CHAPTER I
THE NEWS DEPARTMENT AND THE LAW

Questions commonly arise in the news department concerning issues of libel, privilege, fair comment, right of privacy, contempt, availability of public records and whether certain meetings of a governing body are open to the public. This chapter discusses these issues and presents current Louisiana and federal law[1] relating to these issues.

FREEDOM OF THE PRESS

Newspaper publications in Louisiana operate under guarantees of freedom provided by both our United States and Louisiana Constitutions. The First Amendment to the United States Constitution provides, in pertinent part:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; …*

Art. 1, §7 of the Louisiana Constitution provides:

> *No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.*

Although both the United States and Louisiana Constitutions guarantee the freedom of speech and press, the Louisiana Constitution specifically links the responsibility for any abuse of that freedom to the liberty itself. Thus, under the Louisiana Constitution, there is not an unbridled freedom to publish anything, but a freedom coupled with the express responsibility not to abuse that freedom.

FREEDOM FROM CENSORSHIP OR PRIOR RESTRAINT

Publications are generally free from prior restraints imposed by the courts. Absent a compelling state interest, publishers cannot be prohibited by an injunction or court order from publishing an article.

The Federal Courts have incorporated the First Amendment to apply to the states via Fourteenth Amendment to the U.S. Constitution.[2] The U.S. Supreme Court has almost universally held that prior restraints to publication, including injunctions, are unconstitutional under basic First Amendment principles. In fact, the U.S. Supreme Court has held that prior restraints are counter to the fundamental law embodied in the First Amendment and therefore come before any court with a "heavy presumption against" its constitutionality.[3] This includes instances where national security is implicated, as in the seminal prior restraint case of ***U.S. v. New York Times*** (known as the Pentagon Papers case).

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[1] The primary focus of *A Law Guide for Louisiana's Newspapers* is Louisiana state law. However, some issues necessarily involve federal law and the courts' interpretation of such law.
[2] ***Gitlow v. New York,*** 268 U.S. 652 (1925).
[3] ***U.S. v. New York Times Co., Inc.,*** 403 U.S. 713 (1971).

Louisiana cases have agreed that as a general rule, the government cannot stop a publication from exercising its rights to publish. In an older Louisiana case, ***Mulina v. Item Co., Inc.,***[4] the Louisiana Supreme Court held that the press was free from all prior censorship over what could be published, and that it was entirely exempt from control in advance or restraint by injunction. This liberty enjoyed by the press included that which may be of a libelous nature, leaving the injured party to seek his legal remedy after the publication took place.

The ***Mulina*** case enforces the general principle that newspapers may print news without fear of prior restraint; however, the newspaper may ultimately be held liable for damages in a suit for defamation or libel because an aggrieved party's remedy is exercised after publication. This principle is reinforced by the U.S. Supreme Court's decision in ***Near v. Minnesota,*** which dealt with a similar situation in which the publisher was alleged to be printing lies and defamation about certain public officials and ethnic groups. However, the U.S. Supreme Court held that regardless of the reputation of the public officials named, a prior restraint cannot stand under the First Amendment.[5]

In ***Kennedy v. Item Co., Inc.,*** the Louisiana Supreme Court cited with approval Alexander Hamilton's definition of freedom of the press as:

> *…liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals*.[6]

LIBEL/DEFAMATION, PRIVILEGE AND FAIR COMMENT

There are two types of liability that may result from making or publishing a defamatory statement: criminal liability and civil liability. Therefore, a defamatory statement can be the subject of both a criminal prosecution and a civil suit for damages.

A defendant publisher has several defenses available which may enable him to defeat a defamation suit. The following sections address the issues involved with defamation and libel, including the elements that must be proved, and defenses to claims for defamation.

Criminal Defamation

At the outset, it is important to emphasize that although a law is on the books, Criminal Defamation (or Criminal Libel) is generally considered to be a relic of the past and unconstitutional. The Louisiana Supreme Court has held that Criminal Defamation, when applied to speech about public officials, public figures and other individuals who are engaged in public affairs, is unconstitutional.[7] Criminal Defamation, therefore, is very much a toothless law.

The crime of defamation is defined in R.S. 14:47, which provides:

§47. Defamation

> *Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:*

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[4] 47 So.2d 560 (1950).
[5] 283 U.S. 697 (1931).
[6] 34 So.2d 886, 889 (1948).
[7] ***State v. Snyder***, 277 So.2d 660 (1973); *reversed on other grounds*, 304 So.2d 334 (1974).

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

Whoever commits the crime of defamation shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

This section provides that the defamatory communication may be published or expressed "in any manner." Such broad language potentially covers all mediums, whether oral, written, printed, videotaped, etc., by which defamatory communications may be communicated.

R.S. 14:48, 49, 50 and R.S. 15:443 further set forth the framework of defenses and exceptions from which a publisher or other person accused of criminal defamation can build a defense.

Presumption of Malice

The element of malice is at the heart of a criminal defamation prosecution. R.S. 14:48 provides:

§48. Presumption of malice

Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

Where such a publication or expression is true, actual malice must be proved in order to convict the offender.

While malice is the most basic element of the crime of defamation, it is also probably the most difficult element to establish. The law recognizes two types of malice: actual malice and legal malice. In ***State v. Lambert***, the Louisiana Supreme Court held that generally, "legal malice" (malice implied from the intentional commission of a wrongful act, without a lawful excuse), is sufficient to support a charge that a publication is criminally libelous.[8] Malice, as an ingredient of the crime of libel, is not presumed from the publication where the communication is privileged, and the privilege can be destroyed only by actual malice.

