment

The fair comment privilege protects statements of opinion regarding matters of public interest and concern. A statement falls within the fair comment privilege when it “involves a matter of public concern, is based on true or privileged facts, and represents the actual opinion of the speaker, but is not made for the sole purpose of causing harm.”⁴⁵ This privilege recognizes that “matters of public interest and concern are legitimate subjects of fair comment and criticism, not only in newspapers, and in radio and television broadcasts, but by members of the public generally, and such comments and

³⁷ *Id.*

³⁸ *Allen*, 802 P.2d at 1311.

³⁹ *Id.* at 1312-13 (citations omitted).

⁴⁰ *Price*, 949 P.2d at 1257.

⁴¹ *Id.* at 1256-57 (citations omitted).

⁴² *Brehany v. Nordstrom*, 812 P.2d 49, 58 (Utah 1991) (quoting W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 115, at 825 (5th ed. 1984)).

⁴³ *See id.*

⁴⁴ *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-05 (Utah 1992) (quoting *Ogden Bus Lines*, 551 P.2d at 225).

⁴⁵ *Russell*, 842 P.2d at 902.

criticisms are not actionable, however severe in their terms, unless they are made maliciously.”⁴⁶ The fair comment privilege protects only opinion, not express or implied statements of fact.⁴⁷

B. Common Interest

Under the Utah Code, a communication is conditionally privileged if made “without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.”⁴⁸ The common interest privilege protects “statements made to advance a legitimate common interest between the publisher and the recipient of the publication.”⁴⁹ For example, the Utah Supreme Court has held that statements made by an employer to employees and other interested persons regarding the reasons for an employee’s termination were conditionally privileged.⁵⁰

C. Fair Report

Under Utah law, a conditional privilege extends to “a fair and true report” of three types of official proceedings. First, the privilege applies to reports of “a judicial, legislative, or other public official proceeding.”⁵¹ The Utah Supreme Court has held that the “protection of statements made in official proceedings extends the scope of the privilege to statements by public officials in charge of the proceeding or authorized to remark on the proceeding.”⁵² Unless the defendant knows that the public official has exceeded or violated his authority to comment on the proceeding, reports of the public official’s comments “deserve the same degree of privilege as the reports of the official proceedings he commented on.”⁵³

Second, the privilege applies to reports of “a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.”⁵⁴ The Utah Supreme Court has read this section broadly to “encompass all official governmental proceedings, not merely criminal proceedings resulting from the issuance of a warrant.”⁵⁵ In other words, a report on charges “buttressed by official action” would fall within the privilege, while a report on “complaints made by a private citizen upon which no official action had been taken” would not be privileged.⁵⁶

⁴⁶ *Ogden Bus Lines*, 551 P.2d at 224 (citation omitted).

⁴⁷ *See Russell*, 842 P.2d at 902.

⁴⁸ UTAH CODE ANN. § 45-2-3(3).

⁴⁹ *Brehany*, 812 P.2d at 58 (citations omitted).

⁵⁰ *See id.*

⁵¹ UTAH CODE ANN. § 45-2-3(4); *see also Russell*, 842 P.2d at 900.

⁵² *Russell*, 842 P.2d at 901.

⁵³ *Id.* at 902.

⁵⁴ UTAH CODE ANN. § 45-2-3(4); *see also Russell*, 842 P.2d at 900.

⁵⁵ *Russell*, 842 P.2d at 901.

⁵⁶ *Id.*

Third, the fair report privilege applies to reports of “the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public.”⁵⁷

To qualify for the privilege, the communication at issue must be a “fair and true report” of the proceedings. The “fair and true report” requirement “does not mean that all individual statements or allegations made in the proceeding must be true for the report to be privileged, but merely that the report must accurately reflect the proceedings and the statements or allegations made therein.”⁵⁸ In other words, if the report accurately reflects the proceedings, the privilege protects the publisher of the report from liability even if the statements or allegations made in the proceedings themselves are false and defamatory.⁵⁹

D. Public Interest

When the matter published is of public interest, a qualified privilege protects statements made without malice.⁶⁰ For example, the “public benefit,” or “public interest,” privilege might apply where the defamatory statement involves a matter “about which the public ought to be informed because of a possible effect on public safety.”⁶¹

REQUISITE DEGREE OF FAULT

Actual Malice – Public Figure

In *New York Times Co. v. Sullivan*,⁶² the United States Supreme Court held that when a false, defamatory statement is made against a public official, the First Amendment to the United States Constitution shields the publisher from liability unless the publisher acted with actual malice. Actual malice means that the defendant published the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁶³ To establish reckless disregard, the plaintiff must present “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”⁶⁴

The actual malice standard applies to both public officials and public figures.⁶⁵ A public official is “one who holds a position in government which has such apparent importance that the ‘public has an independent interest in the qualifications and performance of the person who holds’ that position.”⁶⁶ Not all public employees are public officials.⁶⁷ To qualify as a public official, the “employee’s position must be one

⁵⁷ UTAH CODE ANN. § 45-2-3(5).

⁵⁸ *Russell*, 842 P.2d at 902.

⁵⁹ *See id.*

⁶⁰ *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981); UTAH CODE ANN. § 45-2-3(5).

⁶¹ *Seegmiller*, 626 P.2d at 978.

⁶² 376 U.S. 254, 279-80 (1964).

⁶³ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁶⁴ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

⁶⁵ *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

⁶⁶ *Russell*, 842 P.2d at 903 n.20 (quoting *Van Dyke v. KUTV*, 663 P.2d 52, 54-55 (Utah 1983)); *see Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

⁶⁷ *See Cox*, 761 P.2d at 560.

which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”⁶⁸ Therefore, the court must conduct a two-step analysis when the plaintiff is a public employee: “(1) The libeled individual must occupy a position which invites public scrutiny absent any defamatory charges, before the label of ‘public official’ may attach to him. (2) Next, and only then, may the defamatory comment which must relate to his conduct in that position enjoy the constitutional, qualified privilege.”⁶⁹

Public figures must also prove actual malice in order to recover on a defamation claim. A person is a public figure if the person has either “(1) attained special prominence in the affairs of society and thus assumes a public figure role voluntarily, or (2) thrust himself or herself to the forefront of public controversies in order to affect the outcome of those controversies. The former category is known as a ‘general purpose public figure,’ and the latter, as a ‘limited purpose’ public figure.”⁷⁰ It is important to note that a person who commits a crime does not automatically become a limited purpose public figure.⁷¹ However, a “criminal plaintiff” may become a limited purpose public figure if “the crime committed is a public controversy” and if “the nature and extent of the plaintiff’s participation in the controversy was enough to cause him or her to become a public figure.”⁷² Under these circumstances, “a defamation plaintiff accused of a crime may be deemed a public figure solely by virtue of committing a crime.”⁷³

Public officials and public figures receive less protection for reputational interests for several reasons.⁷⁴ First, “it may be assumed that one who forsakes the anonymity of private life and enters the limelight of the public arena is prepared to engage in a full-blown discussion of public issues with the attendant personal risks.”⁷⁵ Second, public officials and public figures are more likely to have access to the media and, therefore, to possess the ability to rebut false charges.⁷⁶ Finally, the “need to provide the media with a margin for error is most clear and compelling in cases involving public officials and public figures.”⁷⁷ Matters involving public officials and public figures are more likely to be of public importance and “relevant in the decision-making process of self-government.”⁷⁸ In order to promote “the freest flow of information likely to be of importance in deciding matters of public import,” it is necessary to provide the media with more breathing space when reporting on matters involving public individuals.⁷⁹

⁶⁸ *Rosenblatt*, 383 U.S. at 86 n.13.

⁶⁹ *Van Dyke*, 663 P.2d at 55.

⁷⁰ *Russell*, 842 P.2d at 903 n.20 (internal quotations and citations omitted).

⁷¹ *See id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See Seegmiller*, 626 P.2d at 973-74.

⁷⁵ *Id.* at 974.

⁷⁶ *See id.* at 973.

⁷⁷ *Id.*

⁷⁸ *Id.* at 974.

⁷⁹ *Id.* at 973.

Negligence – Private Figure

In *Gertz v. Welch*,⁸⁰ the Supreme Court held that the First Amendment requires that private figure plaintiffs prove some degree of fault on the part of the defendant in order to recover for defamation, but the states could choose what degree of fault had to be proved. In *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*,⁸¹ the Supreme Court “made clear that the constitutional requirement of fault in a private plaintiff defamation case applies only if the subject of the defamatory falsehood pertains to a matter of ‘public concern.’ If the defamatory falsehood does not relate to a matter of ‘public concern,’ state law could constitutionally continue to apply the common law doctrine of strict liability in a defamation action.”⁸²

In Utah, “the necessary degree of fault which must be shown in a defamation action brought by a ‘private individual’ against the media is negligence.”⁸³ In this context, negligence “means a departure from standards which exist or ought to exist as standards of professional conduct in the news media industry.”⁸⁴ This standard of care requires that “media personnel act as reasonably prudent persons in the industry would act to ascertain the truth.”⁸⁵

Private individuals are afforded more protection against defamation because society’s interest in protecting the reputational interests of private individuals outweighs society’s interest in the uninhibited flow of information involving private figures. Unlike public officials and public figures, private individuals have not thrust themselves into the forefront of public affairs and have not voluntarily exposed themselves to the risk of defamation.⁸⁶ Private individuals are involuntary news figures with little or no opportunity to rebut false statements.⁸⁷ Most importantly, matters involving private figures are less likely to be of public importance and thus the stringent actual malice standard is not necessary to protect the marketplace of ideas.⁸⁸ Where a private figure is involved in a matter of public importance, the public concern privilege provides the media with added protection against defamation suits.⁸⁹

DAMAGES

If each of the above elements is met, the plaintiff must then prove that he or she has suffered damages as a result of the defamation. Actual damages may be one of two types: general damages and special damages. General damages are those “which, from the common sense and experience of mankind, would naturally be expected to result from

⁸⁰ 418 U.S. 323 (1974).

⁸¹ 472 U.S. 749 (1985).

⁸² *Cox*, 761 P.2d at 559-60 (internal citations omitted).

⁸³ *Seegmiller*, 626 P.2d at 973; *see also* UTAH CODE ANN. § 45-2-7 (providing that a broadcaster may not be held liable for any defamatory statement contained in a radio or television broadcast unless the broadcaster “failed to exercise due care”).

⁸⁴ *Seegmiller*, 626 P.2d at 976.

⁸⁵ *Id.* at 974.

⁸⁶ *See id.* at 973-74.

⁸⁷ *See id.* at 973.

⁸⁸ *See id.* at 973-74.

⁸⁹ *See id.*

that type of a wrong to any person so injured,” such as reputational harm done by the defamatory statement.⁹⁰ In contrast, special damages are “particular items of damages which result from circumstances peculiar to the case at hand,” such as out-of-pocket expenses and lost income.⁹¹

If the plaintiff has not suffered any special damages, the plaintiff cannot recover general damages unless the defamation amounts to “defamation per se.”⁹² To constitute defamation per se, “the defamatory words must charge criminal conduct, loathsome disease, conduct that is incompatible with the exercise of a lawful business, trade, profession, or office⁹³ or the unchastity of a woman.”⁹⁴ Special damages are not required where the defamation is actionable per se because the words are “of such common notoriety that damage can be presumed from the words alone.”⁹⁵

However, if the alleged defamatory statements do not constitute defamation per se, the plaintiff must plead special damages that are “specific, actual, and non-speculative.”⁹⁶ Generalized allegations of special damages such as a negative impact on business, and allegations of special damages not recognized by Utah law such as attorneys fees, are not enough to state a claim for which relief can be granted and will result in dismissal of a defamation claim.⁹⁷ The U.S. Court of Appeals for the Tenth Circuit noted, in dismissing a defamation claim against Bloomberg News for the plaintiff’s failure to plead special damages, that “Utah requires a party seeking special damages to plead each type of damage specifically to afford the opposing party an opportunity to defend the claims.”⁹⁸

Punitive damages may also be awarded against the defendant if the fact finder determines that the injury was willful and malicious.⁹⁹ Punitive damages are not awarded in order to compensate the plaintiff for loss but “to punish the defendant for a wilful and malicious wrong and to serve as a wholesome warning to others not to engage in similar wrongful conduct.”¹⁰⁰ In setting an amount of punitive damages, the award “must bear some reasonable relationship to the actual damages found.”¹⁰¹

Utah’s retraction statute limits a plaintiff’s recovery to actual damages if the alleged defamation was published in good faith due to mistake or misapprehension of the facts and the media defendant publishes “a full and fair retraction.”¹⁰² When the

⁹⁰ Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975).

⁹¹ *Id.*

⁹² Baum v. Gillman, 667 P.2d 41, 42 (Utah 1983).

⁹³ To constitute defamation per se, a defamatory statement “with respect to the practice of a trade or profession necessarily must, as its natural and proximate consequence, compel the conclusion that plaintiff will be damaged. Speculative injury as to some future difficulty does not give rise to a cause of action as defamatory per se.” Larson v. SYSCO Corp., 767 P.2d 557, 560 (Utah 1989) (internal citations omitted). For example, an employer’s notation indicating “poor performance” as the reason for an employee’s termination “cannot be considered a statement which will necessarily injure his trade or profession.” *Id.*

⁹⁴ Baum, 667 P.2d at 43.

⁹⁵ *Id.*

⁹⁶ Computerized Thermal Imaging, Inc. v. Bloomberg, 312 F.3d 1292, 1298 (10th Cir. 2002).

⁹⁷ *Id.* at 1299-1300.

⁹⁸ *Id.* at 1300 n.15.

⁹⁹ See Prince, 538 P.2d at 1329.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² UTAH CODE ANN. § 45-2-1 & -1.5.

allegedly defamatory statement was published in a newspaper, the newspaper must publish the retraction in the same type and in the same position on the same page as the allegedly defamatory statement.¹⁰³ The retraction must be published in the next regular issue or, in the case of a daily newspaper, within three days after the newspaper receives notice that the statement was allegedly erroneous.¹⁰⁴ If the statement appeared in a Sunday edition, however, the retraction must appear in a Sunday edition within two weeks of notification.¹⁰⁵ When the allegedly defamatory statement occurs in a radio or television broadcast, the retraction must be broadcast on the same station and approximately the same time of day as the alleged defamation.¹⁰⁶ The retraction must air within three days after the broadcaster learns of the allegedly erroneous statement.¹⁰⁷

¹⁰³ UTAH CODE ANN. § 45-2-1.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See* UTAH CODE ANN. § 45-2-1.5.

¹⁰⁷ *See id.*

THE REPORTER PRIVILEGE

THE UTAH OPEN MEETINGS ACT

“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

–*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)

By Jeffrey J. Hunt
Parr Waddoups Brown Gee & Loveless
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The Utah Open and Public Meetings Act, commonly referred to as the “Sunshine Law,”¹ mandates that any meeting of a public body must be open and known to the public, subject to certain limited exceptions. Recognizing that “the state, its agencies and political subdivisions, exist to aid in the conduct of the people’s business[,]” the Open and Public Meetings Act, Utah Code Ann. §§ 52-4-1 to -10, aims to ensure that government officials’ “actions be taken openly and that their deliberations be conducted openly.”² The Act is an important protection because speech is only as free as the information necessary to make it meaningful.

WHO IS SUBJECT TO THE ACT?

The Act applies to any “public body,” which is defined as “any administrative, advisory, executive, or legislative body of the state or its political subdivisions that: (i) consists of two or more persons; (ii) expends, disburses, or is supported in whole or in part by tax revenue; and (iii) is vested with the authority to make decisions regarding the public’s business.”³

“Public body” does not include any political party, group or caucus, or any conference, rules or sifting committee of the Legislature.⁴ Utah legislators in the majority Republican Party have used the exception for political party caucuses to hold closed-door meetings to discuss budgets and even bills. Opponents argue that because Republicans meeting in “caucus” often form a quorum, or simple majority, of the legislative body in question, the meeting should be open. Legislators claim that meetings may be closed as long as no votes are taken. In 2003, a bill that would have required caucus meetings to be open died in committee.⁷

¹ The name derives from United States Supreme Court Justice Louis Brandeis’ famous statement, “Sunlight is said to be the best of disinfectants; electric light the most effective policeman.” LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY* 62 (Harper Torchbooks ed. 1967).

² UTAH CODE ANN. § 52-4-1.

³ *Id.* § 52-4-2(3).

⁴ *Id.* Some committees of public bodies, although not necessarily subject to the Act, provide access to their meetings through their own rules.

⁷ Bob Bernick, Jr., *House Panel Kills Measure to Open Caucus Meetings*, DESERET NEWS (Feb. 11, 2003).

The Act applies not only to legislative bodies, but also to administrative or executive bodies, such as a city council,⁵ the Public Service Commission,⁶ and the Board of Pardons.⁷ Advisory committees to any public body are subject to the Act as well, since the function of making advisory recommendations necessarily involves some form of decision-making.⁸ Although courts are not subject to the Act, the right of the public to attend judicial proceedings has long been recognized under common law, and courts recognize a First Amendment right of access as well.⁹

WHAT CONSTITUTES A MEETING?

Under the Act, a “meeting” is “the convening of a public body, with a quorum [a simple majority of the membership of a public body] present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power.”¹⁰ Meetings subject to the Act do not include the convening of a public body that has both legislative and executive responsibilities, such as some county commissions, where no public funds are appropriated and the body is convened solely for the discussion or implementation of administrative or operational matters.¹¹

A meeting is convened whenever a person authorized to do so calls a public body together “for the express purpose of discussing or acting upon a subject over which that public body has jurisdiction” or advisory power.¹² Thus, any time an authorized person calls a meeting of a public body regarding an official matter, the public must be given notice of the meeting and an opportunity to attend. The Act does not apply to “chance meetings” where no official business is discussed or acted upon.

A public body may hold an electronic meeting, including by telephone, computer, or another telecommunications device.¹³ In addition to complying with the normal notice and other requirements of the Act, a public body holding an electronic meeting must also describe in its notice how the members will be connected, establish written procedures for the electronic meeting, and ensure that at least part of the meeting originates from the building and city where the public body normally meets.¹⁴ The public body must also ensure that the public has space and facilities to attend, monitor, and participate in the open portions of an electronic meeting.¹⁵

⁵ *See Ward v. Richfield City*, 798 P.2d 757 (Utah 1990).

⁶ *Common Cause v. Utah Pub. Serv. Comm’n*, 598 P.2d 1312 (Utah 1979).

⁷ *Andrews v. Utah Bd. of Pardons*, 836 P.2d 790 (Utah 1992).

⁸ UTAH ATTORNEY GENERAL’S OFFICE, OPEN MEETINGS MANUAL at 5.

⁹ *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-15 (1986) (holding that public and press have right to attend criminal preliminary hearings); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (holding that public and press have right to attend civil proceedings); *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515, 518-20 (Utah 1984) (holding that public has right of access to criminal trials and preliminary proceedings subject to protection of defendant’s Sixth Amendment rights).

¹⁰ UTAH CODE ANN. § 52-4-2(2)(a).

¹¹ UTAH CODE ANN. § 52-4-2(2)(b).

¹² UTAH CODE ANN. § 52-4-2(1).

¹³ *Id.* § 52-4-7.8.

¹⁴ *Id.* § 52-4-7.8(3).

¹⁵ *Id.* § 52-4-7.8(3)(e) & (f).

Utah court decisions have somewhat muddied the definition of “meetings” subject to the Act. In *Common Cause v. Utah Public Service Commission*,¹⁶ the Utah Supreme Court held that the Act does not apply to meetings of a “judicial” or “quasi-judicial” nature. While the Court held that the Utah Public Service Commission fell within the definition of a “public body” subject to the Act, the Court distinguished between “information gathering” meetings and “decision making” meetings, holding that the former must be open while the latter may remain closed. This decision has been severely criticized for undermining the purpose of requiring open meetings,¹⁷ but has not been overturned.

In fact, the Utah Supreme Court confirmed its ruling on “quasi-judicial” meetings in *Andrews v. Utah Board of Pardons*.¹⁸ The Court stated that while the Board of Pardons is a “public body” subject to the Act, its deliberations on whether to grant a commutation hearing to a death-row inmate were quasi-judicial in nature and therefore exempt from the open meeting requirements.

UNDER WHAT CIRCUMSTANCES MAY A MEETING BE CLOSED?

The Act provides that “[e]very meeting is open to the public unless closed pursuant to Sections 52-4-4 and 52-4-5.”¹⁹ Despite this blanket requirement, it is likely that a meeting could also be closed upon separate statutory authority.²⁰

In order to close a meeting, the public body must first hold an open meeting for which public notice has been given. Two-thirds of the members present must vote to hold a closed meeting. The reason for closing the meeting, along with the members’ votes on whether to close the meeting, must be recorded in the minutes. A meeting may be closed *only* for the following purposes:²¹

- discussion of an individual’s character, professional competence, or physical or mental health;
- strategy sessions to discuss collective bargaining;
- strategy sessions for discussion of pending or reasonably imminent litigation;²²

¹⁶ 598 P.2d 1312 (Utah 1979).