Qualified Privilege Precluding a Prosecution for Defamation

A communication made in good faith, on any subject in which the party has an interest or in reference to which he has a legal, moral, or social duty may be "qualifiedly privileged," if made to a person having a corresponding interest or duty. Such a privilege may preclude a prosecution for libel. R.S. 14:49 addresses qualified privileges and provides:

§49. Qualified privilege

A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

[8] 188 La. 968, 178 So. 508 (1938).

(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs or

(b) A thing which the proprietor thereof offers or explains to the public.

(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

(4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

If a communication which contains a libelous statement enjoys a qualified privilege, then the burden is on the prosecution to prove that the communication was made with actual malice so as to destroy the privilege.[9]

Absolute Privilege Precluding a Prosecution for Defamation

Louisiana also has a statutory provision to protect communications which are absolutely privileged. R.S. 14:50 provides:

§50. Absolute privilege

There shall be no prosecution for defamation in the following situations:

(1) When a statement is made by a legislator or judge in the course of his official duties.

(2) When a statement is made by a witness in a judicial proceeding, or in any other legal proceeding where testimony may be required by law, and such statement is reasonably believed by the witness to be relevant to the matter in controversy.

(3) Against the owner, licensee, or operator of a visual or sound broadcasting station or network of stations or the agents or employees thereof, when a statement is made or uttered over such station or network of stations by one other than such owner, licensee, operator, agents or employees.

These types of communications are absolutely privileged regardless of whether there was malice involved or not.

[9] ***State v. Lambert***, 188 La. 968, 178 So. 508 (1938).

Truth as a Defense to a Prosecution for Defamation

Truth can always be used as a defense to a criminal defamation prosecution. R.S. 15:443 states that "[i]n all prosecutions for defamation, the truth thereof may be given in evidence."

The U.S. Supreme Court has also held, in ***Garrison v. State of Louisiana,***[10] that if, upon a lawful occasion for making a publication, one has published the truth and no more, there is no sound principle which can make him liable, even if he was motivated by malice; if there is a legal right to make a publication and the matter is true, the end is justifiable.

Truth is recognized as a defense to a defamation action because truth contributes to the free exchange of ideas for which the First Amendment protections are founded. If truth was not recognized as a defense, then the free exchange of ideas could be stifled. While honest utterances, even if inaccurate, may further the exercise of free speech, it does not follow that a lie, knowingly and deliberately published about a public official, should enjoy like immunity. ***Garrison v. State of Louisiana***, *supra*.

Civil Defamation

Generally, a civil action for defamation is quite different than a criminal prosecution. It is largely different in that the prosecuting party, or the plaintiff, is an aggrieved private citizen or business, not the local district attorney.

Like most torts in Louisiana, civil actions for defamation are brought under La. C.C. art. 2315, which provides, in pertinent part:

> *Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.*

Defamation is an invasion of a person's interest in his reputation and good name. Likewise, a defamatory communication is one that tends to harm the reputation of another so as to lower him in the estimation of the community or to defer third parties from associating with him.[11]

In order to prevail in a defamation action, the plaintiff must prove the following: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. [12]

There is a relationship between criminal defamation and civil defamation. The Louisiana Supreme Court, in ***Gugliuzza v. K.C.M.C., Inc.***, held that criminal statutes are not, in and of themselves, definitive of civil liability and do not set the rule for civil liability, but may be used as guidelines by the court in fixing civil liability. To determine the existence of a civil duty, the court's inquiry focuses on whether the statute was intended to protect a particular plaintiff from the type of harm which ensued. Thus, a finding of criminal defamation does not mean that civil penalties automatically ensue or vice versa. The court will consider whether or not there has been a criminal prosecution or civil suit as well as other factors. However, in a suit for civil defamation, all five elements previously discussed must be established by the plaintiff. The elements of

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[10] 379 U.S. 64 (1964).

[11] ***Sassone v. Elder***, 626 So.2d 345 (1993).

[12] ***Kennedy v. Sheriff of E. Baton Rouge***, 935 So.2d 669, 674 (La. 2006) (*see also* ***Sassone v. Elder,*** *supra;* ***Gugliuzza v. K.C.M.C., Inc.***, 606 So.2d 790 (1992), and ***Cangelosi v. Schwegmann Brothers Giant Supermarkets,*** 390 So.2d 196 (1980)).

defamation are essential to evaluating a story or broadcast's potential for a civil lawsuit between the alleged defamed and the news organization.

Falsity

In order to succeed, a defamation plaintiff must prove falsity of the statement, as requiring the defendant to prove the truth of every assertion would cast a chilling effect on the media.[13] This also means that the alleged defamation must be susceptible to being proved false, as we explore in the "Opinion vs. Fact" section, *infra.*

In ***Schafer v. Lynch and the Times-Picayune Publishing Corporation,***[14] the Louisiana Supreme Court held that the former director of the State Employees Retirement System could not recover damages for defamation where the article was factually correct, even though there was evidence that the article was written with malice and ill will on the part of the reporter who wrote the article. In ***Schafer,*** the former director admitted under oath that, as far as he knew, there was nothing factually incorrect in the newspaper article. Therefore, a public official cannot recover damages because a defamatory publication is motivated by ill will unless the publication is also false.

The law recognizes that, in some instances, the use of a certain word or words toward another person carries an unmistakable implication and may be *per se* actionable. For instance, words which impute a crime to another were held to be defamatory *per se.*[15] The use of words reflecting on the character of a woman of good social standing implies malice and was held to be actionable *per se.*[16] Generally, libel *per se* includes accusations of dishonesty, fraud, crime and immorality.

Where a published article is judicially held to be libelous *per se*, the law presumes the article to be false, and that it was written with malice, which then places the burden on the defendant to prove the truth of his assertion,[17] unless, of course, the plaintiff is a public official or public figure as noted in the U.S. Supreme Court case of ***Philadelpha Newspapers v. Hepps,*** *supra.*

Libel Red Flags		
Illegal Conduct	Sexual Misconduct	Cheating
Honesty	Integrity	Racial, Ethnic or Religious Bigotry
Economic Status	Ability to Engage in Business	Criminal Status

[13] ***Philadelphia Newspapers v. Hepps,*** 475 U.S. 767 (1986).
[14] 406 So.2d 185 (1981).
[15] ***Cangelosi v. Schwegmann***, 390 So.2d 196 (1980).
[16] ***Williams v. McManus***, 38 La. Ann. 161, 58 Am. Rep. 171 (1886).
[17] ***Martin v. Markley***, 11 So.2d 593 (1942).

Identification

In order to be actionable, the publication must identify the person defamed, although this does not necessarily require the use of his name. In ***Naihaus v. Louisiana Weekly Publishing Co.***,[18] a newspaper was not relieved from liability by publishing libelous articles without mentioning the plaintiff's name in the publication. The fact that the newspaper articles did not refer to plaintiff by his individual name, but to the name of his business, was immaterial since the principal injury done by the publications was to the business itself.

Similarly, in ***Mulina v. Item Co., Inc.***,[19] the plaintiff brought a suit for libel where the newspaper published a group picture of several men, including the plaintiff sheriff, with the headline above the picture reading: "Milk war indictees photographed despite their threats." The explanatory matter beneath the picture stated that the picture depicted some of the men indicted by a federal grand jury on conspiracy charges growing out of a recent milk strike and other figures involved in the case. The Louisiana Supreme Court held that the publication was not libelous as to the sheriff.

The Public Figure and Fault

Type of Figure	Definition	Fault Standard
Public Official	On government payroll; holds position that invites public scrutiny (makes policy decisions, spends funds, operates without supervision and/or directs public affairs).	Actual Malice: knowledge of or reckless disregard for whether it was true or not, by clear and convincing evidence.
Public Figure	Person occupies a position of such pervasive power and influence that they are deemed public figures for all purposes.	Actual Malice: knowledge of or reckless disregard for whether it was true or not, by clear and convincing evidence.
Limited Public Figure	Someone who has voluntarily thrust themselves into a public controversy with the intent of having an impact	Actual Malice: knowledge of or reckless disregard for whether it was true or not, by clear and convincing evidence.
Private Figure	Everybody Else!	Negligence: a lack of reasonable care under the circumstances.

[18] 145 So. 527 (1932).
[19] 47 So.2d 560 (1950).

The level of fault of the publisher generally falls on the classification of the plaintiff as a public official, public figure, limited public figure or private figure. The most significant development in this area of the law is the U.S. Supreme Court's distinction between defamation of private individuals and of public figures. In the landmark case of ***New York Times Co. v. Sullivan,***[20] the New York Times published an "editorial" advertisement[21] communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of the civil rights movement in the South. An elected commissioner of the city of Montgomery, Alabama, brought a civil libel action against the publisher of the newspaper and against those clergymen whose names appeared in the advertisement. Importantly, the Montgomery commissioner was not named in the advertisement but still convinced an Alabama jury that he was reasonably identifiable because he was in charge of the public services, such as police, that were implicated in the advertisement.

The U.S. Supreme Court stated that there is a 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. This holding was in line with other decisions which had held that the free exchange of ideas was so important to our democratic society that, under the First Amendment of the Constitution, freedom of expression upon public questions is secured. The U.S. Supreme Court held in ***New York Times*** that the constitutional guarantee required a federal rule to prohibit a public official, such as the city commissioner of Montgomery, from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for whether it was false or not. The ***New York Times*** case is important because it provides guidelines for conduct and it sets the standard that actual malice must be proved in order for a public official plaintiff to be successful.

This language and the actual malice rationale was eventually expanded through further U.S. Supreme Court cases. A case usually read in conjunction with the ***New York Times*** case is ***Gertz v. Robert Welch, Inc.***[22] ***Gertz*** was decided ten years after ***New York Times***. Therein, the U.S. Supreme Court further elaborated on the definition of actual malice and it set forth what factors should be considered when deciding whether a plaintiff is a public official or public figure. In ***Gertz***, a libel action was brought against the publisher of a magazine. The libelous article was written as a result of an incident in which a Chicago policeman named Nuccio was convicted of murder. The victim's family retained Gertz, a reputable attorney, to represent it in civil litigation against Nuccio. An article appearing in the defendant's magazine alleged that Nuccio's murder trial was part of a Communist conspiracy to discredit the local police. Further, the article falsely stated that Gertz had arranged Nuccio's "frame-up," it implied that petitioner had a criminal record and it labeled him as a "Communist-fronter."

First, on the issue of actual malice, the U.S. Supreme Court stated that:

> *Mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth [actual malice]. Rather, the publisher must act with a "high degree of awareness of ... probable falsity."*

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[20] 376 U.S. 254 (1964).
[21] A copy of the advertisement is reprinted in the Appendix.
[22] 418 U.S. 323 (1974).