¹⁷ See, e.g., Laurie A. O’Connell, Note, *Common Cause v. Utah Public Service Commission--The Applicability of Open Meeting Legislation to Quasi-Judicial Bodies*, 1980 UTAH L. REV. 829.

¹⁸ 836 P.2d 790 (Utah 1992).

¹⁹ UTAH CODE ANN. § 52-4-3.

²⁰ See Jeffrey J. Hunt, *Tapping Officials’ Secrets: The Door to Open Government in Utah*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, UT-20 to -21 (1997).

²¹ UTAH CODE ANN. § 52-4-5.

²² The Utah Supreme Court interpreted the scope of the litigation exception in *Kearns-Tribune Corp. v. Salt Lake County Comm’n*, 2001 UT 55, 28 P.3d 686. The Court recognized that exceptions to the Act must be “strictly construed,” *id.* at ¶ 15, but held that a Boundary Commission proceeding regarding a contested annexation petition constituted “litigation” for purposes of the Act. In interpreting the term “litigation,” the Court found that the Boundary Commission “resolve[d] disputes between adverse parties by applying rules of law to a particular set of facts,” thus performing a “judicial function.” *Id.* at ¶ 25. As a result, the Court held that the Salt Lake County Commission did not violate the Act when it held a closed meeting to discuss bringing a challenge before the Boundary Commission to an annexation petition filed by Riverton City. *Id.* at ¶ 35. It remains to be seen how far the definition of “litigation” will be expanded to include various quasi-judicial agency proceedings.

- strategy sessions to discuss the purchase, exchange, lease or sale of real property, provided proper public notice of the terms of the sale is given before the sale is approved;
- discussion regarding deployment of security personnel, devices or systems; or
- investigative proceedings regarding allegations of criminal misconduct.

These justifications for closing a meeting are discretionary rather than mandatory – nothing in the Act *requires* meeting closure of any kind for any reason.²³

A public body may not approve any “ordinance, resolution, rule, regulation, contract or appointment” in a closed meeting.²⁴ This means that a public body may not take final action at a closed meeting, even on those matters for which a closed meeting is permitted. A public body must always vote in the open and on the record.²⁵ In addition, a public body may not interview a person applying to fill an elected position in a closed meeting.²⁶

MEETING REQUIREMENTS

The Act requires a public body to take certain steps to provide the public with meaningful access to meetings and the information therein.

Notice

In order to involve the public as much as possible, a public body must provide notice of the agenda, date, time, and place of the meeting not less than 24 hours before the meeting.²⁷ Notice may be satisfied through:

- posting written notice at the principal office of the public body or the building in which the meeting will be held; *and*
- providing notice to at least one local general circulation newspaper or local media correspondent.²⁸

In addition, any public body which holds regular meetings over the course of a year must give the public notice at least once per year of its annual schedule.²⁹ The Act also encourages the development and use of electronic methods of notice, such as posting notices on the Internet, as a supplement to those specified in the statute.³⁰

In some instances, an emergency meeting may be held if supported by a majority vote. Such a meeting may only be held due to “unforeseen circumstances” that make it

²³ UTAH CODE ANN. § 52-4-4.

²⁴ *Id.* § 52-4-4.

²⁵ UTAH ATTORNEY GENERAL’S OFFICE, OPEN MEETINGS MANUAL at 15.

²⁶ UTAH CODE ANN. § 52-4-5(1)(b).

²⁷ *Id.* § 52-4-6(2).

²⁸ *Id.* § 52-4-6(3).

²⁹ *Id.* § 52-4-6(1).

³⁰ *Id.* § 52-4-6(4).

necessary to consider matters of an “emergency or urgent nature.”³¹ In such a case, the Act requires only that the “best notice practicable” be given.³²

Minutes

Whether a meeting is open or closed, a public body is required to keep a written record, or minutes, of the meeting. These minutes must include the date, time, and place of the meeting and the names of all members present or absent.³³ An open meeting must also include a summary of all matters proposed, discussed, or decided, the names and substance of the testimony of any citizens, a record of the individual members’ votes on each matter, and any further information a member requests inserted.³⁴ The minutes of a closed meeting must also include the names of all others present unless such a disclosure would infringe on the original purpose for closure.³⁵

The minutes of open and closed meetings are public records and must be available within a reasonable time after the meeting.³⁶ In addition, all or any part of an open meeting may be recorded by any person present, unless it interferes with the meeting itself.³⁷

LEGAL REMEDIES FOR VIOLATIONS OF THE ACT

A public body can violate the Act in several ways. For example, a public body may violate the Act by closing a meeting without first voting openly to do so, by closing a meeting for purposes other than those provided for in the Act, by taking official action during a closed meeting, or by failing to provide public notice as required by the Act. In the event of a violation, the Act provides both public and private remedies.

Final Action “Voidable”

Any final action taken in violation of the Act is “voidable” by a court of competent jurisdiction.³⁸ “Voidable” does not mean that the action is automatically void – only that a court may hold the action void in any given case.³⁹ The power to declare official action taken in violation of the Act void is within the trial court’s discretion.⁴⁰ In addition, a violation of the Act can sometimes be cured by a subsequent open meeting at which the contested final action is again discussed and decided.⁴¹

³¹ *Id.* § 52-4-6(5).

³² *Id.*

³³ *Id.* § 52-4-7(1) & (2).

³⁴ *Id.* § 52-4-7(1)(a)-(e).

³⁵ *Id.* § 52-4-7(2)(c).

³⁶ *Id.* § 52-4-7(3).

³⁷ *Id.* § 52-4-7(4).

³⁸ *Id.* § 52-4-8.

³⁹ Ward, 798 P.2d at 759-60.

⁴⁰ *Id.* (affirming trial court’s refusal to void official action taken in violation of a temporary restraining order).

⁴¹ *Id.* at 759.

Causes of Action

Although the power to enforce the Act is vested in the Attorney General and county attorneys of the state, a private citizen who is denied any right under the Act may bring suit in the proper court to compel a public body to comply with the Act, to prevent future violations, or to determine the validity of the public body's actions under the Act.⁴² Because the Attorney General and county attorneys historically have shown no interest in exercising their enforcement powers under the Act, complaints of violations usually arise as private causes of action.⁴³

Any lawsuit seeking to void an action taken by a public body must be filed within 90 days after the contested action.⁴⁴ Any lawsuit seeking to void an action with respect to bonds, notes, or other evidences of indebtedness must be filed within 30 days after the action.⁴⁵ On the other hand, suits for declaratory judgments, seeking a judicial determination of whether a public body has complied with the Act, may be exempt from the 90-day limitation, as they are not specifically mentioned in the Act.⁴⁶

While the Act provides for legal action against violators, it does not provide punitive or deterrent penalties. This is unfortunate, as such penalties might create strong incentives against unnecessary meeting closures. The Act does, however, allow a court to award reasonable attorney fees and court costs to a successful plaintiff.⁴⁷

Role of the Court

In an action challenging a public body's closed meeting, the court is required to review the tape recording or written minutes of the closed meeting *in camera*, or in chambers, to decide the legality of closing the meeting.⁴⁸ If the judge subsequently finds no violation, the case is dismissed without disclosure of the information in the recordings. However, if the court finds a violation, it shall publicly disclose all information in the recording or minutes about the portion of the meeting that was illegally closed.⁴⁹

WHAT SHOULD A PERSON DO IF EXCLUDED FROM A MEETING?

⁴² UTAH CODE ANN. § 52-4-9(1) & (2).

⁴³ One obvious difficulty with public enforcement is that the public officials charged with enforcing the Act – the Attorney General and the county attorneys – are often the same officials who have counseled the public body to take the action alleged to be unlawful under the Act and/or who are responsible for representing the public body. Although such conflicts of interest might be cured by appointing independent counsel to represent either the public enforcement official (the Attorney General or the county attorneys) or the public body named in an enforcement action, to the author's knowledge, no such appointment has been made in the twenty-six-year history of the Act.

⁴⁴ See UTAH CODE ANN. § 52-4-8.

⁴⁵ *Id.*

⁴⁶ Lawsuits asking for declaratory judgments as relief may instead be governed by Utah Code Ann. § 78-12-25(3), which requires that actions “for relief not otherwise provided for by law” be brought within four years. It does not appear, however, that this issue has been decided by Utah courts.

⁴⁷ UTAH CODE ANN. § 52-4-9(2).

⁴⁸ UTAH CODE ANN. § 52-4-10(1).

⁴⁹ *Id.* § 52-4-10(2).

Following are some suggestions for a journalist or other member of the public who believes he or she has been illegally excluded from a meeting:

- Object to the closed meeting and request that your objection be recorded in the minutes.
- Request that the presiding official of the meeting state the reason for closing the meeting and that such reason be recorded in the minutes.
- Request that the public body vote on closing the meeting and that the results be recorded in the minutes.
- Advise the participants of the meeting that any action taken at a meeting held in violation of the Act may be void.
- If the closed meeting is already in progress, deliver a written objection to the public body and request that the objection be incorporated into the minutes.
- Request a transcript of the meeting or a copy of the minutes – even the minutes of a closed meeting are public records.

COPYRIGHT AND THE JOURNALIST

By Jeffrey J. Hunt
Parr Waddoups Brown Gee & Loveless
Copyright 2003

As new technologies continue to force changes in U.S. copyright law, journalists in the 21st century will face significant and unique challenges in gathering information for publication or broadcast. Free speech depends on access to information.¹ Copyright law seeks to promote the progress of science and art by granting limited monopolies to originators of creative works,² but in doing so, copyright law as it has developed in the United States increasingly threatens to cut off access to information. New technologies and recent extensions of copyright terms strengthen the rights of copyright holders to keep works out of the public domain. At the same time as they struggle with the impact of copyright on access to information, journalists and their employers benefit from the protections afforded to their own creative works by the copyright laws.

THE COPYRIGHT ACT

The Copyright Act, codified at 17 U.S.C. § 101 *et seq.*, sets forth specific requirements regarding the material that may be copyrighted, the protection copyright provides, the manner in which copyright protection is obtained, the determination of the copyright owner, the duration of copyright protection, and the activities that may infringe on copyright. Each of these topics is briefly summarized below.

What Material May Be Copyrighted?

Copyright protection is extended to original works, including: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.³ To be original, and thereby qualify for protection, it is not necessary for the work to be novel. Instead, originality in this context means that the work is independently created and not copied from other works. To illustrate the meaning of originality, the U.S. Supreme Court related a hypothetical about

¹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583 (1980) (Stevens, J., concurring) (“[A]n arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”).

² The U.S. Copyright Act, 17 U.S.C. § 101 *et seq.*, was enacted pursuant to the United States Constitution, which permits Congress to establish laws that “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8. The Copyright Act protects original works that are fixed in any tangible medium of expression and allows the copyright owner an exclusive right to copy, distribute, or perform the work for a specific period of time.

³ 17 U.S.C. § 102(a).

two poets who write identical poems virtually devoid of literary merit. As long as one poet did not copy the other, both poets' compositions enjoy copyright protection.⁴

While facts are not copyrightable,⁵ a journalist's expression of those facts in printed or recorded form is subject to copyright. Thus, if a news article "involves authorship and literary quality and style, apart from the bare recital of the facts or statement of news, it is protected by the copyright law."⁶ Copyright protection is denied to all unoriginal elements of the work, such as those elements found in the public domain. Although a news article, as a literary production, may be original and entitled to protection, "the news element – the information respecting current events contained in the literary production – is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*," that is, in the public domain.⁷ The element of a news article that is protected by copyright "is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments."⁸

Copyright does not protect ideas, but the expression of ideas. Therefore, copyright protection for an original work does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."⁹ In other words, copyright does not preclude others from using ideas or information revealed by an author's work; it merely protects the author's original form of expressing ideas and information.

Accordingly, "copyright protection is denied to expression that is inseparable from or merged with the ideas, processes, or discoveries underlying the expression."¹⁰ This rule ensures that courts do not "unwittingly grant protection to an idea by granting exclusive rights to the only, or one of only a few, means of expressing that idea."¹¹ Similarly, "those expressions that are standard, stock, or common to a particular topic or that necessarily follow from a common theme or setting" are not protected by copyright.¹²

Finally, works that have not been fixed in a tangible form of expression, such as speeches that are neither committed to writing nor recorded, are not entitled to copyright protection.¹³

⁴ *Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345-46 (1991).

⁵ *Id.* at 348.

⁶ *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797, 798-99 (7th Cir. 1921).

⁷ *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918). While news facts are not protected by copyright, direct copying of an article while the news is fresh, even if the news article copied is rewritten, is an appropriation of property and an act of unfair competition. *See id.* On the other hand, there is nothing unlawful about using others' news articles as tips to form the basis for independent investigation and news writings. *See id.*

⁸ *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977).

⁹ 17 U.S.C. § 102(b).

¹⁰ *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 838 (10th Cir. 1993).

¹¹ *Id.*

¹² *Id.*

¹³ 17 U.S.C. § 102.

What Protection Does Copyright Provide?

Section 106 of the Copyright Act provides that the owner of a copyright has six exclusive rights: (1) the right to reproduce the copyrighted work; (2) the right to prepare derivative works, or adaptations; (3) the right to publicly distribute the work; (4) the right to publicly perform the work, if it is a literary, musical, dramatic, or choreographic production, or a pantomime, motion picture or other audiovisual work; (5) the right to publicly display the work; and (6) the right to publicly perform a digital sound recording by means of digital audio transmission.¹⁴

How is Copyright Obtained?

When an original work of authorship is created and fixed in a tangible medium of expression, the author automatically has copyright protection in that work.¹⁵ Before 1989, a copyright notice had to appear on all publicly distributed copies of the work in order to maintain copyright protection. Typically, the copyright notice consisted of the symbol © or the word “copyright,” the year of first publication, and the copyright owner’s name.¹⁶ However, the Berne Convention Implementation Act of 1988 eliminated the notice requirement. Affixing notice is no longer a necessary precondition to copyright protection for works first published after March 1, 1989.¹⁷

Similarly, a copyright need not be registered with the Register of Copyrights in order for a work to maintain copyright protection. However, registration allows a copyright owner to pursue certain remedies for infringement. For instance, a court may award statutory damages and attorneys fees to a prevailing copyright owner only if the copyright was registered within three months of publication or if the infringement occurred after registration.¹⁸ In addition, the copyright must be registered prior to filing suit for copyright infringement.¹⁹

Registration may be accomplished at any time by filing an application for registration, along with a \$30 fee and copies of the work to be registered. Generally, two complete copies of the best edition of a published work must be deposited.²⁰ In the case of an unpublished work, a work first published outside the United States, or a contribution to a collective work, one complete copy must be deposited for registration.

The particular form used for registration depends upon the type of work to be registered.²¹ Journalists may be able to register a group of articles at the same time for a

¹⁴ 17 U.S.C. § 106.

¹⁵ 17 U.S.C. § 302.

¹⁶ 17 U.S.C. § 401.

¹⁷ *Direct Mktg. of Va., Inc. v. E. Mishan & Sons, Inc.*, 753 F. Supp. 100, 104 n.8 (S.D.N.Y. 1990).

¹⁸ 17 U.S.C. § 412.

¹⁹ 17 U.S.C. § 411.

²⁰ 17 U.S.C. § 408.

²¹ The following forms may be obtained free of charge from the Register of Copyrights, Library of Congress, Washington, DC 20559, or online at www.loc.gov/copyright:

Form TX

non-dramatic literary works (books and newspaper or magazine articles)

Form PA

works in the performing arts (musical and dramatic works, motion pictures, and television newscasts, if fixed on film, videotape, etc.)

single registration fee. To qualify for single registration, all works must have the same individual author and must have been first published as submissions to periodicals, including newspapers, within the same twelve month period.²²

The owner of a copyright or of the exclusive right of publication in a work published in the United States is generally required to deposit copies of the work with the Library of Congress within three months of publication.²³ Copies submitted at the time of copyright registration will satisfy the deposit requirement of the Library of Congress.²⁴ Although deposit with the Library of Congress is mandatory, no sanctions are provided for failure to make the deposit, unless not made within three months of a written demand by the Register of Copyrights.²⁵

Who Has Ownership of Copyright?

Copyright in a work initially vests in the author, the person who actually creates the work. Where there is more than one author of a work, the joint authors are co-owners of the copyright.²⁶

Where a work is made for hire, the employer is deemed the author of the work and is the initial owner of the copyright.²⁷ A work made for hire, is “(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties agree in a written instrument signed by them that the work shall be considered a work made for hire.”²⁸

Thus, a newspaper that hires a reporter to write articles as part of her employment is the author of articles written by the reporter and is the copyright owner. However, the reporter may retain authorship if both the newspaper and the reporter sign a written agreement specifying that such works are not to be considered works made for hire.²⁹

In contrast, a freelance or independent reporter, who is not an employee of a newspaper working within the scope of his employment and who is specially commissioned to write an article for a paper, is the owner of the copyright in the article

<u>Form VA</u>	works in the visual arts (pictorial or graphic works, including photographs, sketches, cartoons, and comic strips)
<u>Form SR</u>	sound recordings
<u>Form SE</u>	serial publications (issues of newspapers, magazines, and newsletters)
<u>Form GR/CP</u>	group registration of contributions to a periodical
<u>Form RE</u>	renewal of copyrights obtained prior to 1978
<u>Form CA</u>	correction or amplification of a prior registration

²² 17 U.S.C. § 408(c)(2). The author must submit both a GR/CP and a TX form, identifying each contribution separately, and a copy of the entire publication or section containing each contribution. 17 U.S.C. § 408(c)(2)(A)-(B).

²³ 17 U.S.C. § 407(a).

²⁴ 17 U.S.C. § 407(b).

²⁵ 17 U.S.C. § 407(d).

²⁶ 17 U.S.C. § 201.

²⁷ 17 U.S.C. § 201(b).

²⁸ 17 U.S.C. § 101.

²⁹ 17 U.S.C. § 201(b).

unless the newspaper and reporter have a written agreement signed by both of them that the work is to be treated as a work made for hire.³⁰ Even when the reporter owns the copyright, however, the owner of a collective work, such as a newspaper, has the right to reproduce and distribute the contribution as part of the collective work, any revision of the collective work, or any later collective work in the same series.³¹

Ownership of copyright may be transferred in whole or in part by a written grant signed by the copyright owner or by his or her agent.³² The initial owner may revoke the transfer of or license in a copyrighted work 35 years after the grant or, if the grant covers the right of publication, the earlier of 35 years from the date of publication, or 40 years from the execution of the grant.³³ If the initial owner does not effectively terminate the grant within five years after the right of termination accrues, the grant continues in effect for the life of the copyright.³⁴

How Long is Copyright Protection Extended?

For works created after 1978, a copyright endures for the author's life plus 70 years.³⁵ In the case of anonymous or pseudonymous works, or works made for hire, the copyright lasts for a term of 95 years from the first publication, or 120 years from the date of creation, whichever expires first.³⁶ The United States Supreme Court held that the 1988 law that extended the term of copyrights to life of the author plus 70 years did not violate the First Amendment.³⁷ The Court reasoned that copyright law and free speech are compatible because copyright law does not prohibit someone from using the facts or ideas contained in someone else's expression.³⁸ Additionally, the Court said, the Copyright Act allows "fair use" (see below) of even copyrighted expression.³⁹

For works created before 1978, the copyright expires 28 years from the date the copyright was secured.⁴⁰ At that time, the copyright may be renewed for another 67 years.⁴¹ Therefore, for works copyrighted before 1978, the following rules of thumb apply: (1) if the work was copyrighted more than 28 years ago, it is still protected only if the copyright has been renewed; (2) if the work was first published more than 95 years ago, the copyright has expired and the work is in the public domain.

³⁰ 17 U.S.C. § 101.

³¹ 17 U.S.C. § 201(c). The United States Supreme Court held that the right to produce and distribute a revision of a collective work such as a newspaper or magazine did not permit *The New York Times*, *Newsday*, and *Time* to license the publication of freelancers' articles for re-publication in electronic databases such as LEXIS/NEXIS. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

³² 17 U.S.C. § 201.

³³ 17 U.S.C. § 203(a)(3).

³⁴ 17 U.S.C. § 203(b)(6).

³⁵ 17 U.S.C. § 302(a).

³⁶ 17 U.S.C. § 302(c).

³⁷ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 17 U.S.C. § 304(a).

⁴¹ 17 U.S.C. § 304.

When is a Copyright Not Considered Infringed?