Secondly, on the issue of how to determine if one is a "public figure" and what factors are helpful to determine the issue, the U.S. Supreme Court stated that:

> *Those who, by reason of notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.* [Emphasis added.]

The U.S. Supreme Court further stated that some public figures, "more commonly … have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Limited public figures must also prove "actual malice" of the publisher or broadcaster. It is therefore preferable to look to the nature and extent of his participation in the particular controversy giving rise to the defamation. The plaintiff should not be deemed a public personality for all aspects of his life in the absence of clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society.

The U.S. Supreme Court justifies this holding by explaining that, because private individuals characteristically have less effective opportunities for rebuttal than do public officials and public figures, they are more vulnerable to injury from defamation. Because private individuals have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensating injury to the reputation of private individuals is, therefore, greater than for public officials and public figures.

Louisiana has adopted the same standard of proof of actual malice when faced with a defamation suit where the petitioner is a public official or public figure. In ***Kidder v. Anderson***,[23] an acting chief of police sued a newspaper reporter and his employer-publisher to recover damages resulting from the publication of several newspaper articles and editorials. Kidder, a law enforcement officer, alleged that he suffered damages caused by defamatory articles accusing him of accepting payoffs and favors from barroom proprietors and gamblers, of being interested in the operation of a house of prostitution in the 1950's, and of using the influence of his office for public gain. The Louisiana Supreme Court stated that:

> *A public official may not recover damages for a defamatory statement, even if false, relating to his official conduct "unless he proves that the statement was made with 'actual malice'-- that is, with knowledge that it was false or with reckless disregard whether it was false or not …." Moreover, the public official plaintiff must meet this burden not merely by a preponderance of the evidence, but with "clear and convincing proof." Id.* at 1308.

The Louisiana Supreme Court cited ***New York Times*** and ***Gertz*** for these propositions.

The major distinction between civil suits for defamation filed by public officials or public figures and private individuals was addressed in ***Neuberger, Coerver and Goins v. The Times Picayune Publishing Co.***[24] The plaintiff in this case was a commercial partnership of accountants that sued for defamation based on a series of reports in the defendant's newspaper regarding financial irregularities at a hospital for which the plaintiff provided accounting services. In

[23] 354 So.2d 1306 (1978).
[24] 597 So.2d 1179 (La. App. 1st Cir. 1992).

Neuberger, the Louisiana First Circuit Court of Appeal held that, where the media publishes an article on a matter of public concern, the subject of the publication must prove malice regardless of whether the subject is a public or private person. However, the distinction between a public or private person is relevant to whether the subject must prove malice by clear and convincing evidence or by a preponderance of the evidence.

The First Circuit also noted the difference between "preponderance of the evidence" and "clear and convincing evidence:"

> *A "**preponderance of the evidence"** means evidence of greater weight, or evidence which is more convincing, than that offered in opposition to it. "**Clear and convincing evidence"** is evidence that requires more proof than a preponderance of the evidence but less than the criminal standard of "beyond a reasonable doubt."*[25]

Therefore, malice is an element of civil defamation regardless of whether the plaintiff is a public official or private individual. However, the difference between the two is critical in terms of the burden of proof. Public officials must prove actual malice by clear and convincing evidence, while private individuals must prove actual malice by a preponderance of the evidence. In theory, the difference in the standard of proof exists because a private individual normally has less of an opportunity to vindicate the wrong while a public official or public figure has access to the media and is normally more capable of using that means to vindicate the wrong.

Opinion vs. Fact

The U.S. Supreme Court has stated that: "Under the First Amendment there is no such thing as a false idea."[26] Although false statements of fact are not protected if made with fault, before "the test of reckless or knowing falsity can be met, there must be a false statement of fact."[27] This requires a statement that is "sufficiently factual to be susceptible of being proved true or false."[28] "Subjective assertions" that are not "an articulation of an objectively verifiable event" are not actionable under defamation law.[29]

In ***Milkovich v. Lorain Home Journal,*** the U.S. Supreme Court announced the principle that "matters of public concern must be provable as false before there can be liability under state defamation law."[30] Louisiana libel law has also adopted this rule, stating that: "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."[31]

Because "without an assertion of fact there can be no falsity,"[32] the Louisiana Supreme Court has noted that an expression of opinion is actionable only if it "implies the existence of underlying facts ascertainable by a reasonable person with some degree of certainty, and the

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[25] 597 So.2d at p. 1183 [*emphasis added*].
[26] ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 339 (1974).
[27] ***Old Dominion Branch No. 496, Nat. Ass'n of Ltr. Carriers, AFL-CIO v. Austin***, 418 U.S. 264, 284 (1974).
[28] ***Milkovich v. Lorain J. Co.***, 497 U.S. 1, 21 (1990).
[29] *Id.* at 22.
[30] *Id.* at 19.
[31] ***Romero v. Thomson Newspapers (Wisconsin), Inc.***, 648 So.2d 866, 870 (La. 1995).
[32] ***Bussie v. Lowenthal***, 535 So.2d 378, 381 (La.1988).

implied factual assertions are false, defamatory, made with actual malice, and concern another."[33] In ***Marshall Investments v. R.P. Carbone,*** the Eastern District of Louisiana refused to find actionable under defamation law the statement that a potential lender should "stay away from the project" because the defendant was a "bad person."[34] In ***Singleton v. St. Charles Parish,*** the assertions that the plaintiff was "lazy or not wanting to work" were found to be "clearly expressions of opinion" which "can be neither true nor false."[35]

Louisiana's own law of libel states that the threshold of fault is higher for statements of opinion. In ***Mashburn v. Collin***, the Louisiana Supreme Court established that the First Amendment protects expression of opinions about matters of public concern that were made without knowing or reckless falsity.[36] In ***Bussie v. Lowenthal***, the Court further stated that a statement of pure opinion, based totally on the speaker's subjective view, which does not state or imply the existence of underlying facts, is afforded complete protection under the First Amendment.[37] Other opinions which state or infer that certain false facts are true will still be protected if the statements were made "without knowing or reckless falsity, or actual malice."[38]

Rhetorical Hyperbole

Similar to opinion, statements of hyperbole or satire are not actionable as they cannot be reasonably interpreted by the reader as stating "actual facts" about a person. Hyperbole and words used in the "loose figurative sense" are not actionable if the "reasonable" reader does not believe the literal truth or falsity of the use of the words.[39] The U.S. Supreme Court has said that protection for these words "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[40]

In the case of ***Greenbelt Co-Op. Pub. Ass'n v. Bresler,*** the U.S. Supreme Court directly addressed the issue of hyperbole in defamation. The case centered around a newspaper's account of speakers at public meeting who used the word "blackmail" to describe the plaintiff's negotiating tactics. Bresler sued, claiming defamation. He argued that since the newspaper and the speakers knew that he had not committed the crime of blackmail, "they could be held liable for the knowing use of falsehood." Bresler was successful on the trial and appellate level, until the U.S. Supreme Court reversed, arguing that:

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[33] ***Fitzgerald v. Tucker***, 737 So.2d 706, 717 (La. 1999).
[34] ***Marshall Investments Corp. v. R.P. Carbone Co.***, 2006 WL 2644959, *3 (E.D. La. 2006).
[35] ***Singleton v. St. Charles Parish***, 833 So.2d 486, 496 (La. App. 5th Cir. 2002), *writ denied*, 839 So.2d 44 (La. 2003); *See also* ***Tatum v. Orleans Parish Sch. Bd.,*** 982 So.2d 923, 926 (La. App. 4th Cir. 2008), *writ denied*, 989 So.2d 102 (La. 2008) (recommendation that teacher not be rehired was not defamatory).
[36] 355 So.2d 879 (La.1977).
[37] 535 So.2d 378 (La.1988).
[38] *Id.*
[39] ***Greenbelt Co-op. Pub. Ass'n v. Bresler***, 398 U.S. 6, 14 (1970); ***Old Dominion Branch No. 496, Nat. Ass'n of Ltr. Carriers, AFL-CIO v. Austin***, 418 U.S. 264, 284 (1974); ***Milkovich v. Lorain J. Co.***, 497 U.S. 1, 16-17 (1990); s*ee also* ***Hustler Magazine, Inc. v. Falwell***, 485 U.S. 46, 50 (1988) (ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); s*ee also* ***In re Baxter,*** 2001 WL 34806203 at n.20 (W.D. La. 2001).
[40] ***Milkovich v. Lorain J. Co.***, 497 U.S. 1, 20 (1990).

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.[41]

The U.S. Supreme Court again addressed the requirement that a statement is not actionable unless it can reasonably be interpreted as stating actual facts about a person in ***Letter Carriers v. Austin,*** declaring it was "similarly impossible to believe that any reader of the *Carrier's Corner* would have understood the newsletter to be charging the appellees with committing the criminal offense of treason."[42]

Louisiana Courts, citing the above cases, have recognized that "speakers may use language that is insulting, offensive, or otherwise inappropriate, but constitutes no more than 'rhetorical hyperbole.' Statements that are mere hyperbole cannot reasonably be understood to convey a false representation of fact."[43] Also, the Louisiana Supreme Court has explicitly stated that "[h]yperbole, which could not reasonably be interpreted as stating actual fact, is protected."[44]

Indeed, in ***Wood v. Del Giorno,*** a talk radio guest filed a libel action against a host when he interrupted and made several rude comments to and/or about the plaintiff including: "The man is a fraud. He is a complete fraud!"; "Everything you've said so far is out-and-out lying!"; and, "You're an idiot!"[45] The trial court found and the Court of Appeal affirmed that the statements were not defamatory as they did not "necessarily imply, in the mind of a listener of ordinary intelligence and sensitivity, that Wood is guilty of the crime of fraud." Del Giorno's reference to Wood as an "idiot," was:

merely an opinion and is not likely to be understood by a normal listener to convey the false idea that Wood lacks normal mental capacity. Similarly, Del Giorno's remarks that Wood is a fraud and a liar cannot be understood to convey to the average listener that Wood is a person lacking moral character or untruthful in his business practices.… The remarks were plainly abusive words not intended to be taken literally as statements of fact. Accordingly, we find that Del Giorno's remarks, while rude and insulting, are not defamatory.[46]

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[41] ***Greenbelt***, 398 U.S. at 14.
[42] ***Old Dominion Branch No. 496, Nat. Ass'n of Ltr. Carriers, AFL-CIO v. Austin***, 418 U.S. 264, 285 (1974).
[43] ***Wood v. Del Giorno***, 974 So.2d 95, 100 (La. App. 4th Cir. 2007), *writ denied,* 977 So.2d 933 (La. 2008) (*citations omitted*).
[44] ***Romero v. Thomson Newspapers (Wisconsin), Inc.,*** 648 So.2d 866, 870 (La. 1995).
[45] ***Wood,*** 974 So.2d at 100.
[46] *Id.*