The rights granted by a copyright are not absolute. They are subject to a number of specific exceptions set forth in the Copyright Act. Perhaps the most important exception, from a journalist's perspective, is the doctrine of "fair use." Under this exception, the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.⁴² To determine whether the use of the work in a particular case falls within the fair use exception, four factors must be considered:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (1) the nature of the copyrighted work;
- (2) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (3) the effect of the use upon the potential market for or value of the copyrighted work.⁴³

The final factor, the effect of the use on the value of the work, is often given the greatest weight by the courts.⁴⁴

The classic examples of fair use are "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."⁴⁵ Copying such passages from copyrighted work is considered "fair use" and does not constitute infringement of the copyright.

NEW TECHNOLOGY, COPYRIGHT LAW AND FREE SPEECH

While technology has altered the copyright law landscape in recent decades, the response of Congress and the courts thus far has been to merely tinker with existing copyright law rather than to fundamentally rethink how to promote science and art while preserving the access to information necessary for free speech to thrive.⁴⁶ In recent years,

⁴² 17 U.S.C. § 107.

⁴³ *Id.*

⁴⁴ Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1 (1999).

⁴⁵ COMMITTEE ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 65 (1976).

⁴⁶ See INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 140 (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

technology and the congressional response to technology have strengthened the rights of copyright holders,⁴⁷ seemingly limiting access to information that otherwise would be in the public domain or at least available for “fair use” by journalists. Although the effect on journalists thus far has been relatively small, the precedent set is a dangerous one.

Digital Millennium Copyright Act

In 1998, Congress adopted a law that aimed to bring the Copyright Act into the Internet age. The Digital Millennium Copyright Act limits the liability of online service providers by providing a “safe harbor” to copyright infringement. Essentially, the Act says that online service providers may not be subject to monetary damages or injunctions for (1) transitory communications, or merely acting as a data conduit; (2) system caching, or retaining copies for a limited time; (3) storage of information on networks at the direction of users; and (4) providing information location tools such as hyperlinks, online directories, and search engines.⁴⁸

The Digital Millennium Copyright Act also prohibits circumvention of technological measures used to protect copyrighted works. Critics have charged that, by taking steps toward giving copyright holders complete control over digital copyrighted works in an age where nearly everything is digital, Congress has gone too far in limiting access to copyrighted works.⁴⁹ If Internet users, for example, cannot gain access to certain copyrighted works, those users will not be able to make fair use of those works or build on those works in their own creative activities, thereby frustrating the constitutional purpose of copyright.⁵⁰

The Napster Effect

The tension between copyright law and access to information entered the national consciousness in 2000 with the highly publicized case involving the free music-sharing program Napster. The Ninth Circuit Court of Appeals held that a recording industry group and various artists who sued Napster had shown that Napster needed to be shut down because Napster facilitated copyright infringement by its users and thus made it less likely that those users would purchase audio CDs.⁵¹ The Ninth Circuit rejected Napster’s argument that its users merely engaged in fair use of copyrighted works by sampling the works and by space shifting (storing digital music on a computer that users already owned in audio CD form). *Napster* and other recent cases have caused some scholars to suggest that the fair use defense to copyright infringement has been weakened

⁴⁷ *Id.* at 7 (“Advances in technology particularly affect the operation and effectiveness of copyright law. . . . Copyright law has had to respond to those challenges. . . .”).

⁴⁸ 17 U.S.C. § 512(a) – (d).

⁴⁹ JESSICA LITMAN, DIGITAL COPYRIGHT 175 (2001).

⁵⁰ *Id.* See also Niels Schaumann, *Copyright vs. Consumers*, 21 ENT. & SPORTS LAW. 1, 25-28 (2003); Edward L. Carter, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in Bonneville International Corp. v. Peters*, 2002 B.Y.U. L. REV. 1155.

⁵¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

and that a copyright holder's rights in the online world are stronger than in the non-digital world.⁵²

The Future

To combat the effect of technology and recent changes in the law that have strengthened the rights of copyright holders, scholars have suggested that the statutory defense of fair use be expanded. Rather than treating fair use as a defense to copyright infringement, fair use could serve as an affirmative right of the public and press.⁵³ The affirmative right to fair use would presume that all uses of a copyrighted work are fair uses protected from copyright infringement, unless a copyright holder shows intentional exploitation of copyrighted works for the economic benefit of someone other than the copyright holder. Such a scheme would allow copyright holders to benefit from their limited monopoly – thereby encouraging others to produce creative works and promoting the progress of science and art – while giving the public and press broad authority to access and use copyrighted works.⁵⁴ With or without such changes in the Copyright Act, the tension between access to information and copyright likely will be a significant issue facing the journalism industry for decades to come.

⁵² See *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267, 1274 (11th Cir. 2001) (holding that the National Geographic Society infringed on a freelance photographer's right to prepare derivative works from his copyrighted photographs when the Society included the photographs, previously published in *National Geographic Magazine*, in a CD-ROM); *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (stating that the right of public distribution is at least implicated by electronic transmission, such as e-mail, of copyrighted works); *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001) (holding that radio stations could not broadcast copyrighted digital sound recordings online without paying a licensing fee, even though those same radio stations could broadcast copyrighted sound recordings over the radio airwaves without paying the licensing fee).

⁵³ LITMAN at 182.

⁵⁴ *Id.*

ACCESS TO GOVERNMENT RECORDS

“[R]eflection, . . . with information, is all which our countrymen need, to bring themselves and their affairs to rights.”

– Thomas Jefferson to James Lewis, Jr., May 9, 1798
(reprinted in *The Writings of Thomas Jefferson*, vol. 10, pg. 37)

By Jeffrey J. Hunt
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Copyright 2003

Utah’s Government Records Access Management Act (“GRAMA”), and its federal equivalent, the Freedom of Information Act (“FOIA”), attempt to balance the interest of the public and press in access to government information with two other important interests: individual privacy and state or national security. GRAMA and FOIA are similar in terms of organization, fees, time limits, and the appeals process. Familiarity with both acts is important when seeking the widest range of information from the government. The following discussion provides an overview of both the state and federal statutory schemes.

UTAH’S GOVERNMENT RECORDS ACCESS MANAGEMENT ACT

Overview

GRAMA,¹ enacted in 1991, is the latest in a series of attempts by the Utah Legislature to strike a balance between “two constitutional rights: (a) the public’s right of access to information concerning the conduct of the public’s business; and (b) the right of privacy in relation to personal data gathered by governmental entities.”² GRAMA is intended to promote access while delineating circumstances under which the public’s right of access is outweighed by individual privacy or government security interests. In addition, GRAMA aims to prevent abuse of confidentiality by government, to provide guidelines for disclosure or restriction, and to establish fair records management practices.³

Access Rules

GRAMA defines “records” as “all books, letters, documents, papers, maps, plans, photographs, films, cards, tapes, recordings, electronic data, or other documentary materials regardless of physical form or characteristics: (i) which are prepared, owned, received, or retained by a governmental entity or political subdivision; and (ii) where all of the information in the original is reproducible by photocopy or other mechanical or

¹ UTAH CODE ANN. §§ 63-2-101 through -1001.

² *Id.* § 63-2-102(1).

³ *Id.*

electronic means.”⁴ “Records” do not include temporary drafts, daily calendars, or other personal notes; privately owned, copyrighted, or patented material; notes or internal memoranda prepared as part of a judicial or quasi-judicial deliberative process; proprietary software or computer programs; junk mail or commercial publications received by the governmental entity; and books or other materials available in public libraries.⁵

Under GRAMA, all government records are presumed to be public unless classified as “private,” “protected,” or “controlled,” or unless access is restricted by another state or federal statute or by court rule.⁶ The manner in which a record is classified determines the scope of the public’s access.

A. Public Records

“Public records” consist of all records that are not classified as “private,” “controlled,” or “protected,” or otherwise restricted by court rule, federal statute or regulation, or another state statute.⁷ Anyone can inspect public records free of charge and obtain copies of public records during normal working hours after payment of copying fees.⁸

B. Private Records

The following records, which contain personal information about an individual, are classified as private under GRAMA:

- medical data;
- eligibility for unemployment or welfare benefits and benefit levels;
- information about an alleged violation of the rules of legislative ethics (although these records lose their private classification once a Utah Senate or Utah House of Representatives ethics committee holds a public meeting to discuss the alleged violation);
- Utah Senate confirmation records on an individual’s character, professional competence, or physical or mental health (but only if the chair of the confirmation committee finds that release of the records would interfere with the investigation or would deprive the nominee of a fair and impartial hearing);
- social security numbers;
- individual library records; and
- home addresses, telephone numbers, and other purely private information regarding government employees.⁹

⁴ *Id.* § 63-2-103(19)(a).

⁵ *Id.* § 63-2-103(19)(b).

⁶ *Id.* § 63-2-201(2) & 201(3).

⁷ *Id.* § 63-2-103(18).

⁸ *Id.* § 63-2-201(1).

⁹ *Id.* § 63-2-302(1).

In addition, governmental entities may choose to classify the following records as private:

- performance evaluations, race, religion, or disability of a former or current government employee or applicant;
- an individual's financial data, unless expressly classified as public;
- records of independent state agencies if the disclosure would conflict with the agency's fiduciary obligations;
- information on an individual which constitutes a clearly unwarranted invasion of personal privacy; and
- records provided by the United States government or a governmental entity outside the state, on the condition that the records be classified as private.¹⁰

Due to the private nature of the information, a governmental entity may only release these records to the individual who is the subject of the record, the individual's legal guardian, a person with permission from the individual through a notarized release or power of attorney, or, if appropriate, a health care provider.¹¹ A governmental entity may release a private record to a person other than those specified above if the entity determines that the interest favoring access is stronger than the interest favoring restriction.¹² In addition, private records must be released if the records are the subject of a court order or legislative subpoena.¹³

C. Controlled Records

Under GRAMA, records containing medical, psychiatric, or psychological data about a person are "controlled" records if two conditions are met. First, the governmental entity must either reasonably believe that releasing the records would endanger the person's health or the safety of others, or the government must reasonably believe that releasing the information would constitute a breach of professional ethics.¹⁴ Second, the government must properly classify the records as controlled.

Because of the sensitive nature of medical records, GRAMA does not allow the head of the governmental agency to balance the individual's privacy interests with the public's right of access, nor does it allow the public and press to gain access with the permission of the subject. Controlled records may only be released to doctors, social workers, insurance providers, and government health agencies with permission of the subject of the records.¹⁵ The governmental entity may disclose controlled records if they are necessary to accomplish a bona fide research project and the researcher promises not to disclose the records in individually identifiable form.¹⁶ Controlled records must also be disclosed pursuant to a court order or legislative subpoena.¹⁷

¹⁰ *Id.* § 63-2-302(2).

¹¹ *Id.* § 63-2-202(1).

¹² *Id.* § 63-2-201(5)(b).

¹³ *Id.* § 63-2-202(1)(e).

¹⁴ *Id.* § 63-2-303.

¹⁵ *Id.* § 63-2-202(2)(a).

¹⁶ *Id.* § 63-2-202(8)(a).

¹⁷ *Id.* § 63-2-202(2)(a)(ii).

Anyone who obtains access to a controlled record may not share the information with anyone else, including the subject of the record.¹⁸ In addition, if there is more than one subject of a private or controlled record, the governmental entity may only release the portion of the record that the requestor is entitled to inspect.¹⁹

D. Protected Records

While the restrictions on private and controlled records seek to protect the individual's right to privacy, restrictions on protected records seek to safeguard confidential government or business information where disclosure might threaten public safety, government security, commercial interests, or the general functioning of government. Following is a partial list of records that government may designate as "protected" records:

- trade secrets;
- commercial information if disclosure would result in unfair competitive injury, among other requirements;
- commercial or financial information if disclosure would lead to speculation that will interfere with a planned governmental transaction or cause financial injury to the state economy;
- test questions and answers to be used in future license, employment or academic exams;
- records that would give an unfair advantage to a person in a contract with the government, although a person can see contract bids after the bidding has been closed;
- records that would identify real property or the appraised value of personal or real property under consideration for public acquisition, unless the public's interest in the information outweighs the government's interest to acquire the property on the best possible terms, among other requirements;
- information that would endanger an individual's life or safety;
- information that would jeopardize the security of government property, programs or record keeping systems;
- records prepared by or on behalf of a governmental entity in anticipation of litigation that are not available under the rules of discovery;
- personal files of a legislator, unless they include notice of legislative action or policy;
- drafts, unless otherwise classified as public;
- transcripts, minutes or reports of a closed portion of a meeting of a public body;
- the identity of a donor or potential donor to a governmental entity, if the donor requests anonymity in writing, among other requirements;
- at a public institution of education, unpublished lecture notes, unpublished research notes and data, unpublished manuscripts, creative works in process,

¹⁸ *Id.* § 63-2-202(2)(b).

¹⁹ *Id.* § 63-2-202(3).

scholarly correspondence, and confidential information contained in research proposals.²⁰

Only the person who submitted the record, or any individual who has power of attorney or a notarized release, may have access to protected records.²¹ A governmental entity may disclose protected records to other individuals if the head of the governmental entity, or a designee, determines that the interest in public access outweighs any interest in restricting access.²² As with private and controlled records, protected records may also be opened by court order or legislative subpoena.²³

Procedure for Obtaining Access

A. The Request

A person who wishes to access a government record should submit a request to the entity which holds the record. Although a request for access may be made orally, a written request is required to invoke GRAMA's response deadlines and appeals procedure.²⁴ A written request must contain (1) the requester's name, mailing address, and daytime telephone number; and (2) a reasonably specific description of the record requested.²⁵

B. Time Requirements

Generally, a governmental entity must respond to a records request within 10 business days.²⁶ If the requester demonstrates that an expedited response will benefit the public, the governmental entity must respond within five business days.²⁷ Under GRAMA, a reporter who is requesting a record for a news story is acting for the public benefit and is entitled to expedited response.²⁸ Within the required time frame, the governmental entity must respond in one of four ways: (1) approve the request and provide the record; (2) deny the request; (3) notify the requester that it does not maintain the record and direct the requester to the agency which does; or (4) notify the requester that, due to an extraordinary circumstance, the entity cannot either approve or deny the request immediately, and provide the date when the records will be available.²⁹

GRAMA provides a list of extraordinary circumstances which relieve a governmental entity of its duty to grant or deny a record's request within the normal time frame. First, if another governmental entity is using the record, the record must be returned within five business days, unless doing so would impair the entity's work or the

²⁰ *Id.* § 63-2-304.

²¹ *Id.* § 63-2-202(4).

²² *Id.* § 63-2-201(5)(b).

²³ *Id.* § 63-2-202(4)(c).

²⁴ *Id.* § 63-2-204(1).

²⁵ *Id.*

²⁶ *Id.* 63-2-204(3)(a).

²⁷ *Id.*

²⁸ *Id.* § 63-2-204(3)(b).

²⁹ *Id.* § 63-2-204(3)(a).

completion of an audit.³⁰ Second, if the request involves producing or reviewing a large number of records or the governmental entity is currently processing a large number of records requests, the governmental entity must disclose the records it has located, provide an estimate of the amount of time until the remaining records will be available, and complete the work required to produce the records as soon as possible.³¹ Third, if the records must be reviewed by legal counsel before the decision to release, the governmental entity is allowed an additional five days to either approve or deny the records request.³² Fourth, if the records request requires extensive editing in order to segregate the information to which the requester is entitled, the governmental entity must produce the records within 15 days of the original request.³³ If segregating the records requires computer programming, the governmental entity must produce the records as soon as possible.³⁴

If a GRAMA request is submitted to the wrong governmental entity, the entity is required to promptly forward the request to the appropriate entity.³⁵ The time for response begins when the proper entity receives a promptly forwarded request.³⁶ Failure to respond to a GRAMA request within the specified time frame constitutes a denial for purposes of appeal.³⁷

C. Fees

Governmental entities may not charge fees for reviewing a record to determine if it is subject to disclosure, or for allowing requesters to inspect records.³⁸ If a requester seeks a copy of a record, however, a governmental entity may charge “a reasonable fee to cover the ... actual cost of duplicating a record.”³⁹

In addition, when a governmental entity “compiles a record in a form other than that normally maintained by the governmental entity,” the fee may include the cost of staff time for summarizing, compiling, or tailoring the record to meet the request; the cost of staff time for search, retrieval, or other direct administrative costs of complying with the request; or, if the record is the result of computer output other than word processing, the incremental costs of computer usage.⁴⁰ These additional compilation costs may only be imposed when “(1) a request specifies that the documents be compiled in a form other than that used by the agency and the requestor consents to the imposition of compilation fees; or (2) the request, without specifying that the records be compiled in a form other than that maintained by the agency, nonetheless requires the agency to extract materials from a larger document or source and it is not feasible or reasonable to allow the

³⁰ *Id.* § 63-2-204(4)(a)-(b) & (5)(a)-(b).

³¹ *Id.* § 63-2-204(4)(c)-(e) & (5)(c).

³² *Id.* § 63-2-204(4)(f) & (5)(d).

³³ *Id.* § 63-2-204(4)(g) & (5)(e).

³⁴ *Id.* § 63-2-204(4)(h) & (5)(f).

³⁵ *Id.* § 63-2-204(6)(a).

³⁶ *Id.* § 63-2-204(6)(b).

³⁷ *Id.* § 63-2-204(7).

³⁸ *Id.* § 63-2-203(5).

³⁹ *Id.* § 63-2-203(1).

⁴⁰ *Id.* § 63-2-203(2).

requestor to compile the records.”⁴¹ he governmental entity has the burden of proving that a request involves compilation in a form other than that normally maintained and that it would be impossible to allow the requester to compile the documents himself or herself.⁴²

GRAMA does not *require* the imposition of fees; rather, the law encourages governmental entities to fulfill records requests without charge under certain circumstances.⁴³ For example, journalists may request that records be provided free of charge because the information will be used to benefit the public.⁴⁴

Appeals and Remedies

A. Appeals Process

If a records request is denied, the requester may appeal the decision to the chief administrative officer of the governmental entity within 30 days of the denial.⁴⁵ If the governmental entity claims extraordinary circumstances, a requester who disputes the existence of extraordinary circumstances or believes that the estimated time before release of the records is unreasonable must file a notice of appeal within 30 days after being informed of the circumstances.⁴⁶ The notice of appeal must include the requester’s name, address and telephone number, and the relief sought.⁴⁷ The requester may also include a brief explanation of the facts, reasoning, and legal authority supporting access.⁴⁸ The chief administrative officer, or a designee, must make a determination within five business days of receiving notice of appeal, unless the parties agree to an extension.⁴⁹ Failure to issue a timely decision constitutes a denial by the governmental entity.⁵⁰

If the chief administrative officer denies the request, the requester may appeal either to the Records Committee or to a state district court.⁵¹ If the requester chooses to appeal to the state district court, the appeal must be filed (1) within 30 days after an unfavorable decision by the chief administrative officer; (2) within 35 days after the original request if the governmental entity fails to respond to the request; or (3) within 45 days of the original request if the governmental entity claims extraordinary circumstances and the chief administrative officer failed to make a determination.⁵² The petition for review should be submitted as a complaint and must contain the requester’s name and address, the name and address of the governmental entity denying the request and a copy of that determination, a request for relief, and a statement of the reasons why the

⁴¹ *Graham v. Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 979 P.2d 363, 372 (Utah Ct. App. 1999).

⁴² *Id.* at 372-73.

⁴³ UTAH CODE ANN. § 63-2-203(4).

⁴⁴ *Id.* § 63-2-203(4)(a).

⁴⁵ *Id.* § 63-2-401(1)(a).

⁴⁶ *Id.* § 63-2-401(1)(b).

⁴⁷ *Id.* § 63-2-401(2).

⁴⁸ *Id.* § 63-2-401(3).

⁴⁹ *Id.* § 63-2-401(5)(a) & (c).

⁵⁰ *Id.* § 63-2-401(5)(b).

⁵¹ *Id.* § 63-2-402(1).

⁵² *Id.* § 63-2-404(2).

requester is entitled to relief.⁵³ At the earliest practical opportunity, the district court shall review the records *in camera* and make a decision without deference to the governmental entity's decision.⁵⁴ Even if the records are properly classified as private, controlled, or protected, the court may order the disclosure of the information if the interests favoring access outweigh those favoring restriction of access.⁵⁵ The court also has discretion to limit the requester's use and further dissemination of the information to protect privacy interests.⁵⁶

Alternatively, a requester may file an appeal with the state Records Committee within 30 days after an unfavorable decision by the governmental entity's chief administrative officer, or within 45 days of the original request if the governmental entity claimed extraordinary circumstances and the chief administrative officer failed to make a determination.⁵⁷ The notice of appeal must contain the requester's name, address, and telephone number, a copy of any written denial of the records request, and the relief sought.⁵⁸ No less than 14 days and no more than 45 days after receiving the notice of appeal, the Records Committee must hold a hearing on the records request, at which the interested parties may testify, present evidence, and comment on the issues.⁵⁹ The Records Committee must issue an order within 3 days of the hearing, either granting access or upholding the governmental entity's decision to restrict access.⁶⁰ In making its determination, the Records Committee shows no deference to the governmental entity's determination and may order disclosure even if the governmental entity properly classified the records if the interests favoring access outweigh those favoring restriction of access.⁶¹ The Records Committee may also limit the requester's use of the records.⁶² The requester may appeal the Records Committee's decision to the state district court within 30 days of the Records Committee's order.⁶³

B. Remedies

Either the Records Committee or the district court may order a governmental entity to disclose withheld records.⁶⁴ Additionally, a district court may enjoin a governmental entity from committing continuing or future violations of GRAMA.⁶⁵ If the requester substantially prevails, the district court may also assess attorney's fees and costs against the governmental entity.⁶⁶

⁵³ *Id.* § 63-2-404(3).