Defenses to a Civil Defamation Claim

The truth of the matter may always be offered as a defense in a defamation action. R.S. 13:3602 provides:

§3602. Pleading and proof of truth as justification for defamation

> *Whenever any civil suit for slander, defamation, or for a libel, shall be instituted in any court of this state, it shall be lawful for the defendant to plead in justification the truth of the slanderous, defamatory or libelous words or matter, for the uttering or publishing of which he may be sued; and in the trial of the issue in such suit, to maintain and prove his plea by all legal evidence.*

The truth of the contents of an alleged libelous document is always a valid and absolute defense to an action in damages.[47] Also, proof that alleged libelous charges are substantially true is sufficient. In proving the truth of an alleged libelous article, it is not necessary to prove the truth of every unimportant detail, but it is sufficient to prove that the charges are substantially true.[48]

In ***Rosen v. Capital City Press***,[49] the newspaper article reported that the physician had been indicted on five narcotic counts, when in fact the physician had been indicted for distribution of biphetamine and obedrin, which are stimulant drugs that affect the central nervous system. The First Circuit Court held that the article was substantially true, which constituted a defense to the physician's cause of action against the newspaper for damages for publishing the article. Further, a defendant pleading the truth of the alleged libelous publication assumes that burden of proof.[50]

Louisiana courts have further recognized and upheld the defense of truth.[51]

Qualified Privilege

The defense of qualified privilege extends to fair and true reports of judicial, legislative, or other public or official proceedings, including statements or arguments made during the course of the proceedings. The privilege is limited only to the judicial proceeding itself, not to preliminary matters leading up to the trial, nor to statements made by litigants outside of the actual proceeding.

In ***Freeman v. Cooper***,[52] the Louisiana Supreme Court[53] held that the privilege accorded attorneys' statements in a judicial proceeding is a qualified one and, in order for the privilege to apply, the statement must be material and must be made with probable cause and without malice. Attorneys must be free to allege facts constituting unacceptable behavior if there is any reasonable basis for such an allegation and if the behavior is relevant to the proceeding; however, attorneys in Louisiana courts cannot make disparaging statements, either in pleadings, briefs or argument, if the defamatory statements are not pertinent to the case, or are made maliciously or without a reasonable basis.

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[47] ***Brannan v. Wyeth Laboratories, Inc.***, 562 So.2d 1101 (1988); ***Parsons v. Gulf & South American Steamship Company, Inc.***, 194 So.2d 456 (La. App. 4th Cir. 1967), *writ denied*, 197 So.2d 80 (1967).
[48] ***Otero v. Ewing***, 165 La. 398, 115 So. 633 (1928).
[49] 314 So.2d 511 (La. App. 1st Cir. 1975).
[50] ***Naihaus v. Louisiana Weekly Publishing Co., Inc.***, 145 So. 527 (1932).
[51] ***Deshotel v. Thistlewaite***, 121 So.2d 222 (1960); ***Madison v. Bolton***, 102 So.2d 433 (1958); and ***Thompson v. St. Amant***, 196 So.2d 255, 250 La. 405 (1967), *reversed on other grounds*, 88 S.Ct. 1323, 390 U.S. 727 (1968).
[52] 414 So.2d 355 (1982).
[53] In other jurisdictions, a defamatory statement by an attorney in a judicial proceeding is generally held to be absolutely privileged, if the statement has some relation to the proceeding. Restatement (Second) of Torts, §586 .

Another case which illustrates the scope of the qualified privilege defense as it relates to publishers is ***Matassa v. Bel***.[54] As a member of the Louisiana House of Representatives, Matassa alleged that the defendants maliciously caused to be published in the *Times-Picayune* a libelous article attacking his personal, business, and political reputation in a conspiracy to defeat him in an election. The article falsely and maliciously stated that he was unfit for the office because he had been guilty of irregularities while serving as manager of the New Orleans airport. The article omitted the information that the candidate had been exonerated of the charges by the grand jury. The Louisiana Supreme Court stated that Matassa had stated a cause of action for libel and the suit was not protected under the rule of fair comment and criticism or qualified privilege. Specifically, as to the qualified privilege defense, the Louisiana Supreme Court held that:

> *…for the publication to enjoy a qualified privilege, the statement must be prepared bona fide, with the view to preventing or punishing some public abuse, in which case it is considered as justified as a duty owed to society, providing it does not "meet the objection of having been made maliciously and without probable cause."*[55]

Publications concerning political matters, public officers and candidates for office are entitled to a measurable privilege by reason of the public interest unless the statements are motivated by actual malice. Further, it is generally held that accusations of dishonesty or corruption and imputations of dereliction of duty or misconduct in office are not privileged.[56]

Fair Comment and Criticism

In order to use the defense of fair comment and criticism, the publication must be made with an honest purpose, without malice, based on facts, restricted to one's acts or works and must not attack one in his private character nor convey imputations of evil sort except so far as facts, truly stated, warrant such imputation.[57] The publisher should be certain that a report is a "fair and true" account of the proceeding. If it is not, then the publication will not fall within the scope of the privilege.