⁵⁴ *Id.* § 63-2-404(7).

⁵⁵ *Id.* § 63-2-404(8)(a).

⁵⁶ *Id.* § 63-2-404(8)(b).

⁵⁷ *Id.* § 63-2-403(1).

⁵⁸ *Id.* § 63-2-403(2).

⁵⁹ *Id.* § 63-2-403(4)(a)(i) & 403(8).

⁶⁰ *Id.* § 63-2-403(11)(a).

⁶¹ *Id.* § 63-2-403(10)(c) & (11)(b).

⁶² *Id.* § 63-2-403(11)(c).

⁶³ *Id.* § 63-2-404(1).

⁶⁴ *Id.* § 63-2-403 & -404.

⁶⁵ *Id.* § 63-2-802(1).

⁶⁶ *Id.* § 63-2-802(2).

A public employee who intentionally violates GRAMA is subject to disciplinary action, including suspension and termination, and may be charged with a Class B misdemeanor.⁶⁷

FEDERAL FREEDOM OF INFORMATION ACT (FOIA)

Overview

FOIA requires all agencies in the federal government to provide government records to any person upon request, so long as the information contained in the record does not fall within one of nine exemptions. Because of the FOIA's broad exceptions and the immense numbers of requests processed by federal agencies annually, gaining access to federal records may be a difficult and time-consuming process. Nonetheless, FOIA is an essential tool for journalists seeking to provide information on government practices to the public.

Access Rules

Federal agencies subject to FOIA include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency.”⁶⁸ These agencies must release a government record on request, unless the record is specifically exempted from FOIA.⁶⁹

FOIA does not apply to nine categories of records containing sensitive, high security, or private information. The following records are exempt from the FOIA's disclosure requirements:

- records properly classified as secret in the interests of national defense or foreign policy;
- internal personnel rules and practices of an agency;
- information specifically exempted by another statute;
- trade secrets and privileged or confidential commercial or financial information;
- internal government memoranda or letters;
- medical files and personnel files;
- information compiled for law enforcement purposes if release would interfere with enforcement proceedings, deprive a person of the right to a fair trial or adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose investigative or prosecutorial procedures, or endanger the life or physical safety of an individual;
- reports of an agency regulating financial institutions; and
- geological and geophysical information, including maps, concerning wells.⁷⁰

⁶⁷ *Id.* § 63-2-801(1)(a), -801(3), -804.

⁶⁸ 5 U.S.C. § 552(f)(1).

⁶⁹ 5 U.S.C. § 552(a)(3)(A). In addition, FOIA lists records that *must* be published or made available for public inspection and copying. These include information on internal operations of each agency, final orders, opinions, statements of policy, interpretations, staff manuals or instructions, and indexes of information available to the public. *See* 5 U.S.C. § 552(a)(2).

⁷⁰ 5 U.S.C. § 552(b)(1)-(9).

Even if an exemption applies to the record requested, the governmental entity must nonetheless provide the portion of the record that does not contain protected information.⁷¹

Procedure for Obtaining Access

A. The Request

Any person can request records under FOIA.⁷² Before making a request, the requester must identify the governmental agency that possesses the record. To determine the appropriate agency, a requester may consult the *United States Government Manual*,⁷³ which lists all federal agencies, a description of the agencies' functions, and the addresses to which FOIA requests may be sent.⁷⁴ The written request must contain the following information: (1) a statement that the request is being made under FOIA; (2) a reasonably specific description of the records sought; and (3) the name and address of the requester.⁷⁵

To enable the agency to assess the appropriate fees, journalists should identify themselves as members of the news media.⁷⁶ A journalist may request a further reduction or waiver of fees if the release of the information will contribute significantly to the public's understanding of the workings of government.⁷⁷ Journalists requesting expedited processing must also include a certified statement describing the urgent need for the information.⁷⁸

B. Time Limits

Until 1996, a federal agency was required to respond to a reasonable request for information within 10 business days. Due to the immense number of requests received each year by federal agencies, particularly the FBI, this time limit was extended to 20 days.⁷⁹

In the event of "unusual" circumstances, the agency may extend the time limit by a maximum of 10 days "by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched."⁸⁰ "Unusual circumstances" are identified as the need to search and collect records from field offices or other separate facilities, the need to

⁷¹ 5 U.S.C. § 552(b).

⁷² 5 U.S.C. § 552(a)(3)(A).

⁷³ The *United States Government Manual* can be found at any public library, or online at <http://www.access.gpo.gov/nara/nara001.html>.

⁷⁴ See COMMITTEE ON GOVERNMENT REFORM, A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H.R. REP. NO. 106-50, at 9 (1999).

⁷⁵ See *id.*

⁷⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁷⁷ 5 U.S.C. § 552(a)(4)(A)(iii).

⁷⁸ 5 U.S.C. § 552(a)(6)(E)(v)-(vi).

⁷⁹ 5 U.S.C. § 552(a)(6).

⁸⁰ 5 U.S.C. § 552(a)(6)(B)(i).

search, collect, and examine a voluminous amount of material, or the need to consult with another agency.⁸¹

If the request cannot be processed within the additional 10 days, the agency shall give the requester the opportunity to modify or limit the request or to arrange an alternative time frame for processing the request.⁸²

Members of the press may obtain expedited processing by submitting a certified statement that there is an urgent need to inform the public about the contents of the record.⁸³

C. Fees

Like GRAMA, FOIA allows federal agencies to charge reasonable fees to cover the cost of fulfilling records requests. The fees imposed depend on the purpose of the request. If the records are requested for commercial use, the agency may charge for document search, duplication, and review.⁸⁴ If the records are requested for non-commercial use by an educational or non-commercial scientific institution for scholarly or scientific research or by a representative of the news media, fees are limited to reasonable charges for document duplication.⁸⁵ In all other circumstances, the agency may charge for document search and duplication.⁸⁶

An agency shall waive or reduce fees “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁸⁷

Appeals and Remedies

In the event that the agency denies or fails to respond to a request for records, the requester may appeal to the head of the agency, who must make a determination within 20 days.⁸⁸ If the head of the government agency denies or fails to respond to the appeal, the requester may seek judicial review by filing a complaint in federal district court. The federal court may either uphold the agency determination or order the production of agency records improperly withheld.⁸⁹ If the requester substantially prevails, the court may assess reasonable attorney’s fees and litigation costs against the United States.⁹⁰ Additionally, if the court finds that “the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding,” an investigation shall begin to determine whether discipline is warranted.⁹¹

⁸¹ 5 U.S.C. § 552(a)(6)(B)(iii).

⁸² 5 U.S.C. § 552(a)(6)(B)(ii).

⁸³ 5 U.S.C. § 552(a)(6)(E)(v)-(vi).

⁸⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(I).

⁸⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁸⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(III).

⁸⁷ 5 U.S.C. § 552(a)(4)(A)(iii).

⁸⁸ 5 U.S.C. § 552(a)(6)(A).

⁸⁹ 5 U.S.C. § 552(a)(4)(B).

⁹⁰ 5 U.S.C. § 552(a)(4)(E).

⁹¹ 5 U.S.C. § 552(a)(4)(F).

CAMERAS IN THE COURTROOM

“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. . . . With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”

–*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-93 (1975).

By Jeffrey J. Hunt
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Utah’s courtrooms remain largely off limits to cameras, despite a national trend among state courts toward allowing liberal photographic coverage. Although made in 1981, the Utah Supreme Court’s statement that “the practice in Utah courts has historically been one of overwhelmingly excluding cameras and broadcast equipment”¹ is still applicable in the 21st century. Nevertheless, Utah courts allow some limited still photography in trial courts and broadcast coverage in appellate courts. Only one television camera at a time, under a pooling arrangement, is permitted in the Utah Supreme Court and the Utah Court of Appeals. Trial judges who exercise their discretion to allow still photography generally also require a pooling arrangement limited to one photographer in the courtroom at a time.

As is the case nationwide, cameras are not permitted in federal district courts within Utah. Some federal district courts and appellate courts in other states have experimented with cameras in the courtroom. Rep. Steve Chabot, R-Ohio, has introduced several pieces of legislation in the U.S. House of Representatives in recent years that would allow the presiding judges of federal appellate courts and federal districts to authorize photographic coverage of courtroom proceedings.

NATIONAL TREND FAVORS CAMERAS

Television is a particularly accessible medium that allows members of the public to directly observe judicial proceedings without traveling to the courthouse. Courtroom footage allows television reporters to illustrate news stories and accurately depict courtroom proceedings. In recognition of the fact that cameras in the courtroom are an indispensable tool for disseminating information about the judicial system to the public, many states in the last several decades have opened their courtrooms to television news cameras. However, the difficulty of gauging the effect of cameras on a trial complicates the courts’ efforts to maintain the delicate balance between the Sixth Amendment and the

¹ In re Modification of Canon 3A(7) of the Utah Code of Judicial Conduct, 628 P.2d 1292, 1292 (Utah 1981).

Due Process Clause guarantees of a fair trial, on the one hand, and the First Amendment guarantee of a free press on the other hand.

Constitutional Issues

Parties opposed to cameras in the courtroom point to the Sixth and Fourteenth Amendments, arguing that cameras in the courtroom inhibit the fair conduct of a trial. Specifically, they assert that cameras may have a significant impact on jurors by directing their focus away from the actual proceedings in the trial to the media publicity. They also contend that the presence of cameras may impair the quality of the testimony in a trial by distracting, intimidating, or focusing an overabundance of attention on witnesses. Finally, opponents express concern over the additional responsibilities cameras place on the trial judge to preside over the courtroom. For these reasons, opponents argue that the very presence of cameras in the courtroom adversely affects the conduct of the trial and impedes the constitutional guarantee of a fair trial.²

On the other hand, proponents of cameras in the courtroom rely on the media's First Amendment right of access to the courtroom and the public's Sixth Amendment right to scrutinize courtroom proceedings. Public access to court proceedings is essential to at least six fundamental constitutional interests: (1) public access to the courts promotes public debate essential to self-governance; (2) open proceedings assure the public that the proceedings are conducted fairly; (3) the public has a right to know what goes on in its courts; (4) public access provides a check on the judiciary; (5) open proceedings help to ensure that the defendant receives a fair trial; and (6) open proceedings encourage trial participants to be conscientious in performing their roles.³ Media broadcasts of court proceedings further these interests by allowing a much larger segment of society to accurately observe what goes on inside the courtroom. As one proponent observed:

In the absence of television broadcast, the public and members of the press not fortunate enough or able to obtain permanent seats in the courtroom will be relegated to relying upon the eyes and ears of others, or upon a "cold" transcript, for information about trials. In an age when the public increasingly relies on television technology, it may seem strange to limit trial coverage to fifteenth century technology.⁴

The United States Supreme Court has upheld the states' exercise of their authority to prescribe courtroom camera procedures as long as cameras do not compromise the fairness of the proceedings. In *Chandler v. Florida*,⁵ the Supreme Court affirmed a burglary conviction despite the fact that the trial was televised over the objections of the defendant, pursuant to Florida's experimental guidelines permitting cameras in the

² These arguments were accepted by the United States Supreme Court in *Estes v. Texas*, 381 U.S. 532 (1965).

³ Dan Paul & Richard J. Ovelman, *Access*, 420 PLI/PAT 55, 90-92.

⁴ Christo Lassiter, *TV or Not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 961-62 (1996).

⁵ 449 U.S. 560 (1981).

courtroom. The Court distinguished the 1962 case of *Estes v. Texas*,⁶ which reversed a conviction based on the prejudicial impact of cameras in the courtroom. In *Estes*, the Court had held that the presence of cameras violated the defendant's due process rights because the safeguards at the time were insufficient to assure a fair judicial process. However, the Court held that the technological advancements between 1962 and 1977 minimized the intrusion caused by the cameras in *Chandler*. In order to establish a due process violation, the *Chandler* Court held that the defendant must prove that the trial was actually compromised by the television coverage and that the coverage interfered with the defendant's right to a fair trial.

While the Court refused to hold that television coverage is constitutionally prohibited, the Court also refused to hold that television coverage is constitutionally protected.⁷ In doing so, the Court affirmed its earlier ruling in *Nixon v. Warner Communications*,⁸ where it declared that the First Amendment does not entitle the media to record or broadcast live witness testimony and that the Sixth Amendment guarantee of a public trial operates to safeguard an accused from persecution in an unjust trial and does not confer any special benefit on the press.⁹ By declining to "endorse or to invalidate" Florida's guidelines, the Court merely ruled that states should be free to experiment and develop their own court rules in this area absent a showing of "prejudice of constitutional dimensions" to defendants.¹⁰

Developments in Other States

Given the wide latitude conferred by the United States Supreme Court, many states have advanced their own guidelines allowing cameras in courtrooms, subject to the discretion of the presiding judge and other specific limitations. Of the 45 states with permanent rules on camera coverage, 36 allow cameras in trial and appellate courts, two allow cameras in trial courts only, and seven, including Utah, allow television cameras in appellate courts only.¹¹ In almost all states, the presiding judge must consent to the use of cameras and may impose certain restrictions and procedural requirements. Many states have notice rules requiring advance written requests to film the proceedings. Moreover, many states prohibit coverage of juveniles, victims of sex crimes, domestic relations, trade secrets, jurors, and witnesses who object.¹²

HISTORY OF CAMERAS IN UTAH COURTROOMS

Utah's first court rule prohibiting the use of cameras in courtrooms was modeled after the American Bar Association's Judicial Canon 35, first adopted by the ABA in

⁶ 381 U.S. 532 (1965).

⁷ The Court did not grant the broadcast media a First Amendment right of access to the courtroom or confer on the public a Sixth Amendment right to watch the trial broadcast on television. 449 U.S. at 569-70.

⁸ 435 U.S. 589 (1978).

⁹ *Id.* at 610.

¹⁰ *Chandler*, 449 U.S. at 582.

¹¹ National Center for State Courts, "Cameras in the Courts: Summary of State Court Rules," at http://www.ncsconline.org/WC/Publications/KIS_CameraPub.pdf.

¹² *See id.*

1937. In 1972, the ABA replaced the Canons of Judicial Ethics with the Code of Judicial Conduct, which Utah largely adopted with respect to rules governing use of cameras in courtrooms. Utah's Canon 3A(7), approved in 1974, mirrored the ABA's model in stating that, subject to three exceptions, "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions. . . ."¹³ Exceptions were allowed, both under the ABA proposal and Utah's adopted version, for (1) presentation of evidence and preservation of the judicial record; (2) ceremonial, insensitive or naturalization proceedings in a courtroom; and (3) "appropriate court proceedings" as authorized by the judge.¹⁴

With respect to the third exception, Utah's rule actually allowed more photography in courtrooms than the ABA model rule because the Utah rule omitted provisions requiring consent of the parties and mandating that photographs be used only after the conclusion of the proceedings and only "for instructional purposes in educational institutions."¹⁵ However, Canon 3A(7) was not applied broadly by Utah judges, prompting the justices of the Utah Supreme Court to make their remark in 1981 that the state's practice was overwhelmingly to exclude cameras from courtrooms.

Beginning in about 1979, however, the Utah chapter of the Society of Professional Journalists filed a series of petitions with the Utah Supreme Court requesting photographic access to trial and appellate courtrooms. The Utah journalists' case was strengthened by *Chandler*, the 1981 United States Supreme Court decision that said Florida did not violate a criminal defendant's constitutional due process guarantee of a fair trial by allowing photographic, radio and television coverage in court.¹⁶ Following that decision, the Utah Supreme Court reached the first of several opinions slowly opening the state's courthouses to cameras.

In response to a Society of Professional Journalists' petition, the Utah Supreme Court in 1981 authorized the use of still photography in trial courtrooms at the discretion of the judge presiding at a hearing.¹⁷ The new Canon 3A(8) stated that the judge could grant still photographers permission to take pictures "of the judge and other court personnel, counsel, spectators, parties and witnesses."¹⁸ The right to photograph was contingent on the advance written consent of parties and witnesses, and the right also was subject to restrictions outlined by the court. Judges were instructed not to allow photography if doing so would jeopardize a fair trial or hearing.

In the same 1981 opinion that allowed still photography, the Utah Supreme Court stated that television cameras should continue to be banned from Utah courtrooms due to concerns about the effect on the right to a fair trial. The Utah State Bar and Salt Lake County Bar associations supported a one-year experiment in television coverage, but the Salt Lake Legal Defenders Association and Utah Judicial Council fretted that witnesses and jurors would be negatively affected by television cameras, thereby depriving criminal defendants of a fair trial. The Court sided with the opponents, one of whom declared that

¹³ In re Modification of Canon 3A(7), 628 P.2d 1292.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Chandler v. Florida*, 449 U.S. 560 (1981).

¹⁷ In re Modification of Canon 3A(7), 628 P.2d 1292.

¹⁸ *Id.* at 1294.

television cameras in courtrooms threatened to “compromis[e] the dignity of the proceedings by creating a circus side show effect,” and that “there is a real danger that this gawking mechanism will divert the litigation from its proper course.”¹⁹

Responding to another Society of Professional Journalists petition, the Utah Supreme Court in 1986 authorized a one-year experiment of allowing a single television camera at a time to film proceedings of the Utah high court.²⁰ The Court did not choose to extend the experiment into Utah’s trial courts, despite the wishes of Justice Christine Durham, who argued in a concurring opinion that “[n]othing in the Court’s rationale militates against a carefully constructed experiment” in the trial courts.²¹ The majority of the Court expressed the opinion that, “[g]iven the time constraints inherent in televising a news story, there will be little opportunity, as a practical matter, to educate the public.”²²

Once again at the request of the Society of Professional Journalists, the original one-year experiment in the Utah Supreme Court was extended in 1987.²³ Four years later, a television camera pooling arrangement was approved for the Utah Court of Appeals.²⁴

CURRENT RULES FOR CAMERAS IN UTAH COURTROOMS

Following an evaluation of the experiments in the Utah Supreme Court and Utah Court of Appeals – and after a review of other states’ policies – the Utah Supreme Court in 1995 adopted a permanent policy of allowing cameras in Utah’s appellate courtrooms, subject to the court’s discretion.²⁵ Cameras in trial courtrooms, however, are still limited exclusively to still photography, with the judge’s permission. However, video cameras are used in Utah’s trial courts to create video transcripts of the proceeding. These video transcripts are presumptively public records and copies may be obtained by the news media in the same manner as other court records.

Trial Courts

The Utah Code of Judicial Administration Rule 4-401 is the current authority on cameras in Utah’s trial courtrooms. Under Rule 4-401(1)(A), filming, video recording, and audio recording in a trial courtroom are prohibited except to preserve the record of the proceedings. On May 1, 1996, Third District Judge Pat Brian apparently violated this rule by allowing television cameras to film through an open courtroom door while John Blanchard was pronounced guilty of strangling his ex-wife.²⁶ The judge’s action

¹⁹ *Id.* at 1293.

²⁰ Petition of Soc’y of Prof. Journalists, 727 P.2d 198 (Utah 1986).

²¹ *Id.* at 200 (Durham, J., concurring).

²² *Id.* at 199.

²³ In re Petition of Society of Professional Journalists, 745 P.2d 460 (Utah 1987).

²⁴ In re Petition of KSL-TV, 816 P.2d 1222 (Utah 1991).

²⁵ Guidelines for Experimental Use of Cameras in the Utah Supreme Court, 911 P.2d 978 (Utah 1995); Guidelines for Experimental Use of Cameras in the Utah Court of Appeals, 911 P.2d 979 (Utah 1995).

²⁶ Brian Maffly & Sheila McCann, *Cameras in Court? It’s a No-No in Utah*, SALT LAKE TRIB., May 12, 1996, at B1.