Mashburn v. Collins,[58] involved a restaurant owner who filed suit against the author of a newspaper column devoted to restaurant reviews in the New Orleans area. The particular critique began "T'aint Creole, t'aint Cajun, t'aint French, t'aint country American, t'aint good." The restaurant owner sued for defamation seeking damages for humiliation, injury to professional reputation and loss of business allegedly caused by the publication. The Louisiana Supreme Court stated that criticism is privileged as fair comment only when the facts on which it is based are truly stated or privileged or otherwise known either because facts are common knowledge or because they are readily accessible. In determining whether an expression is a statement of fact or opinion under common law, the words must be read in their context.[59]

The column at issue in ***Mashburn*** was determined by the Louisiana Supreme Court to be an expression of the author's opinion, rather than an expression of fact, and thus was privileged

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[54] 164 So.2d 332 (1964).
[55] *Id*. at 334.
[56] *Id.*
[57] ***Matassa v. Bel***, *supra*.
[58] 355 So.2d 879 (1977).
[59] ***Mashburn v. Collin***, *supra*.

unless published with knowing or reckless falsity. Also, since this was a public restaurant, which was actively engaged in advertising and seeking commercial patronage, it was a matter of public interest and, therefore, properly the subject of fair comment.

As a matter of public policy, the conduct of public officials and public bodies is open to criticism and should be given media attention. Therefore, considerable freedom is granted to the media in its coverage. The privilege of fair comment extends to any matter that a person exhibits to the public for approval.

Essentially, comment is fair when it is based on facts which are truly stated. The statement should be an honest expression of the writer's opinion; hence, there should be no imputations or dishonest motives toward the person being criticized beyond what is warranted by the facts. Reporters should not attack a person's character, private life, or motives on matters which are not related to the conduct or works which are the subject of the criticism.

When an individual becomes a candidate for office, his character for honesty and integrity and his qualifications and fitness for the position are put before the public and are thereby made proper subjects for comment.[60]

Generally, comments on the conduct of candidates for office and public officials fall under a qualified privilege for the media since their character and qualifications for the office are directly related to their performance in office. However, if a newspaper goes beyond what is permitted under fair comment and criticism, then the privilege may no longer protect them and they may be found liable for defamation.

In ***State v. Defley***,[61] the Louisiana Supreme Court held that one who accepts the responsibility of a public position has relinquished some of his protection from defamation. In ***Defley***, the defendant was on trial for criminal defamation for calling a school superintendent and a school supervisor drunkards at a public meeting. The Louisiana Supreme Court held that the positions of school superintendent and school supervisor are such that the public has an independent interest, beyond that of all governmental employees, in the qualifications and performance of the persons who hold these positions, so that both were "public officials" for defamation purposes.

In another case, the Louisiana Supreme Court held that fair comment and criticism, whether constructive or derogatory, in the absence of malice concerning the acts and conduct of persons in public life on matters of public concern, which is sometimes termed as "qualified privilege," are not libelous.[62]

The newspaper's protection is not unlimited. The privilege of fair criticism and comment will not apply to false allegations which charge misconduct or neglect of duty.[63] The publisher of a newspaper has no greater privilege than an ordinary person to publish false and defamatory statements.[64]

In some situations, parties engage in mutually defamatory conduct which can ultimately lead to a defamation action by one of them. When this occurs, a court may bar recovery by both

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[60] ***Smith v. Lyons***, 77 So. 896, 142 La. 975 (1918).
[61] 395 So.2d 759 (1981).
[62] ***Madison v. Bolton***, 102 So.2d 433 (1958).
[63] ***Cadro v. Plaquemine Gazette***, 202 La. 1, 11 So.2d 10 (1942).
[64] ***Pierson v. Times-Picayune Publishing Co.***, 88 So. 77, 148 La. 817 (1921).

of them. In the case of ***Kenner v. Milner***,[65] the Louisiana Supreme Court stated that a court should not entertain lawsuits between individuals who have engaged in charges against each other of a defamatory or libelous nature and who have cast "mutual opprobrious epithets" at each other. The ***Kenner*** case involved a former attorney who published a letter in a local newspaper charging that Milner, also an attorney, had taken possession of property knowing that a title of record was vested in others. The letter further stated that the defendant intended to take undue advantage of an illiterate person. The defendant's character, especially in relation to his profession, was defamed. Therefore, with sufficient provocation for retaliation, the plaintiff could not recover from the defendant for defamation in a subsequent letter published by defendant concerning the plaintiff. The plaintiff and defendant were engaged in mutual defamatory conduct and, therefore, neither could recover from the other.

DEFAMATION OF THE DEAD

It is well accepted in common law that one cannot libel the dead, and the Louisiana Supreme Court has said that once a person is dead, there is no extant reputation to injure that the law should protect.[66] The crime of defamation, LA R.S. 14:47, includes a clause involving defamation of those deceased. Defamation of the dead is, in effect, a crime against the state, and the statute was not designed to protect an individual's interest in preserving the memory of a deceased person. In ***Gugliuzza v. K.C.M.C***, the plaintiffs brought suit for defamation based on a story by a Shreveport television station following the murder of the plaintiff's husband. The story alleged that his murder may have been tied to a rumor that Gugliuzza had gambling debts and ties to organized crime and that his murder was some sort of payback.

The Louisiana Supreme Court held that the widow and son of the decedent did not have a cause of action for defamation of the decedent allegedly caused by the television newscast. The statute prohibiting defamation of the dead does not create a cause of action for malicious infliction of mental anguish suffered by survivors as a result of defamation of their decedent.