“reportedly prompted a stern warning from Utah Supreme Court Chief Justice Michael Zimmerman.”²⁷

Rule 4-401 provides:

- Still photography may be permitted at the discretion of the judge presiding at the hearing. A request to photograph shall be submitted to the presiding judge at least 24 hours prior to the hearing, unless good cause exists to justify shorter notice.²⁸
- Photographers may not use a flash or strobe lights. Photographers may use only “normally available courtroom equipment” unless the presiding judges approve modifications. If modifications are approved, they are to be made at the expense of the news media.²⁹
- Photographers may not set up or take down equipment while court is in session. Additionally, photographers may not conduct interviews during a hearing and may not use a camera to conduct interviews in the courtroom even after the hearing concludes.³⁰
- Photographers may not comment during a hearing and must “present a neat appearance in keeping with the dignity of the proceedings.”³¹
- Television and still cameras may be permitted in courtrooms for ceremonial or public information programs.³²
- Jurors and prospective jurors may not be photographed until they are dismissed.³³
- Anyone who violates the rules is subject to removal from the courtroom and may have his or her privileges under the rules revoked.³⁴

In determining whether or not to allow still photography in a courtroom, the judge is instructed to consider whether (1) cameras will distract the participants, (2) cameras will jeopardize fair trial rights, and (3) the privacy interests of a victim, party or witness outweigh the public interest in access to courtroom photographs of that person.³⁵ The Rule states that the judge “*may* require reporters to share a single photographer[.]”³⁶ but nothing in the Rule requires a pooling arrangement and, therefore, a judge in her discretion could conceivably allow multiple still photographers in a courtroom at one time.

Although videotaping in trial courtrooms by the news media is prohibited, Utah’s trial courts regularly use video cameras to create the official verbatim record of the proceedings. Video transcripts created in Utah trial courts are public, unless they contain sensitive information specifically exempted from public disclosure under Rule 4-202.02 of the Code of Judicial Administration. Reporters and other members of the public may obtain a copy of the video transcript by submitting a request to the clerk of the court

²⁷ *Id.*

²⁸ UTAH CODE JUD. ADMIN. R. 4-401(4).

²⁹ *Id.* 4-401(5)(B).

³⁰ *Id.* 4-401(5)(C).

³¹ *Id.*

³² *Id.* 4-401(2).

³³ *Id.* 4-401(3).

³⁴ *Id.* 4-401(6).

³⁵ *Id.* 4-401(4).

³⁶ *Id.* 4-401(5)(A).

along with payment of the appropriate fees. The media are free to broadcast or otherwise disseminate the contents of the video transcript.

Appellate Courts

Rule 4-401 of the Utah Code of Judicial Administration allows filming, video recording, and audio recording in Utah appellate courtrooms. The Chief Justice of the Supreme Court, or the presiding judge of the Utah Court of Appeals, may impose conditions on electronic media coverage, after consultation with the other judges or justices, if necessary to preserve the orderly administration of justice.³⁷ If a court decides to deny media access, a written statement of reasons in support of that decision must be issued by the court.

The *Guidelines*³⁸ governing use of cameras in appellate courtrooms provide:

- The media must submit a written notice to the court requesting camera access at least two working days prior to the proceeding, unless good cause exists to justify shorter notice.
- Once a media request is received, the clerk of the court notifies all parties involved in the proceeding. If a party objects to cameras, that objection is taken into account in determining whether cameras will be permitted.
- Only one television camera and operator is permitted in the courtroom at any time while the court is in session. The broadcast media are expected to coordinate pooling arrangements.
- Equipment must be in place and tested 15 minutes before the start of the day's proceedings. Equipment may not be taken down while the court is in session. Furthermore, equipment must be "state of the art," which is defined as "equal in unobtrusiveness, technical quality, and sensitivity to equipment in general usage by the major broadcast stations in Salt Lake City, Utah."
- Individual journalists may use audio recorders as long as they are not distracting.

While the rules do not specify the factors to be considered in granting camera access, the *Guidelines* do state that "[t]he law generally applicable to inclusion or exclusion of the press or public at court proceedings shall apply."³⁹ It is reasonable to assume that an appellate court might take into account the same considerations spelled out for trial judges, namely whether (1) cameras will distract the participants, (2) cameras will jeopardize fair trial rights, and (3) the privacy interests of a victim, party or witness outweigh the public interest in access to courtroom photographs of that person.⁴⁰

³⁷ Guidelines for Experimental Use of Cameras in the Utah Supreme Court, 911 P.2d 978 (Utah 1995); Guidelines for Experimental Use of Cameras in the Utah Court of Appeals, 911 P.2d 979 (Utah 1995).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ UTAH CODE JUD. ADMIN. R. 4-401(4).

ACCESS TO JUDICIAL PROCEEDINGS AND RECORDS

PRIVACY AND THE MEDIA

UTAH'S COURT SYSTEM

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Administrative Office of the Courts
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INTRODUCTION

The Utah Court System is divided into five levels. The first three levels – District Courts, Juvenile Courts and Justice Courts – are trial courts, in which a judge or jury makes a decision based on the evidence presented. The other two levels – the Supreme Court and the Court of Appeals – are appeals courts, to which the loser in a case may appeal for a reversal of the lower court's decision.

Each of these courts has a different jurisdiction. Jurisdiction is the nature and scope of a court's authority to hear and/or decide cases.

Utah is divided into eight judicial districts. All levels of trial courts are represented in each district, though the number of judges in each district varies widely. Appellate level courts do not have any geographical divisions.

Justice Court jurisdictions are based on the boundaries of the local government entity (county or municipality) which hires the judges.

The Judicial Council is the policymaking body for the judiciary, while the Administrative Office of the Courts has the responsibility to implement the standards, policies and rules established by the Judicial Council, among other duties.

SUPREME COURT

The Supreme Court is the highest level appeals court in the state, the "court of last resort." The court consists of five justices who serve 10-year terms. The justices elect a chief justice by majority vote to serve for four years and an associate chief justice to serve for two years.

The Supreme Court has original jurisdiction to answer questions of state law certified, or queried, by federal courts, and to issue *extraordinary writs*. The Supreme Court has appellate jurisdiction to hear first degree and capital felony convictions from the District Court and civil judgments other than domestic cases. It also reviews administrative proceedings of certain state agencies. The Supreme Court also has the discretion to review judgments of the Court of Appeals. The Supreme Court's discretion is exercised by granting or denying a petition for *writ of certiorari*. Proceedings of the Judicial Conduct Commission and both constitutional and election questions are also overseen by the Supreme Court.

The justices are assisted by law clerks, central staff attorneys, the clerk of the court, front office clerks and legal secretaries.

The Supreme Court also adopts rules of civil and criminal procedure and rules of evidence for use in the state courts and manages the appellate process. The court also governs the practice of law, including admission to practice law and the conduct and discipline of attorneys.

COURT OF APPEALS

The Court of Appeals, created in 1987, consists of seven judges who serve six-year terms. A presiding judge is elected by majority vote to serve for two years.

The jurisdiction of the Court of Appeals is complementary to that of the Supreme Court. The Court of Appeals hears all appeals from the Juvenile Court and all criminal cases of the District Court, except first degree and capital felony convictions. It also determines appeals from District Court involving domestic relations. The court also hears appeals from the decisions of certain state administrative agencies.

The Utah Court of Appeals sits and renders judgment in rotating panels of three judges. The court is prohibited by statute from sitting *en banc* (all seven members at once).

The judges are assisted by the clerk of the court, central staff attorneys, law clerks, legal secretaries and deputy court clerks.

DISTRICT COURT

The District Court is the state trial court of general jurisdiction. The District Court has original jurisdiction to try all civil cases, all criminal felonies and misdemeanors. An important part of the District Court caseload is domestic relations cases, such as divorces, child custody and support, adoption and probate. District Court judges also have the power to issue *extraordinary writs*. In addition, the court serves as an appellate court to review informal adjudicative proceedings from state administrative agencies.

Each District Court judge is assigned a court clerk and bailiff. Either a court reporter or a videotape record is provided to maintain a verbatim account of all court proceedings. In the more populous districts, court commissioners have been appointed to assist the District Court judges by conducting pre-trial hearings, pursuing settlements, making recommendations to the judges and handling domestic relations matters. Court Commissioners can also accept pleas in misdemeanor cases and, with the consent of the parties, conduct misdemeanor trials. If a party disagrees with the Court Commissioner's recommendation, a rehearing may be requested before a judge.

The District Courts have a small claims department, which covers disputes less than \$5,000. In those courts, a District Court judge hears small claims cases, but in some areas of the state, the Supreme Court appoints an attorney as a judge *pro tempore* to hear the cases. Many small claims are heard in Justice Courts.

JUVENILE COURT

The Juvenile Court is a court of special jurisdiction and is of equal status with the District Court.

The Juvenile Court has exclusive original jurisdiction over youths, under 18 years of age, who violate any federal, state or municipal law or ordinance, and any child who is abused, neglected or dependent. The Juvenile Court has the power to determine child custody, support and visitation in some circumstances; to permanently terminate parental

rights; to authorize or require treatment for mentally ill or mentally disabled children; to place children under the supervision of the court's probation department; to place children in the custody or care of foster homes, group homes, special treatment centers, or secure institutions; and to require children to pay fines and restitution. It also has jurisdiction over habitual truants, runaways and ungovernable youth if efforts by other social service agencies are not successful.

In addition, the Juvenile Court has exclusive jurisdiction in traffic offenses involving minors related to automobile homicide, driving under the influence of drugs or alcohol, reckless driving, joy riding and fleeing a police officer. It has concurrent jurisdiction with the Justice Courts over adults contributing to the delinquency and neglect of a minor.

The Juvenile Court administers a juvenile probation program. A clerical division handles the legal documents and maintains the official court record.

As a member of the Interstate Compact on Juveniles, the court accepts supervision of juveniles who move to Utah from another state (who were under court supervision before moving). In turn, the court requests another state to supervise juveniles who move while still under court supervision in Utah.

JUSTICE COURT

Justice Courts are limited jurisdiction courts. They are not courts of record (no verbatim record of proceedings is kept).

There are two types of Justice Court judges: county judges, who are initially appointed by a county commission and then stand for retention election every four years, and municipal judges, who are appointed by city officials and serve for a four-year term. Some judges hear cases daily, while others have limited court hours. Not all Justice Court judges are attorneys, although all receive extensive and continuing legal training in order to remain certified.

County and municipal Justice Courts have what is called territorial jurisdiction. Their authority is limited by their geographic boundaries.

The territorial jurisdiction of a county Justice Court extends to the limits of the precinct for which it was established and includes all cities and towns within the precinct, except cities where a municipal Justice Court exists. The territorial jurisdiction of a municipal Justice Court extends to the corporate limits of the municipality in which it is created.

Justice Courts have exclusive jurisdiction over Class C misdemeanors, violations of ordinances, and infractions committed within their territorial jurisdiction. They may issue search warrants and other process. Justice Courts also share jurisdiction with the District Court over Class B misdemeanors, and with Juvenile Court over minors 16 or 17 years old who are charged with traffic offenses, except for automobile homicide, alcohol or drug related traffic offenses, reckless driving, fleeing an officer and driving on a suspended license.

Jury trials in Justice Courts are heard by four-person juries. In municipal Justice Courts, city attorneys prosecute cases involving violations of municipal ordinances and state law; in county Justice Courts, county attorneys prosecute cases involving violations

of county ordinances and state law. Litigants and defendants often act without an attorney (*pro se*) in Justice Courts.

Any person not satisfied with a judgment rendered in a Justice Court is entitled to a *trial de novo* (new trial) in District Court.

Any Justice Court judge may be appointed by the presiding District Court judge to conduct preliminary examinations and arraignments for felony cases under some circumstances. Justice Court may also, if certified by the Judicial Council, create a Small Claims Department, which has jurisdiction over claims less than \$5,000.

JUDICIAL COUNCIL

The Judicial Council, chaired by the Chief Justice of the Supreme Court, consists of representatives from each court level and a representative from the state bar.

The Council makes policy for the judiciary. It has the constitutional authority to adopt uniform rules for the administration of all the courts in the state. The Council also sets standards for judicial performance, court facilities, support services and judicial and non-judicial staff levels. Its monthly meetings are open and may be attended by interested parties.

STATE COURT ADMINISTRATION

The Administrative Office of the Courts has the responsibility to implement the standards, policies, and rules established by the Judicial Council, organize and administer all of the non-judicial activities of the courts, prepare the state judicial budget, conduct studies, and develop procedures. Administrative services provided by the Administrative Office of the Courts include accounting, facilities planning, personnel management, judicial and staff education, information services and auditing.

A CRIMINAL PROSECUTION – FROM ARREST TO SENTENCING

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INTRODUCTION

Courts of the State of Utah get their power to act from the Utah Constitution, Article 8. That power is defined in Title 78 of the Utah Code. The Legislature has the power to make the laws in the State of Utah. That power is vested in the Legislature from Article 6, Section 1 of the Utah Constitution.

PRETRIAL PROCEDURES

Arrest – Search and Seizure

Criminal actions usually begin with an arrest. An arrest under Utah law is “an actual restraint of the person arrested or submission to custody.” Under Utah law an arrested person is not to be subjected to any more restraint than is necessary for his arrest and detention. An arrest can be accomplished by both a peace officer and a citizen.

A. Arrest Without Warrant

A peace officer may make an arrest without a warrant under the following circumstances: (a) when a public offense is committed or attempted in his or her presence; (b) when he or she has reason to believe a felony or class A misdemeanor has been committed and he or she has reason to believe the person arrested committed that felony or class A misdemeanor; and (c) when he or she has reasonable cause to believe that a person has committed a public offense and that person may either flee or conceal himself, destroy or conceal evidence of the commission of the offense, or injure another person or damage property belonging to that person.

B. Arrest With Warrant

A warrant is a document authorized by a magistrate which gives the police officer the power to arrest a person for public offense. If the magistrate finds there is probable cause to believe a particular person has committed a crime, he will issue the warrant for arrest. If the warrant is for a felony the arrest may be made anytime of the day or at night. If the offense is a misdemeanor the arrest may be made anytime during the day and may be made at night if the magistrate has authorized that on the warrant. An arrest for a misdemeanor may also be made at night if (1) the person to be arrested is upon a public highway, in a public place, or in a place open or accessible to the public; (2) the person to be arrested is encountered by a peace officer in the “regular” course of that peace officer’s investigation of a criminal offense unrelated to the misdemeanor warrant for arrest. A peace officer is the only person authorized to make an arrest on a warrant.

Whether an arrest is made with or without a warrant, the person making the arrest should inform the arrestee of his intentions, his authority and the reason for the arrest. This notice is not required where there is reason to believe the notice will endanger the life or safety of the officer or another person, where the arrestee may escape, where the person being arrested is in the commission of an offense or is attempting to commit an offense, or where the arrest is being effected after the arrestee has fled from the commission of a crime.

If the arrestee resists the arrest after he has been told that an arrest is to be made, the person making the arrest may use reasonable force to accomplish that arrest. Deadly force may be used when effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape, and (i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or (ii) the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed.

At the time of the arrest if the officer intends to interrogate the arrestee he must give the arrestee a Miranda warning. In this warning the arrested person must be told that he has the right to counsel, that if he can't afford counsel it will be appointed for him, and that he has a right to remain silent but if he waives that right anything he says may be used against him.

Because of the dramatics associated with most arrests, they have always been favorite topics of the news media. A suspect surrounded by police and shackled with chains is almost always good for a publishable photograph as he attempts to hide his identity from members of the news media.

Apart from the popular appeal an arrest may have to onlookers, it may have very little relationship to either the severity of the crime charged or the strength of the case against the subject. Whether a criminal defendant is arrested or merely ordered by summons to appear in court at a predetermined date is solely within the discretion of the police and prosecutor. The decision to arrest is frequently founded upon reasons wholly unrelated to the pending criminal charges, such as the defendant's standing in the community, his economic status or his reputation with the police. It is not uncommon for arrests to take place of defendants alleged to have committed relatively minor offenses and for summonses to issue to other defendants who are charged with more serious crimes.

C. Search Incident to Arrest

An officer arresting a person has a right to make a search incident to that arrest to check for evidence that could be destroyed during the arrest or to check for weapons. Also, an officer who arrests a person driving a car and has reason to believe that car contains contraband can make a search for that contraband. Finally, an officer has the right to make a search for or to seize those items that are in plain view at the time of the arrest. He may also search closed containers found in the passenger compartment of the vehicle.

D. Search With a Warrant

A search warrant is an order given by a magistrate to a police officer allowing that police officer to make a search for property or evidence and seize that property or evidence and bring it before the magistrate. The search warrant must be based on probable cause and must particularly describe the thing, place or person to be searched. Property or evidence may be seized when the officer has probable cause to believe that the property or evidence was unlawfully acquired or possessed, has been used or is possessed for the purpose of committing or concealing the commission of an offense, or establishes illegal conduct.

If the evidence to be seized is not in the possession of a person who is a party to the alleged illegal conduct, e.g., a journalist, a search warrant cannot be issued unless there is a showing that the evidence sought may either be destroyed or damaged if a subpoena is issued, or the subpoena will not cause the person to bring the evidence before the magistrate. This provision was included in Utah's Code of Criminal Procedure as a result of the newsroom search problems highlighted in the *Zurcher v. Stanford Daily* decision by the United States Supreme Court.

The warrant must be served in the daytime unless the magistrate finds that a search at night is necessary to seize the property. A search warrant must be effected within 10 days after its issuance. When an officer is effecting a search warrant he may use reasonable force to enter a building, room or apartment if, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness. The officer may make the entry without notice if the magistrate has previously found that the object of the search could quickly be destroyed, disposed of, hidden or physical harm may result to a person if notice were given.

Jail Incarceration

Once a person has been arrested and taken into the jail, the person will first be searched and property and money that is on him will be taken and he will receive a receipt for the same. He then will be "booked" into jail, which is the formal procedure of admitting him into jail. He will be fingerprinted, given the opportunity to make phone calls, and will be given a pretrial interview. In a noncapital case, the pretrial interview is used to determine whether the arrested person can be released on his own recognizance with reasonable assurance that the arrested will appear for court hearings. The criteria used for this determination may include one or more of the following: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the accused; (3) the accused's family ties, employment, financial resources, character and mental condition; (4) the length of his residence in the community; (5) his past record or convictions; (6) his previous record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

The pretrial interviewer may impose certain conditions for release, such as: placement in custody of a person or organization for supervision; restricted travel, association or place of abode; requirement for execution of an assurance bond in a specified amount and a deposit in a registry of the court, in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be

returned upon the performance of the conditions of the release; requirement for the execution of a bail bond with sufficient solvent sureties for the deposit of cash in lien thereof; or imposition of any other conditions deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

If the arrested person is not released on his own recognizance after a pretrial interview and is required to post bail before getting out of jail, the jail will generally use a uniform bail schedule for traffic offenses or misdemeanors. If the crime the person was arrested for is a felony, that person may not be released on bail unless the bail is approved by a judge. If no release is allowed, or the person is unable to meet the conditions for his release, he will remain in jail until he is taken before a magistrate.

Whether or not a defendant is admitted to bail is wholly discretionary with the court. While the amount of bail generally has some relationship to the seriousness of the crime charged, that is not always the case. For example, a defendant who has a history of flight to avoid prosecution will probably be held under a high bail even though his offense may be relatively minor. Unless the court makes specific findings when bail is set, the media should not conclude that the setting of a high bail is a reflection of the judge's belief that the defendant is guilty, nor is it necessarily a comment on the strength of the prosecution's case.

Screening – County Attorney's Office

The formal charging of the arrested person does not occur until an information has been filed. An information is the charging document which initiates court proceedings. On felonies or class A misdemeanors these informations must be authorized by a prosecuting attorney. The officer who was involved in the arrest or investigation brings the information he has accumulated to the prosecuting attorney's office where that prosecuting attorney reviews the investigative action by the police officer and either proceeds with the prosecution or declines to file formal charges due to lack of substantial evidence. After prosecution has begun the prosecutor may dismiss the prosecution if there are reasonable grounds. The screening process basically requires the prosecuting attorney to go through the evidence and determine whether the elements of a crime are present. Once the prosecuting attorney is satisfied a crime has been committed and there is reason to believe the person being accused did in fact commit it, the prosecuting attorney may authorize an information to be filed charging the arrested person with that crime. The prosecuting attorney may (1) sign the information in the presence of a magistrate; or (2) present and file the information in the office of the clerk where the prosecution is commenced upon signature of the prosecuting attorney. The standard for charging differs from jurisdiction to jurisdiction but the prosecutor generally will issue an information if he believes there is a reasonable likelihood of conviction.

As a practical matter, evidence accumulated by the police or an investigator may be one-sided. An investigator may well accept as true the statements of a complaining witness even though the subject has not explained his version of the events. The investigator and prosecutor have the difficult task of sifting through all of the facts and circumstances to determine whether or not a crime has in fact been committed. Despite the exercise of due care, innocent people are occasionally charged with criminal offenses.

Both the prosecution and the news media must be sensitive to the potentially great harm and personal trauma caused by the publication of false accusations.

Often times, a sworn probable cause statement setting forth in detail the nature of the offense charged will accompany the information. The information and the supporting probable cause statements are public records and available to the press absent a court order sealing the file.

Classification of Crimes

Felonies are classified into four categories:

Capital felony – The sentence shall be death, an indeterminate prison term of not less than 20 years and which may be for life, or, on or after April 27, 1992, life in prison without parole.

First degree felony – This felony is punishable by a term of not less than five years, unless otherwise specifically provided by law, and which may be for life, but if the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of the felony, the court shall sentence the person convicted for a term of not less than six years, and which may be for life. A fine may be imposed for \$10,000.

Second degree felony – A person convicted of a second degree felony may be sentenced for a term of not less than one year nor more than 15 years, but if the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of the felony, the court shall sentence the person convicted for a term of not less than two years nor more than 20 years. A fine may be imposed for \$10,000.

Third degree felony – In the case of a felony of the third degree, sentence may be for a term not to exceed five years, but if the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of the felony, the court shall sentence the person convicted for a term of not less than one year nor more than five years, and the court may sentence the person convicted for a term of not less than one year nor more than ten years. A fine may be imposed for \$5,000.

Misdemeanors are classified into three categories:

Class A misdemeanor – A person convicted of a Class A misdemeanor can be sentenced for up to one year in prison and/or fined \$2,500.

Class B misdemeanor – A person convicted of a Class B misdemeanor can be imprisoned for up to six months and/or fined \$1,000.

Class C misdemeanor – A person convicted of a Class C misdemeanor can be imprisoned for up to 90 days and/or fined \$750.

In addition to felonies and misdemeanors, crimes may be classified as infractions. A person convicted of committing an infraction is not imprisoned, but can be fined up to \$750.

All offenses require an appearance before a magistrate, generally in the District Court. At that time, the judge reads the information to the defendant. In the case of a misdemeanor, the defendant is then required to enter a plea of either guilty or not guilty. If the defendant has been released from jail on bail or on his own recognizance and fails to appear for the arraignment, a warrant of arrest can be issued and bail may be forfeited.

If the defendant is charged with a felony, he is advised of his right to a preliminary examination and a date is fixed at the arraignment. If the prosecuting attorney consents, the defendant can waive his right to a preliminary hearing. There is no preliminary hearing available in a misdemeanor case.

Preliminary Hearing

The preliminary hearing is to be held within a reasonable amount of time. If the defendant is in custody for the offense charged, the preliminary hearing shall occur not more than ten days after the arraignment. If the defendant is not in custody, the preliminary hearing shall occur not more than 30 days after the arraignment. These time limits can be extended for good cause and frequently are extended upon stipulation of counsel and subsequent order of the court.

The purpose of the preliminary hearing is to require the state to satisfy the court that there is probable cause that this defendant should stand trial for the crime. The state may present evidence and provide any other information to the court to show that probable cause exists. The defendant may testify at this time and present witnesses or evidence to show that he did not commit the crime. After viewing the evidence, the judge must determine whether or not he believes that probable cause exists to show that the crime charged has been committed and the accused committed it. If the judge finds that no probable cause exists, the judge shall dismiss the information and release the defendant. This does not necessarily mean the state will be precluded from instituting a later prosecution for the same offense. If the judge finds that probable cause does exist, the judge will bind over the defendant for trial. If the defendant is bound over for trial on a felony charge, the defendant is required to enter a plea of guilty or not guilty.

Under Utah statutes, the court may, in its discretion, close the preliminary hearing to all persons except the accused, the attorneys involved and necessary witnesses.

Laymen and even some lawyers who are not familiar with the criminal law process frequently confuse the finding of probable cause at the preliminary hearing with the ultimate finding of guilt. The fact that a judge binds a defendant over for trial does not necessarily mean that the judge thinks the defendant is guilty. The judge has only made the finding that the prosecution's evidence, if accepted as true, justifies the submission of the case to a jury. The court must resolve all issues of credibility in favor of the prosecution. If two witnesses testify, one indicating guilt and the other innocence, the court must generally accept the government's version, even though the judge may personally believe the defense witness.

With this concept in mind, it is easy to understand why few defendants choose to call witnesses or offer evidence at preliminary hearings. It also underscores the fallacy of concluding that the mere finding of probable cause is an indication of the defendant's guilt or the strength of the prosecution's case.

Pretrial Motions

Motions are a form of pleading that either the prosecution or defendant may make to bring a certain matter before the court. Generally those motions that can be determined before the trial should be made at least five days before the trial. Motions

regarding admissibility of evidence, requests for discovery, requests for severance of charges or defendants or motions to dismiss on the grounds of double jeopardy must be made at least five days prior to trial, or those objections may be waived. When a person has brought a motion before the court and the other side has answered that motion, the motions are argued before the judge prior to the judge making his decision.

Pretrial Conference

At the discretion of a trial judge, the court may hold a pretrial conference. The purpose of the conference is to consider those matters that will promote a fair and expeditious trial. Basically, a pre-trial conference can be a housekeeping hearing during which time the stage may be set for a trial.

Plea Bargaining

The prosecution and defense may enter into plea bargaining, and this procedure consists of one party making an offer of a plea and the other party considering the plea and deciding whether or not to accept that offer. The judge does not participate in the plea bargaining process, but must approve of the bargain in court. If a defendant pleads guilty to a charge the court will establish that the accused knows he has a right to a jury trial, that he has a right to confront and examine the witnesses, that he knows the nature and elements of the offense, that he knows the minimum and maximum sentence which may be imposed for that offense, and that he is knowingly and intelligently waiving all his rights. If the defendant acknowledges that he has these rights but nonetheless waives these rights, the defendant will then be convicted of the crime charged. Although often criticized, plea bargaining is generally considered a practical necessity and if properly controlled and administered the practice can actually promote justice.

Subpoena

Both the prosecution and the defense have the right to subpoena those witnesses and that evidence which may help establish their respective cases. If compliance with the subpoena would be unreasonable, the court may quash or modify it upon motion of the subpoenaed party. Failure to obey the subpoena may place the person in contempt of court.

TRIAL PROCESS

Right To Trial by Jury

Under the Utah Constitution and the United States Constitution, the defendant has the right to a trial by jury for certain charges. In Utah, all felony cases are tried by a jury unless the defendant waives his right in open court with the judge's approval and the prosecutor's consent. All other trials will be tried without a jury unless the defendant makes a written demand at least ten days prior to the trial.

Counsel

A defendant has a right to counsel in cases where he stands the chance of being incarcerated, but the defendant also has the right to waive his right to counsel and proceed *pro se*. *Pro se* is self-representation.

The Players and Their Duties

A. Judge

The judge presides over the trial and makes all final decisions on issues of law and admissibility of evidence. In those trials where a jury is not used, the judge becomes the person who decides guilt or innocence.

B. Bailiff

The bailiff is the person who calls the court to order and announces that the judge is present. The bailiff also will announce the end of the trial. The bailiff's basic duty is to see that the audience does not interfere with the trial and that people in the courtroom act appropriately. The bailiff also may perform certain duties as the judge requests. Often times the court will assign the bailiff the responsibility of monitoring the use of cameras in the courtroom.

C. Court Clerk

Each justice of the peace has a court clerk who numbers the exhibits, maintains the exhibits during the trial and does other administrative-type duties for the judge.

D. Court Reporter

This is the person who is responsible for taking down verbatim all the words said during the trial or hearing. The court reporter is responsible for translating what is recorded and putting it into certified form.

E. Defense Counsel

He represents the defendant and will be present at all hearings. Defense counsel is responsible for seeing that the defendant's rights are protected and that any decisions that the defendant makes will be informed.

F. Prosecutor

The prosecutor is the attorney for the state, county, or city and has the duty to see that the laws are upheld and justice is done. The prosecution has the burden of going forth with evidence and showing that the crime charged was committed beyond a reasonable doubt.

G. Defendant

The defendant is the person accused of the crime.

H. Victim or Witness Counselor

A victim counselor or witness counselor may be involved in certain cases. These include cases which deal with sexual assaults and abuses, or any other violent crime, or other cases in which witnesses need extra support and guidance. The duty of the victim or witness counselor is to see that a person who is to testify understands the process and receives necessary support.

Judicial Fairness

The judicial process is a carefully designed system of checks and balances. Each participant in the process plays a specified role. Each participant is bound by certain legal and ethical obligations to the individual litigants as well as to the judicial process as a whole. A prosecutor, for example, cannot ethically express his personal opinion about a particular case, nor can he discuss the evidence outside the courtroom. Neither the prosecution nor the defense can knowingly introduce false or misleading evidence during the trial. The judge may not comment outside the courtroom on a matter pending before the court. To the extent the officers of the court violate their legal or ethical duties, our system of justice fails.

The criminal justice system is designed to ensure that no final decision is made without full evidentiary hearings. The process recognizes that incomplete knowledge often results in miscarriage of justice. Both sides are given an opportunity to present evidence supporting their respective position or to offer evidence which impeaches or refutes evidence offered by their opponents. The courts allow only legally admissible evidence to guard against inaccuracies or falsity. The system attempts to prevent the injection of external evidence into the fact finding process so that all decisions are made in the “sterile” atmosphere of the courtroom.

Although the responsibility of preserving an accused’s constitutional right to a fair trial is primarily that of the court, the news media should be sensitive to the possible contamination, perhaps unintentionally, of the judicial process by the injection of inadmissible facts or extraneous pressures into the courtroom. The judicial system is designed to deal with the usual news reporting of events transpiring during the course of the trial. Jurors, for example, are often instructed by the judge not to read news reports about the trial or to discuss the case with anyone outside the courtroom. A more serious problem for the administration of justice, however, is presented where there is an attempt by the news media or the public to influence the outcome of a specific criminal proceeding. Efforts by anyone outside the judicial process to cause a desired ruling or result are counter-productive to the system’s attempt to avoid injustice resulting from inaccuracy or incomplete information. While judges and other officers of the court are resistant to these kinds of external pressures, the risk that an innocent person may be convicted or that a guilty person may be acquitted is substantially increased when the

public or news media attempt to influence the outcome of specific criminal cases or decisions. Of course, criticism of a judicial decision, once rendered, is legally permissible and indeed, is a part of our system of checks and balances.

Phases of Trial

A. Jury Selection

Jurors are selected from a random cross section of the population of the area served by the court. All qualified citizens have the obligation to serve as jurors. A qualified citizen is a person who is a citizen of the United States, is over 18 years old, is a resident of the county in which the charges will be brought, and is able to read, speak, and understand English.

In capital cases – those cases which may result in a death penalty – 12 jurors are selected for the trial. In a criminal case which carries a term of incarceration of more than one year as a possible sentence for the most serious offense charged, eight persons are selected. Six persons are selected in a criminal case which carries a term of incarceration of more than six months but not more than one year. Four persons are selected in a criminal case which carries a term of incarceration of six months. In a civil case at law, eight persons shall be selected except that the jury shall be four persons in a civil case for damages of less than \$20,000, exclusive of costs, interests, and attorneys' fees.

At the beginning of the jury selection, the clerk calls the number of jurors that will be used. The court may permit the prosecutor and the defense counsel to ask questions of the prospective jurors and may itself ask questions of the prospective jurors. This is called *voir dire*. The judge may disqualify certain jurors if those jurors have been convicted of a felony, are currently serving on active duty for the United States, or if they have a physical or mental disability which precludes them from jury duty. Either party can challenge jurors individually for cause or may challenge the panel as a whole. A challenge is a request that those jurors not be allowed to serve for certain reasons. Intensive *voir dire* may be undertaken in high profile cases to determine jurors' exposure to potentially prejudicial pre-trial publicity.

No qualified juror is generally exempt from appearing when subpoenaed for jury duty and jurors are currently compensated \$18.50 for the first day and \$49 for each subsequent day in addition to \$1 for each four miles in excess of 50 miles actually traveled. If a person fails to appear and cannot show cause for that failure, he may be guilty of criminal contempt, which could carry a fine of \$100 or three days in prison or both. An employer cannot fire a person for serving on a jury.

B. Exclusion of Witnesses

Under Utah law, the court may exclude witnesses during any other witness' testimony.

C. Opening Statement

The prosecution usually begins the trial by making an opening statement. This is generally an overview of the crime charged and the evidence that is to be presented. It is then the defense attorney's turn to make an opening statement, but the defense may elect to wait to make an opening statement until after the prosecution has put on its evidence or he may choose not to make one.

D. Evidence

The prosecution offers its substantive evidence through witness, exhibit or object testimony and must prove every element (beyond a reasonable doubt) of the crime charged. At this time, both circumstantial and direct evidence may be offered. Under the law, there is no difference between circumstantial and direct evidence, and a person may be convicted totally on circumstantial evidence.

E. Defense Evidence

Once the prosecution has rested, the defense may make an opening statement, if it has not already done so, and present any evidence that will substantiate the defense or mitigate the crime charged.

F. Rebuttal Evidence

After both sides have offered their evidence, each side may then offer rebuttal evidence.

G. Closing Argument

Once all evidence has been offered each side may make a closing argument. A closing argument is merely a commentary on the evidence as each side sees it. Generally, wide discretion is allowed unless an improper comment is made that may prejudice the defendant. The prosecution goes first with its closing, the defense then offers its closing argument and the prosecution responds to the defense's closing argument. Either side may waive closing arguments.

H. Jury Instructions

At the close of the evidence, or at an earlier time if the court reasonably directs, both parties may file written requests that the court instruct the jury on the law as set forth in their requests. The court may accept or reject the parties' proposed instructions. It may give instructions of its own. Prior to closing arguments the court informs the parties what instructions it will give and provides copies of the instructions to counsel for both sides. The jury instructions set forth the law of the offense charged and instruct the jury on any defense raised by the evidence. If either side disagrees with the instructions given by the judge, it must specifically object to that instruction or possibly lose the right to challenge the instruction on appeal.

I. Jury Deliberation

The jury is not to form an opinion until the case has been submitted to it. Jurors may not deliberate until they have been given the instructions, heard all of the evidence and received the exhibits. The jury is kept under the charge of an officer who will not allow communication with them from the outside and will not communicate with them himself. The jury may ask for clarification on questions of law. If a request is made, the court may answer the request before both defense and prosecution counsel in open court. It is never proper for a reporter to communicate with a juror during deliberations. It is, however, proper to communicate with a juror after a verdict is reached and announced and the juror is excused.

J. Jury Verdict

The jury may return a verdict of guilty, not guilty, or not guilty by reason of mental illness if insanity has been introduced as a defense. A verdict must be unanimous and must be given in open court with the defendant present unless he chooses not to be. There must be a verdict for each offense charged. If there is more than one defendant there can be different verdicts for each defendant. Either party or the court may poll the jury. Polling of the verdict is an assurance that each juror has reached the announced decision. If the verdict is not guilty the defendant is released. If the verdict is guilty the defendant may be taken into custody or released on bail.

If the jurors cannot reach a decision the judge may declare a mistrial and the case will be dismissed and set for retrial.

SENTENCING

After a verdict of guilty or a plea of guilty, the court may set sentencing for not less than two nor more than 45 days after that verdict or plea. If the defendant chooses, he may waive that time and may be sentenced the day he is convicted. At this time, the defendant may present any information or make any plea to the court on his own behalf to show why the punishment should be mitigated or the sentence shouldn't be imposed. In capital cases, the defendant has a sentencing hearing during which time the defense counsel brings out evidence that mitigates the justifications for the death penalty and the state puts on evidence of aggravating circumstances which would justify the death penalty. The jury then deliberates whether the person should be given the death penalty or a life sentence.

Before the judge sentences the defendant, the Department of Adult Probation and Parole will generally prepare a pre-sentence report and make a sentencing recommendation to the court. This report will take into account prior offenses and the circumstances of the current crime for which the defendant was convicted. A judge considers this report and recommendation when imposing sentence. He must stay within those limits prescribed by the law and may imprison, fine or place a defendant on probation. In addition, the court may assess other penalties. The court shall also order restitution to victims who suffered pecuniary damages.

APPEAL

The prosecution may appeal a case in very limited circumstances and this appeal is generally handled by the Attorney General's Office.

The defendant has a wider range of matters from which he can appeal. Either party must notice any appeal within 30 days after the entry of judgment. Appeals from District Court and Juvenile Court decisions may go to either the Utah Court of Appeals or the Utah Supreme Court.

If an appeal is successful and a judgment or conviction is reversed, a new trial can be set unless the appellate court specifies otherwise. It should be noted that in capital cases where the death penalty has been given, the case is automatically reviewed by the Utah Supreme Court within 60 days after certification of the trial court's record.

CORRECTIONS

Once a person is sentenced to jail or prison, that person is placed in the custody of either the Sheriff or the Utah State Prison warden. If placed in the custody of the Sheriff the prisoner will be placed in jail. If placed in the custody of the Utah State Prison warden the prisoner is to be placed in prison. If the person is placed in prison he is under the jurisdiction of the Board of Pardons, which takes total control of his release. Any decisions on release from prison will be made by this Board. Neither the prosecutor, the defense attorney nor the judge has control over release from prison. Under Utah law, the Board of Pardons has the exclusive right to determine the defendant's length of incarceration.

A CIVIL LAWSUIT – FROM COMPLAINT TO APPEAL

PRACTICAL TIPS FOR JOURNALISTS

Shut out of a meeting? Denied access to a government record? Wondering what to do about the threat of a subpoena seeking your notes or video outtakes? Almost daily Utah journalists face these and similar questions as they gather and publish information in the public interest.

Following are 10 practical tips for individual Utah journalists and news organizations regarding common legal issues. Please note that the following does not constitute legal advice; if confronted with a particular legal problem, contact your news organization's attorney.

1. Know your rights and responsibilities. With respect to freedom of information and other media law issues, the axiom that the law protects the vigilant applies with particular force. Be familiar with Utah laws and regulations governing access to government documents, closure of public meetings, and cameras in the courtroom (see accompanying summary tables). To stay abreast of developments in Utah media law, review this Handbook, consult your news organization's attorney, and monitor updates given by the Utah Headliners Chapter of the Society of Professional Journalists (<http://www.spj.org/uthead>) and <http://www.utahfoi.org>.

2. Develop, implement, and maintain clear newsroom policies. With respect to the preservation of notes, video outtakes, and other newsgathering material, a clearly defined newsroom policy is essential. The particulars of the policy – whether to retain reporters' notes for a month or six months after publication of a story, for example – are not as important as the existence of and compliance with some kind of policy. Such a policy may prove helpful in the event of, among other things, litigation for defense of a defamation claim or opposition to a subpoena.

3. Create and keep a record. When requesting a government document, requesting access to a government meeting, or responding to a litigation-related request for your notes or video outtakes, be sure to create and preserve a paper trail, in accordance with your newsroom's policy, of everything that takes place. For example, keep a file with copies of GRAMA requests and responses.

4. State your objections clearly and calmly. For example, if you are about to be shut out of a government meeting you might take the following steps that will preserve your objections:

- Request that your objection to the meeting closure be recorded in the official minutes. If the closed meeting is already in progress, deliver a written objection and request that it be recorded in the minutes.
- Request that the public body vote on closing the meeting and record the results in the minutes. Also, ask the presiding official to state on the record the reason for closing the meeting.
- Advise the public body that any action taken at a meeting in violation of Utah law may be subject to being declared void.

5. Follow prescribed procedures. For the sake of order, government sometimes imposes administrative requirements on journalists. As long as these requirements are reasonable and do not target certain kinds of speech, they are probably valid and should be followed. For example, Utah trial judges require that requests for use of still cameras in courtrooms be submitted at least 24 hours before the hearing in question. That guideline should be followed unless, as the regulation allows, the journalist can explain a valid reason why 24-hour notice was not possible.

6. Identify yourself. When approaching a crime scene, querying a government official, or requesting access to a meeting or document, identify yourself. Letting people know who you are may preclude some claims based on deception and also facilitates communication, a key factor in improved relations between the press and the legal or government officers with whom they interact.

7. Be precise. A common complaint by lawyers and judges about journalists is that news is not as precise as the legal documents and courtroom procedures to which members of the bar are accustomed. The nature of journalism, including deadlines and space limitations, sometimes precludes exactness, but journalists should always take as much time and care as they can to ensure accuracy and completeness. Doing so not only serves readers but also improves relations with sources. Take time to read and understand court documents. If something is not clear or you don't understand a particular legal argument or procedure, ask the lawyers involved for an explanation. Nothing will undercut your credibility more quickly with those who understand Utah criminal procedure, for example, than to say that an accused person was "charged" with a crime when no formal charge (the "information") has actually been filed yet and the accused is merely being held in custody for investigation of what the police listed for "booking charges."

8. Be professional. The government officials with whom you may sometimes have an adversarial relationship will respect you and help you if they are treated professionally. Journalists should behave in a manner befitting the public trust that they serve. It may be a cliché, but you really do catch more flies with honey than vinegar.

9. Obey the law. Remember that, despite the First Amendment, even journalists are subject to generally applicable laws that promote public welfare and don't target – although they have an incidental effect on – speech. Justice Oliver Wendell Holmes famously wrote in 1919 that the First Amendment does not protect someone who falsely shouts "Fire!" in a crowded theater. Likewise, government officials sometimes have valid legal grounds to prevent journalists from accessing a crime scene, for example.

10. Get help. If you are served with a subpoena or otherwise involved in a complicated legal-related matter, seek the assistance of your news organization's attorney. You might also find assistance through the Society of Professional Journalists (<http://spj.org>), the Reporters Committee for Freedom of the Press (<http://www.rcfp.org>), the Media Law Resource Center (<http://www.medialaw.org>), and the Utah Freedom of Information Hotline (532-7840).

FREQUENTLY ASKED QUESTIONS

- 1. Where do I begin to research a story involving the law?**
- 2. What are the sources of the law?**
- 3. What if the story involves the courts?**
- 4. May I interview the lawyers and judges involved in a case?**
- 5. May I bring a camera into the courtroom?**
- 6. Can I be forced to testify about confidential sources and the product of my newsgathering work?**
- 7. What government documents are open to the public and press?**
- 8. What about federal government records?**
- 9. What government meetings are open under Utah's sunshine law?**
- 10. How can I avoid liability for defamation or slander?**
- 11. What do I need to know about invasion of privacy?**
- 12. What if I have further legal questions?**
- 11. What if I have further legal questions?**

1. Where do I begin to research a story involving the law?

The legal system of the United States, like other government functions, is divided into federal, state, and local levels. Federal law governs many aspects of national life, including interstate commerce, immigration, bankruptcy, banking, currency, foreign relations, highways, labor unions, civil rights, public lands, war and national defense, and intellectual property (copyrights, trademarks, and patents). State law, meanwhile, governs such areas as intrastate commerce, family relations, motor vehicles, corporations, public and higher education, real estate transactions, wills, torts, contracts, fraud, and most serious crimes. Finally, counties and cities may adopt ordinances in areas such as land zoning, business licenses, animal control, and minor crimes.

Frequently, research for news stories involves overlapping federal, state, and local laws. Firearms, for example, are subject to various provisions in federal statute, state code, and certain city ordinances. Additionally, a single criminal act could subject a person to criminal prosecution under both state and federal law.

2. What are the sources of the law?

Federal statutes are adopted by the United States Congress and are found in the United States Code, which can be accessed at local law schools' libraries or at <http://www4.law.cornell.edu/uscode/>. Federal government agencies – part of the executive branch – may promulgate regulations, which typically interpret or flesh out federal statutes and can have the force of law. The Code of Federal Regulations can be accessed at <http://www.access.gpo.gov/nara/cfr/>.

State law is found in the Utah Code, adopted by the Utah Legislature and accessible at <http://www.le.state.ut.us/~code/code.htm>. State government agencies also

promulgate regulations, which can be found in the Utah Administrative Code at <http://www.rules.utah.gov/publicat/code.htm>.

Finally, many counties and cities publish their ordinances in bound volumes or online.

3. What if the story involves the courts?

Again, you must first determine whether you are dealing with federal, state, or municipal courts. Federal courts are courts of limited jurisdiction and thus may handle only matters specifically allocated to them in the U.S. Constitution or U.S. Code. The U.S. District Court for the District of Utah is located at 350 S. Main Street in Salt Lake City (tel. 801-524-6100). The Court's Website is <http://www.utd.uscourts.gov/default.htm>. Federal district judges, or trial judges, hear both criminal and civil cases. Appeals from the U.S. District Court for the District of Utah are taken to the U.S. Court of Appeals for the Tenth Circuit (<http://www.ck10.uscourts.gov/>). Tenth Circuit opinions are catalogued in several locations on the Internet, including <http://www.law.emory.edu/10circuit/>. A small number of appeals from Tenth Circuit cases are heard by the U.S. Supreme Court (<http://www.supremecourtus.gov/>).

State courts are courts of general jurisdiction and thus handle all matters not specifically delegated to another court. Utah's state court system (<http://www.utcourts.gov/>) is divided into eight geographic judicial districts. Trial judges in each judicial district hear both criminal and civil cases. Additionally, Juvenile Courts are of equal status with District Courts and have exclusive jurisdiction over minors who violate the law or are abused. Appeals from the District Court and Juvenile Court may be heard by the Utah Court of Appeals or the Utah Supreme Court. In certain limited circumstances, an appeal from the Utah Supreme Court may be heard by the U.S. Supreme Court.

Finally, counties and cities operate Justice Courts, which have jurisdiction to handle certain misdemeanors, infractions, ordinance violations including traffic offenses, and small claims matters within their respective geographic areas.

4. May I interview the lawyers and judges involved in a case?

Generally, lawyers working on a case may talk to journalists about the case as long as the lawyers are truthful. However, the Utah Rules of Professional Conduct forbid a lawyer from revealing confidential information regarding the lawyer's representation of clients without the clients' permission, except in certain limited circumstances.

Additionally, Rule 3.6 of the Rules of Professional Conduct specifically mandates that a Utah lawyer may not make a statement to be published or broadcast in the news media if the lawyer knows or should know that the statement will have a prejudicial effect on the court case in question. The Rule allows lawyers, including prosecutors, to tell journalists certain basic information such as the claim or defense involved, the existence of an investigation, the identity and address of a person accused of a crime, and facts surrounding an arrest.

In addition, a criminal prosecutor has an added responsibility to ensure that secretaries, police officers, investigators, and others over whom the prosecutor has control do not make statements to journalists that the prosecutor herself would be prohibited from making.

Generally, judges working on a case are not free to speak with journalists about the case. The Utah Code of Judicial Conduct prohibits a judge from making a public comment about a matter in his court or any court that could affect the case's outcome or impair its fairness. Judges are required to ensure similar abstention on the part of court personnel such as clerks. The Code of Judicial Conduct expressly allows judges to make public comments in the course of their official duties and to explain, for public information, the procedures of the court.

5. May I bring a camera into the courtroom?

Cameras generally are prohibited in trial courts. However, a single still photographer in a pooling arrangement with other media organizations may be permitted in the courtroom during a hearing at the discretion of the judge. A written request for such access by a pool photographer must be submitted to the judge 24 hours before the hearing. The Utah Code of Judicial Administration states that no one may photograph a juror, presumably either inside or outside the courtroom, before the juror is dismissed. Broadcast news cameras are never allowed in trial courts, and one state court judge was informally reprimanded for allowing television cameras outside the courtroom to film proceedings inside the courtroom through an open door.

Broadcast television cameras may be permitted, under a pooling arrangement, in the Utah Court of Appeals and the Utah Supreme Court at the discretion of the presiding or chief judge in those courts. A written request must be submitted 48 hours before the hearing. Set-up and take-down of camera equipment must be completed while the court is not in session. Individual journalists may also use tape recorders in the Utah Court of Appeals and the Utah Supreme Court.

6. Can I be forced to testify about confidential sources and the product of my newsgathering work?

Utah does not have a shield law that protects journalists from being forced to reveal confidential sources or to disclose the product of their newsgathering work. However, several Utah trial judges in recent years have relied on authority from the U.S. Supreme Court to give reporters and broadcasters some protection from subpoenas seeking notes, videotape, and testimony.

The U.S. Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972) said that the First Amendment to the U.S. Constitution affords journalists some protection against subpoenas seeking their testimony but that the reporter's privilege could be abrogated if the government's interest in a criminal grand jury investigation, for example, were important enough. The Tenth Circuit in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) propounded a four-part test for determining whether a journalist could invoke the reporter's privilege to be free from compelled testimony. The test measures (1) the type of controversy, (2) whether the information is available through a source

other than the journalist, (3) whether the information sought goes to the heart of the matter before the court, and (4) whether the information is of certain relevance.

Utah trial judges have generally applied the framework of *Branzburg* and *Silkwood* to determine whether the reporter's privilege outweighs the litigants' interest in obtaining information.

If you are served with a subpoena to provide testimony or other information in a civil or criminal case, consult your news organization's attorney.

7. What government documents are open to the public and press?

Utah's Government Records Access Management Act (GRAMA), Utah Code Annotated §§ 63-2-101 to 63-2-909, states that all government records – including books, letters, documents, papers, maps, plans, photographs, recordings and electronic data – are presumed to be open and accessible to journalists and the general public. However, government entities may classify certain records as private, protected, or controlled, thus restricting or cutting off access to those records.

A journalist who wishes to gain access to a government record should submit a written request including the requester's name, address, and telephone number. The request should specifically describe the records desired to be inspected. Journalists may request reductions in copying fees and expedited responses because they are working in the public interest. A denied request may be appealed to the head of the government agency in question and then to the Utah State Records Committee.

Under the Utah Code of Judicial Administration, most court records – including case files, court exhibits, minutes or other official records of open court proceedings, arrest warrants, and executed search warrants – are public records. Most juvenile court records are not public, although the name and delinquency history of a minor over age 14 who is charged with a felony are public records.

8. What about federal government records?

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides that federal government records shall be released upon request unless those records fall into one of nine categories of sensitive, private, or high security information.

The Act requires that a written request, stating the name and address of the requester as well as a specific description of the records, be submitted. Journalists may request reductions in copying fees and expedited responses because they are working in the public interest. A denied request may be appealed to the head of the government agency in question and then to the U.S. District Court.

9. What government meetings are open under Utah's sunshine law?

The Utah Open and Public Meetings Act, Utah Code Annotated §§ 52-4-1 to 52-4-10, provides that government meetings are presumptively open to the press and public. The Act applies whenever a simple majority of a particular public body comes together to discuss official business. Electronic meetings, including teleconferences and videoconferences, are considered public meetings that should be open. In addition,

government bodies must give 24-hour notice of their meeting agendas and must keep minutes of their meetings. The minutes are public records.

Closed meetings may be held – but are not required – to discuss the following: an individual’s character, professional competence, or health; collective bargaining; pending litigation; purchase or sale of real estate; deployment of security personnel; and investigations of criminal misconduct.

The public and press have the right to attend criminal trials, and other judicial proceedings such as preliminary hearings and competency hearings are also presumptively open. *Soc’y of Prof. Journalists v. Bullock*, 743 P.2d 1166, 1177 (Utah 1987). A judge may close a pretrial proceeding only after a hearing and exhaustion of alternative attempts to preserve the balance between fair trial and free press. *Id.*

10. How can I avoid liability for defamation or slander?

A statement that is true or substantially true will not support an action for defamation (a written statement) or slander (a spoken statement) in Utah. If a statement is false, the party bringing an action for defamation must also show that the statement was communicated to at least one person besides the speaker and the subject of the statement; that the statement was “of and concerning” the plaintiff; and that the statement had a defamatory meaning, as opposed to merely an embarrassing or bothersome quality.

A journalist reporting on a legislative, judicial or other official proceeding may assert a qualified privilege from defamation as long as the report is fair and true. Additionally, journalists may invoke a qualified privilege for fair comment on matters of public concern.

If the allegedly defamatory statement is made about a public official or public figure, the plaintiff must show that the journalist acted with actual malice, which means that the journalist knew the statement was false or acted with reckless disregard as to its falsity. If the statement concerns a private person and does not involve a matter of public concern, the journalist could be liable if she was merely negligent. Negligence means departing from generally accepted or reasonably prudent journalistic standards.

For assistance with particular questions about whether a story might involve defamation, consult your news organization’s attorney.

11. What do I need to know about invasion of privacy?

The Utah Supreme Court has said that a civil invasion of privacy claim, which “protects an individual’s interest in being let alone,” may be brought against the news media when the published statements in question are not necessarily false but place the subject of the news story in a false light that “would be highly offensive to a reasonable person.” *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 906-07 (Utah 1992). An invasion of privacy claim could also be based on publication of “private facts,” intrusion upon seclusion (such as eavesdropping or peering through a window), or misappropriation of another’s name or likeness.

Additionally, Utah imposes criminal penalties on certain electronic interceptions of private communications, unlawful trespass with the intent to eavesdrop, and

unauthorized installation of a recording or photographic device in a private place where the person being observed or recorded is entitled to privacy.

Utah is a one-party consent state, meaning that there is no liability for tape recording a conversation, for example, as long as at least one of the parties to the conversation knows that the conversation is being tape recorded. Thus, in most circumstances, a reporter can tape record a conversation with a source even though the source does not know about the tape recording.

Utah news organizations also have been subjected to lawsuits for intentional infliction of emotional distress, although journalists would be held liable only if their conduct was extreme and outrageous and resulted in severe emotional distress.

12. What if I have further legal questions?

The Utah Freedom of Information Hotline, sponsored by the Utah Headliners Chapter of the Society of Professional Journalists and the law firm Parr Waddoups Brown Gee & Loveless, may be accessed by calling 801-532-7840. Nationally, the Reporters Committee for Freedom of the Press (<http://www.rcfp.org>) provides free legal assistance to journalists. The Media Law Resource Center (formerly Libel Defense Resource Center) provides information and assistance regarding certain First Amendment issues and may be accessed at <http://www.medialaw.org>.

GLOSSARY

Actual malice: In defamation law, knowledge that a statement is false or reckless disregard for whether or not the statement is false. The United States Supreme Court said in *New York Times v. Sullivan* that a publisher may not be held liable for defamation of a public official unless the plaintiff shows that the publisher acted with actual malice.

Amicus curiae: “Friend of the court.” An individual or group not party to a lawsuit but with an interest in the issues involved in a case that petitions the court for the opportunity to submit a brief illuminating potential impact of the court’s impending decision.

Anti-SLAPP statute: In 2001, the Utah Legislature enacted the Citizen Participation in Government Act, Utah Code Ann. § 78-58-101 *et seq.*, which allows for summary dismissal of lawsuits brought against an individual for the primary purpose of interfering with his First Amendment speech rights. A SLAPP suit, or “Strategic Lawsuit Against Public Participation,” is one brought against someone who speaks out at a public meeting, for example, about a controversial topic. The effect of such a suit, which can be brought for defamation, copyright infringement, or one of several other alleged wrongs, is to curtail the defendant’s ability to participate in government and speak freely.

Appellant: A party who appeals a lower court decision, also called petitioner.

Appellee: A party who responds to the appeal of a lower court decision, also called respondent.

Arraignment: The hearing at which a criminal defendant first appears – other than for setting bail – before a court to hear the charges against him. In Utah, this hearing is sometimes called a first appearance. If the defendant is charged with a misdemeanor, the defendant may enter a plea of either guilty or not guilty at the arraignment. If the defendant is charged with a felony, the defendant does not enter a plea until after a preliminary hearing, which is set at the time of arraignment.

Bottomly v. Leucadia Corp.: In 1996, Judge Ronald Boyce of the U.S. District Court for the District of Utah recognized the reporter’s privilege in a case involving subpoenas to reporters from the Associated Press and *The Salt Lake Tribune*. Judge Boyce applied the four factors laid out in the Tenth Circuit’s *Silkwood* opinion and quashed the subpoenas.

Branzburg v. Hayes: The 1972 United States Supreme Court case recognizing that the First Amendment provides some protection for journalists against compelled disclosure of the identity of confidential sources and information obtained in the course of gathering news. Five out of nine justices joined the majority opinion holding that three journalists were not privileged to withhold information from a good-faith grand jury investigation about news sources implicated in crime.

Burden of proof: A party's responsibility to establish an assertion. In criminal cases, the prosecution must establish beyond a reasonable doubt that each element of the crime has been satisfied. In a civil case, the plaintiff is responsible to meet a lower burden – usually by a preponderance of the evidence.

Certiorari: An extraordinary writ ordering a lower court to deliver a case to an appellate court for review. The United States Supreme Court has virtually complete discretion to decide whether to grant *certiorari* and hear a case.

Chattel: Personal property.

Chilling effect: Reluctance or inability to exercise a right such as free speech as a result of government regulation limiting that right.

Class action: A lawsuit brought by a relatively small group of people on behalf of a larger group of similarly situated people.

Common law: As opposed to statutes passed by legislators, law that comes from the decisions of judges.

Collateral estoppel: The doctrine that says an issue already litigated in a previous action may not be litigated in a subsequent action. The determination made on such an issue in the first action will be preclusive in the second action against the party that litigated in the first action.

Commercial speech: Speech, such as that found in commercial advertisements, that does nothing other than propose a purchase or sale receives some protection under the First Amendment, although the level of protection may be less than that afforded to classic political speech. The U.S. Supreme Court said in 1976 that “society also may have a strong interest in the free flow of commercial information.” *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764 (1976).

Complaint: The document that initiates a civil lawsuit by setting forth basic facts and the plaintiff's claims.

Contempt: Defying the authority or dignity of a court. A journalist who refuses to comply with a court order requiring disclosure of a confidential source, for example, could be subject to jail time after a finding of criminal contempt.

Content-based regulation: Government discrimination against speech based on its content. Content-based regulation is generally subject to strict scrutiny in court, meaning the government must demonstrate that it has a compelling interest in regulating the speech in question and that the means employed are narrowly tailored to achieve that end.

Content-neutral regulation: Government conduct that may have an incidental effect on speech but does not specifically target certain kinds of speech for their content. Content-

neutral regulation is more likely to be upheld in court than content-based regulation because the government need only show an important or substantial interest in regulation and the means chosen need only have a rational relationship to the end sought.

De novo: Anew. An appeal under a standard of *de novo* review means the appellate court does not have to accord deference to the judgment of the lower court.

Deposition: A witness' testimony, taken under oath but not in court. The testimony, which generally take place in a law office with attorneys for both sides present, is recorded and transcribed by a court reporter. In civil cases, depositions are a staple of the discovery process. The side that issued the subpoena for the witness to appear "takes" the deposition by asking questions and soliciting answers; the other side "defends" the deposition by objecting to the form or content of questions.

Discovery: The parties' mandatory exchange of requested information in a civil or criminal case. Discovery generally takes place early in the litigation process so that the parties may learn facts to assist in the presentation of their cases on summary judgment and at trial. Discovery is generally not supervised by a judge but is governed by applicable rules of procedure.

Dissent: Disagreement by one or more judges with the majority opinion on a court made up of multiple judges.

Due process: The requirement that government conform with certain procedures, generally notice and an opportunity to be heard, in order to protect private rights. Also, the fundamental constitutional rights – such as life, liberty, and property – that necessitate compliance with procedural safeguards.

Easement: An interest in land consisting of the right to use part of the property of another.

Eminent domain: The government power to convert private land to public use, provided that just compensation is made.

Estoppel: A bar that prevents the assertion of a legal claim or right.

Et seq.: "And those that follow."

Ex parte: Involving only one party without notice to or argument from the other party.

Fiduciary: A person who is entrusted with the management and disposition of the money or property of another person and therefore must exercise a high degree of care in seeking the best interests of the other person.

Fighting words: The United States Supreme Court in 1942 declared that the First Amendment did not protect "fighting words – those which by their very utterance inflict

injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). However, the Supreme Court has not upheld a fighting words conviction since *Chaplinsky*, and the doctrine has been either eviscerated or severely narrowed by subsequent Court decisions.

Habeas corpus: A writ used to bring a person in custody before a court to determine whether detention is legal. Today, *habeas corpus* is the method by which prisoners being held in state prison pursuant to a murder conviction and imposition of the death penalty, for example, bring their claims before federal courts. Thus, *habeas corpus* represents an exception to the rule that federal courts other than the U.S. Supreme Court do not review judgments of state courts.

Hate speech: Criminal libel against a group of persons based on a common characteristic such as race, ethnicity or religion. Generally speaking, hate speech enjoys little or no First Amendment protection, although scholars criticize the doctrine in that it allows government to define the value of speech.

Hearsay: Testimony based not on a witness’ personal knowledge but on the statements of others. The Federal Rules of Evidence define hearsay as an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is not admissible in court. However, there are many and sometimes broad exceptions that permit certain forms of hearsay to be admitted.

Information: The formal document that initiates a criminal prosecution against an accused person in Utah’s state trial courts. In federal court, the equivalent document is called an indictment. Although police sometimes say that an accused has been “charged” with a crime at the time the person is arrested, the formal charge listed in the information is filed by municipal, county, or state prosecutors and not police. Usually, prosecutors determine within a few days of arrest whether to pursue formal charges and file an information. Prosecutors have discretion in determining whether to file an information and, if so, what charges to include.

Injunction: Court order requiring or prohibiting certain conduct.

Interlocutory appeal: An exception to the rule that says that appeals may be pursued only from final judgments. An interlocutory appeal allows a party to bring a potentially decisive issue before an appeals court even before the case has been finalized in the court below.

Jurisdiction: A court’s authority to hear a dispute or other legal matter. Jurisdiction is established by constitution and statute. The actions of a court without jurisdiction are void. Lack of jurisdiction can be raised by either party or the court itself at any time during litigation, even on appeal, and is not waivable by the parties.

Jury instructions: A set of legal guidelines given to the jury by the judge before the jury begins deliberations to reach a verdict. A Utah judge may ask attorneys for both

sides to draft proposed sets of jury instructions, and then the judge uses those proposals to craft a unified set of instructions for the jury.

Lis pendens: Pending litigation; also, the notice of pending litigation recorded in the chain of title to a piece of real estate, designed as a public warning that the real estate is the subject of litigation. In Utah, a notice of *lis pendens* is absolutely privileged against liability for slander of title because the *lis pendens* merely publishes what already is a matter of public record – the existence of litigation.

Marketplace of ideas: Most famously proclaimed by U.S. Supreme Court Justice Oliver Wendell Holmes in 1919, the marketplace of ideas theory says that “the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Miranda v. Arizona: The 1966 United States Supreme Court case which held that statements may be taken from – and subsequently used in evidence against – a person suspected of a crime only after police have informed the person that he has the right to remain silent during police questioning; anything the person says to police can be used against him in court; the person has the right to consult an attorney and have an attorney present during questioning; and the person has the right to have an attorney appointed for him if he cannot afford to hire an attorney.

Negligence: Failure to exercise the care that a reasonably prudent person would exercise in a given situation. Negligence may be the basis for civil liability in various contexts, including defamation of a private person on a matter of non-public concern.

No contest plea (also called *nolo contendere*): A criminal defendant who pleads no contest does not admit guilt but acknowledges that the prosecution has enough evidence to convict him of the crime charged. Unlike a guilty plea or conviction after trial, a no contest plea cannot be used as evidence of liability in a subsequent civil lawsuit.

New York Times v. Sullivan: The 1964 United States Supreme Court case in which the Court held that a publisher is not liable for defamation of a public official unless the publisher has acted with actual malice (i.e. knowledge or reckless disregard of falsity of statement).

Obscenity: Sexually explicit speech or material that meets a three-part test: “(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). Utah Code calls obscenity “pornography” and defines the prohibited depictions of sexual conduct as patently offensive “nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion.” Utah Code Ann. § 76-10-1203(1)(b).

Overbreadth: A doctrine under which laws limiting speech are declared unconstitutional if they outlaw more potential speech than the U.S. Constitution permits.

Petitioner: A party who appeals a lower court decision, also called appellant.

Preliminary hearing: A person accused of a crime has the right to have the government show, at a preliminary hearing, that enough evidence exists to justify a trial on the matter. The purpose of a preliminary hearing is not to determine the ultimate guilt or innocence of the defendant but merely to allow the judge to determine whether to “bind over” the defendant for trial based on the evidence presented by prosecutors. A criminal defendant is under no obligation to present evidence at a preliminary hearing.

Prima facie: Sufficient to establish a fact or assertion unless rebutted.

Prior restraint: Government-imposed prohibition on speech before the fact. Prior restraints are extremely disfavored by contemporary courts based on the reasoning that any improper speech should be punished after the fact and not restrained beforehand. The United States Supreme Court in 1971 refused to allow prior restraint on publication of the Pentagon Papers, which disclosed previously unknown details about U.S. involvement in Vietnam.

Privacy invasion: Journalists may be subject to civil and criminal liability for invasion of privacy as defined in both statute and common law. Privacy invasion may consist of, among others, eavesdropping, interception of electronic communications, unauthorized installation of hidden cameras or recorders, painting someone in a false light, intruding upon someone’s seclusion, publishing private facts, and appropriating someone’s likeness.

Privilege: The right not to comply with a legal duty. Privileges may be absolute or qualified.

Pro se: To represent oneself in court (i.e. without a lawyer).

Probate: The administration of the estate of a deceased person.

Public forum: Government-owned property such as streets, sidewalks, and parks are presumptively open to speech and may be regulated only with respect to the time, place and manner of speech and not the content of speech. Any regulation of speech in a public forum must be narrowly tailored to achieve a significant government interest and must leave open alternative avenues of speech.

Quash: To terminate or suppress. If a judge quashes a subpoena, the party who received the subpoena is relieved from any obligation to testify or produce documents.

Remand: The returning of a case to a lower court with instructions from an appellate court.

Respondent: A party who responds to the appeal of a lower court decision, also called appellee.

Reporter's privilege: Protection against compelled testimony regarding the identity of confidential sources and information obtained in the course of newsgathering. The privilege in Utah is not recognized in statute but is based on the First Amendment to the United States Constitution. The privilege may be abrogated by certain important government or private interests in gaining the information sought from reporters.

Res ipsa loquitur: "The thing speaks for itself." In the law of torts, the doctrine that the very occurrence of a particular event raises a rebuttable presumption of negligence (i.e. the thing would not have happened without negligent conduct).

Res judicata: The doctrine that says a claim already litigated and decided – or a claim that could have been brought because it arose from the same transaction or occurrence as claims that were brought – in a previous action cannot be heard in a second action.

Seditious libel: Beginning in the 13th century, the English Star Chamber punished speech that tended to erode the authority of the King or cause discord between the people and the Crown. Later, the doctrine evolved to punish not only false statements against the monarchy but also statements – even if true – made against a private person that tended to cause breach of the peace. In the United States, most states punished criminal libel until the mid-20th century, when many courts began striking the statutes down as unconstitutional and some state legislatures repealed the statutes. The Utah Supreme Court declared Utah's criminal libel statute unconstitutional in 2002, although the Utah Code retains a similar misdemeanor crime labeled criminal defamation.

Selective enforcement: The argument that government officials apply the law unevenly to target particular individuals or groups for improper reasons.

Shield law: Statute protecting reporters from compelled testimony, in civil or criminal cases, regarding confidential sources and information obtained in newsgathering. Utah does not have a shield law. Approximately 31 states and the District of Columbia have shield laws that provide varying degrees of protection. A common formulation provides an absolute privilege against disclosure of confidential sources and a qualified privilege, which may be overcome in certain circumstances, against disclosure of information obtained in newsgathering.

Silkwood v. Kerr-McGee Corp.: The 1977 case from the U.S. Court of Appeals for the Tenth Circuit that established a four-part test for determining whether a reporter could claim a privilege not to testify about confidential sources and information obtained while gathering news. The test balances the reporter's privilege against the party's interest in obtaining information by evaluating whether (1) the case is civil or criminal, (2) the

information is available through another source, (3) the information sought goes to the heart of the matter before the court, and (4) the information is of certain relevance.

Standard of review: The level of deference to be accorded a lower court judgment by an appellate court. For example, the United States Supreme Court reviews many legal interpretations of lower courts *de novo*, meaning those legal determinations are given no particular weight and may be corrected by the Supreme Court if they are wrong. However, most factual determinations are reviewed under a more deferential standard, such as clearly erroneous (meaning the appellate court will reverse a determination only if it was made in clear error) or arbitrary and capricious (meaning the appellate court will reverse only if there was no basis in law or fact for a particular determination).

Standing: The right to bring a legal claim before a court. In federal court, for example, a party must show that he actually suffered legal harm as a result of the complained-of conduct and that the interest he seeks to protect is within the zone of interests meant to be protected by the statute under which the claim is brought.

Stare decisis: “To stand by things decided.”

Subpoena: A document issued under authority of a court that orders a person to appear in court or at another specified location, such as a deposition, to provide testimony under oath. Both the prosecution and the defense in a criminal case may subpoena witnesses, and both sides in a civil dispute may also issue subpoenas.

Subpoena duces tecum: A document issued under authority of a court that commands a person to appear in court or at another location to provide testimony under oath and to bring specified documents.

Summary judgment: In civil cases, a mechanism for disposing of issues that can be decided without formal adjudication of the facts. Either party may be granted summary judgment on certain of its claims or counterclaims if there are no disputed issues of material fact and if the party moving for summary judgment is entitled to judgment as a matter of law. Similar to a preliminary hearing in the criminal context, summary judgment in the civil context determines whether a trial is necessary.

Summons: A notice advising a person of a legal proceeding and commanding the person to answer or appear.

Symbolic speech: Nonverbal conduct that communicates a message, such as burning a draft card, is speech that may be protected under the First Amendment. Symbolic speech may be regulated by the government if government has a substantial or important interest, if the government interest is unrelated to suppression of expression, and if the incidental restrictions on symbolic speech are no greater than necessary to further the government interest.

Tort: A civil wrong, such as negligence or trespass, for which damages may be recovered. Some torts, such as assault, battery, infliction of emotional distress, and trespass, are called “intentional” torts. A person may also be held civilly liable for a tort when the person acted recklessly or negligently.

Vagueness: A doctrine under which laws limiting speech are declared unconstitutional if they do not clearly define proscribed conduct.

Voir dire: The process of questioning prospective jurors, conducted by the judge and attorneys for the parties involved, to select a suitable jury.

With prejudice: Dismissal of a claim that results in the claim being unable to be brought again.

Without prejudice: Dismissal of a claim that allows the claim to be revised and brought again.

LEGAL RESOURCES

1. Utah State Courts homepage (<http://www.utcourts.gov>).
2. Dockets and opinions of the Utah Supreme Court and the Utah Court of Appeals (<http://www.utcourts.gov/opinions/>).
3. Utah Rules of Civil Procedure (<http://www.utcourts.gov/resources/rules/urcp/index.htm>).
4. Utah Rules of Criminal Procedure (<http://www.utcourts.gov/resources/rules/urcrp/index.htm>).
5. Utah Code of Judicial Administration (<http://www.utcourts.gov/resources/rules/ucja/index.htm>).
6. Utah Code and Constitution (<http://www.le.state.ut.us/~code/code.htm>).
7. Utah Administrative Code (<http://rules.utah.gov/publicat/code.htm>).
8. United States Code (<http://rules.utah.gov/publicat/code.htm>).
9. Code of Federal Regulations (<http://www.access.gpo.gov/nara/cfr/>).
10. Federal Courts Finder map and links to all federal courts (trial and appellate) in the United States (<http://www.law.emory.edu/caselaw/>).
11. Utah Freedom of Information Hotline – This free service allows journalists to ask Utah lawyers questions about access to government documents and meetings. The service is accessible by calling 801-532-7840. The service is made possible by the Utah Headliners Chapter of the Society of Professional Journalists (<http://www.spj.org/uthead>) and the law firm Parr Waddoups Brown Gee & Loveless.
12. U.S. Supreme Court Multimedia “Oyez” page maintained by Northwestern University, with audio files of arguments before the U.S. Supreme Court (<http://www.oyez.org/oyez/frontpage>).
13. Society of Professional Journalists (<http://spj.org>).
14. Investigative Reporters and Editors (<http://www.ire.org>).
15. National Institute for Computer Assisted Reporting (<http://www.nicar.org>).
16. Reporters Committee for Freedom of the Press (<http://www.rcfp.org>).

17. Media Law Resource Center (<http://www.medialaw.org>).
18. Utah FOI (<http://www.utahfoi.org>).
19. Lawyer Locator, courtesy of the American Bar Association and Martindale-Hubbell (<http://www.abanet.org/premartindale.html>).
20. American Bar Association Forum on Communications Law (<http://www.abanet.org/forums/communication/home.html>).
21. State-by-state legal information, including constitutions, cases, statutes, and administrative rules as well as links to municipal codes, law schools, bar associations, and state government Web sites (<http://www.findlaw.com/11stategov/>).
22. Library of Congress' THOMAS: Legislative Information on the Internet (<http://thomas.loc.gov>).
23. University of Missouri School of Journalism's Freedom of Information Center (<http://www.missouri.edu/~foiwww/>).
24. Guide to more Web sites about freedom of information and other First Amendment issues can be found at University of Missouri School of Journalism's Quick n' Easy Media Law Research page (<http://foi.missouri.edu/legalsites.html>).

SUMMARY TABLES OF UTAH MEDIA LAW

UTAH OPEN AND PUBLIC MEETINGS ACT

TOPIC	CITATION	SUMMARY
To which government bodies does the Act apply?	Utah Code Ann. § 52-4-2(3)	The Act applies to any public body, which includes government bodies (1) made up of two or more people; (2) expending or receiving tax revenue; and (3) vested with authority to make decisions regarding public's business.
What constitutes a meeting?	Utah Code Ann. § 52-4-2(2)	A meeting is the convening of a simple majority of a public body, whether in person or electronically, to discuss or act on official business.
When may a meeting be closed?	Utah Code Ann. § 52-4-4; and Utah Code Ann. § 52-4-5	A meeting may be closed when, in an open portion of the meeting, two-thirds of the members of the public body vote to close the meeting to discuss one of the following: (1) an individual's health or competence; (2) collective bargaining; (3) pending or imminent litigation; (4) purchase or sale of real estate; (5) deployment of security personnel; (6) investigation regarding criminal misconduct.
What are the requirements for a public body's meetings?	Utah Code Ann. § 52-4-5; Utah Code Ann. § 52-4-6; and Utah Code Ann. § 52-4-7	A public body must provide notice of the agenda, date, time, and place of meeting at least 24 hours in advance. Notice must be posted at the principal office and advertised in a general circulation newspaper. Minutes must be kept that include a summary of all matters proposed, discussed, or decided, as well as a record of public input and members' votes. The minutes of open and closed meetings are public records.

<p>What remedies are available for violation of the Act?</p>	<p>Utah Code Ann. § 52-4-8; and Utah Code Ann. § 52-4-9</p>	<p>Any final action taken in violation of the Act may be declared void by a court. The Utah Attorney General and various county attorneys are given specific authority to enforce the Act, but a private citizen denied any right may bring suit to compel compliance, to prevent future violations, or to determine validity of a public body's conduct under the Act.</p>
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UTAH GOVERNMENT RECORDS ACCESS MANAGEMENT ACT (“GRAMA”)

TOPIC	CITATION	SUMMARY
To which government records does the Act apply?	Utah Code Ann. § 63-2-103(18)	The Act defines records as books, letters, documents, papers, maps, plans, photographs, films, cards, tapes, recordings, electronic data, or other documentary materials (1) which are prepared, owned, received, or retained by a governmental entity and (2) where the information is reproducible by photocopy or other electronic or mechanical means.
What determines public accessibility to a record?	Utah Code Ann. § 63-2-201	A record’s availability for public inspection depends on the classification attached to the record. All records are presumed to be public and open unless otherwise classified as private, protected, or controlled.
How can I request a government record?	Utah Code Ann. § 63-2-204(1)	A request for records may be made orally, although a written request is required to trigger response deadlines and procedure for appealing denials. A written request should contain the requester’s name, address, and daytime telephone number as well as a reasonably specific description of the record requested.
When should I expect a response to my GRAMA request?	Utah Code Ann. § 63-2-204(3)	A government entity must respond within 10 business days, either denying or granting the request. If a journalist demonstrates that an expedited response is necessary to benefit the public, the response must be made within five business days.

<p>How much can I expect to pay?</p>	<p>Utah Code Ann. § 63-2-203</p>	<p>A government entity may not charge a fee to review a record to determine whether it is subject to disclosure, or to allow a requester to inspect a record. However, the government may charge reasonable fees to recover the actual costs of duplicating a record, if the requester desires a copy. Records requested in a form other than the form normally maintained by the government may be subject to costs for staff time to summarize or tailor the record. Journalists may request that costs be waived because they are working in the public interest.</p>
<p>What do I do if my request is denied?</p>	<p>Utah Code Ann. § 63-2-401</p>	<p>The denial may be appealed to the chief administrative officer of the governmental entity within 30 days. The appeal should contain the requester's name, address, telephone number, description of relief sought, and brief explanation of the facts, reasoning, and legal authority justifying access. The chief administrative officer must make a decision within five business days. If the appeal is denied, the requester may then appeal either to the State Records Committee or to the state trial courts.</p>

CAMERAS IN UTAH COURTROOMS

TOPIC	CITATION	SUMMARY
Are cameras allowed in Utah trial courts?	Utah Code of Judicial Administration Rule 4-401(1); and Rule 4-401(4)	Generally, filming, video recording, and audio recording are prohibited in Utah trial courts. However, the judge presiding at a hearing may approve a request for a single still photographer to take photographs during a hearing. Interested news media organizations are responsible to work out a pooling arrangement.
What do I have to do to get approval to take photographs in a trial court hearing?	Utah Code of Judicial Administration Rule 4-401(4)	A written request must be submitted to the judge presiding at the hearing 24 hours in advance. A court administrator for a particular judicial district may have a preprinted request form to fill out. The 24-hour-notice requirement may be waived by the judge for good cause.
What restrictions are placed on my use of a camera in a trial courtroom?	Utah Code of Judicial Administration Rule 4-401(3); and Rule 4-401(5)	Photographers may not photograph a juror; use flashes or strobe lights; call attention to themselves; set up or remove equipment while court is in session; make comments in the courtroom; enter the courtroom without a “neat appearance”; conduct interviews in the courtroom; and fail to comply with an order or direction from the court.
Are cameras allowed in Utah appellate courts?	Utah Code of Judicial Administration Rule 4-401(1); <i>Guidelines for Experimental Use of Cameras in the Utah Supreme Court</i> , 911 P.2d 978 (Utah 1995); and <i>Guidelines for the Experimental Use of Cameras in the Utah Court of Appeals</i> , 911 P.2d 979 (Utah Ct. App. 1995)	The Chief Justice of the Utah Supreme Court and the Presiding Judge of the Utah Court of Appeals, in consultation with their fellow jurists, have discretion to allow and control the use of cameras in Utah’s appellate courtrooms. The guidelines adopted by the appellate courts specify that no more than one television camera or motion picture camera at a time shall be permitted in appellate courtrooms.

<p>What do I have to do to get approval to film or photograph an appellate court hearing?</p>	<p><i>Guidelines</i>, 911 P.2d 978; and <i>Guidelines</i>, 911 P.2d 979</p>	<p>A written request must be submitted to the Presiding Judge of the Utah Court of Appeals or the Chief Justice of the Utah Supreme Court at least two working days before the hearing. The court clerk then notifies all parties involved and gives them an opportunity to object.</p>
<p>What restrictions are placed on my use of a camera in an appellate courtroom?</p>	<p><i>Guidelines</i>, 911 P.2d 978; and <i>Guidelines</i>, 911 P.2d 979</p>	<p>The media are responsible to form a media committee or designate a spokesperson to receive instructions from and be responsible to the appellate courts. The media also must form a pooling arrangement. Equipment must be in place and tested 15 minutes before the hearing begins and may not be removed during the hearing. Television cameras and microphones must be “state of the art.” Individual journalists may use personal audio recorders as long as they are not distracting.</p>

UTAH PRIVACY LAW

TOPIC	CITATION	SUMMARY
What is “privacy violation”?	Utah Code Ann. § 76-9-402	“Privacy violation,” a class B misdemeanor, includes unlawful trespass with the intent to eavesdrop in a private place and unauthorized installation of a recording, observation, photographic, amplifying, or broadcasting device in a private place or in a public place where the person being observed or recorded is entitled to privacy. Utah law also allows a civil lawsuit against a person who violates this law.
What is “communication abuse”?	Utah Code Ann. § 76-9-403	“Communication abuse,” a class B misdemeanor, is unlawful interception without consent of “a message by telephone, telegraph, letter, or other means of communicating privately.” Utah law also allows a civil lawsuit against a person who violates this law.
What if I am a party to the conversation I am tape recording?	Utah Code Ann. § 76-9-401	Where one person to a conversation knows about and consents to eavesdropping, there is no liability.
What is the false light invasion of privacy tort?	<i>Cox v. Hatch</i> , 761 P.2d 556 (Utah 1988)	A person who gives publicity that places another in a false light may be civilly liable if (1) the false light would be highly offensive to a reasonable person, and (2) the person who gave the publicity knew or had reckless disregard for the falsity of the information and the false light in which it would place the other person.
What is the private facts invasion of privacy tort?	<i>Shattuck-Owen v. Snowbird Corp.</i> , 16 P. 3d 555 (Utah 2000)	A person may be civilly liable for (1) public disclosure (2) of private facts (3) that would be “highly offensive and objectionable to a reasonable person of ordinary sensibilities.”

<p>What is the intrusion upon seclusion invasion of privacy tort?</p>	<p><i>Stien v. Marriott Ownership Resorts, Inc.</i>, 944 P.2d 374 (Utah Ct. App. 1997)</p>	<p>Intrusion upon seclusion in Utah may take one of two forms: (1) a physical intrusion such as invading someone's home or illegally searching someone's bag at a store; and (2) eavesdropping on conversations by means of wiretapping or hidden microphones. In either case, the plaintiff must establish (1) an intentional substantial intrusion upon her seclusion or solitude; and (2) the intrusion would be highly offensive to a reasonable person.</p>
<p>What is the misappropriation invasion of privacy tort?</p>	<p><i>Cox v. Hatch</i>, 761 P.2d 556 (Utah 1988); <i>Stien v. Marriott Ownership Resorts, Inc.</i>, 944 P.2d 374 (Utah Ct. App. 1997)</p>	<p>A person may be civilly liable for misappropriation if he (1) misappropriated (2) another's name or likeness, if the name or likeness has some intrinsic value, and (3) did so for the benefit of someone other than the person whose name or likeness was appropriated.</p>