MITIGATION OF DAMAGES

When a court decides that damages are due to a particular plaintiff, it may consider a number of factors that can reduce the plaintiff's award prior to a judgment being rendered by the court. These factors are called mitigating circumstances.

Defamatory statements made while in a state of great excitement by one who thinks he has been wronged by another are not justifiable, but the circumstances under which they were made may be considered in fixing damages.[67] Another factor that a court will consider is whether or not a publisher printed a retraction. In ***Francis v. Lake Charles American Press***,[68] the Louisiana Supreme Court held that, while a retraction did not exonerate the publisher from liability for defamation, a retraction is a mitigating factor to consider in fixing damages in a libel action.

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[65] 196 So. 535 (1940).
[66] ***Gugliuzza v. K.C.M.C., Inc.***, 606 So.2d 790, 791 (La. 1992).
[67] ***Gladney v. De Bretton***, 49 So.2d 18 (1950).
[68] 265 So.2d 206, 262 La. 875, *appeal dismissed* 410 U.S. 901, 93 S.Ct. 961 (1972).

CONTEMPT OF COURT

Contempt is defined in C.C.P. art. 221 and C.Cr.P. art. 20. The Louisiana Code of Civil Procedure defines contempt as:

> *A contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority.*
>
> *Contempts of court are of two kinds, direct and constructive.*

Contempt orders are generally issued by courts when there is a need to maintain order and insure justice in the courtrooms.

The Louisiana Constitution, Art. 5, §2, provides:

> *A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of his court. Exercise of this authority by a judge of the supreme court or of a court of appeal is subject to review by the whole court. The power to punish for contempt of court shall be limited by law.*

The courts have long exercised their inherent power to punish for instances of contempt.

It is important to note that both the Code of Criminal Procedure, the Children's Code, and the Code of Civil Procedure contain provisions relative to contempt. In the Code of Criminal Procedure, Articles 20-25 are applicable, in the Children's Code, Articles 1501-1509 are applicable, and in the Code of Civil Procedure, Articles 221-225 are applicable. The major differences between the three sets of laws are the penalties provided and the illustrative lists of acts constituting contempt which follow the definitions of direct and constructive contempt. For purposes of the *Law Guide,* the focus is the Code of Civil Procedure as it relates to the media.

Direct contempt is defined in C.C.P. art. 222, which provides:

> *A direct contempt of court is one committed in the immediate view and presence of the Court and of which it has personal knowledge, or a contumacious failure to comply with a subpoena or summons, proof of service of which appears of record.*

The article also includes an illustrative list of acts which constitute direct contempt of court. However, none of these directly relate to the news media and are not included herein.

Constructive contempt of court, as defined in C.C.P. Article 224, is "any contempt other than a direct one." Also included in this article is an illustrative list of acts which constitute constructive contempt of court. Paragraph (8) of C.C.P. art. 224 relates directly to newspapers and provides:

> *Any of the following acts constitutes a constructive contempt of court:*
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> * * *
>
> *(8) Comment by a newspaper or other medium for the dissemination of news upon a case or proceeding, then pending and undecided, which constitutes a clear, present, and imminent danger of obstructing or interfering with the orderly administration of justice, by either influencing the court to reach a particular decision, or embarrassing it in the discharge of its judicial duties.*

This provision codifies the holding in ***Graham v. Jones***.[69] In ***Graham***, the Louisiana Supreme Court held that, where newspaper editorials attacking a judgment of the Louisiana Supreme Court were published during the pendency of the application for rehearing, and the editorials tended to materially affect the orderly administration of justice in the proceedings to which they referred, then the acts of writing and publishing the editorials were "contempts" of court. However, the rules for contempt against the publishers and editors for contempt would be discharged where the publications did not create a clear and present danger of substantive evils.

The "clear and present danger" standard, which is now codified in C.C.P. 224(8), was first adopted by the U.S. Supreme Court in ***Times-Mirror Co. v. Superior Court of State of California, in and for Los Angeles County***.[70] ***Times-Mirror*** dealt with the scope of our federal constitutional policy safeguarding free speech and a free press. In ***Times-Mirror***, all petitioners had been adjudged guilty and fined for contempt. Their convictions rested upon comments pertaining to pending litigation published in newspapers. The U.S. Supreme Court held that, to justify suppression of free speech, there must be a reasonable ground to fear that serious evil will result if free speech is practiced, and there must be a reasonable ground to believe that the danger apprehended is imminent. This "clear and present danger" standard has afforded practical guidance in a great variety of cases where the scope of constitutional protections of freedom of expression was an issue.

Five years later, in ***Pennekamp v. Florida***,[71] the U.S. Supreme Court held that, for circumstances to create a clear and present danger to judicial administration so as to warrant a conviction of contempt of court for newspapers commenting on litigation, a solidity of evidence is required.

Since constructive contempt is contempt which does not occur in the presence of the Court, the procedure for punishing it is different than for direct contempt. Article 225 of the Code of Civil Procedure provides:

Art. 225. Constructive contempt; procedure for punishing

A. Except as otherwise provided by law, a person charged with committing a constructive contempt of court may be found guilty thereof and punished therefor only after trial by the judge of a rule against him to show cause why he should not be adjudged guilty of contempt and punished accordingly. The rule to show cause may issue on the court's own motion or on motion of a party to the action or proceeding and shall state the facts alleged to constitute the contempt. A person charged with committing a constructive contempt of a court of appeal may be found guilty thereof and punished therefor after receiving a notice to show cause, by brief, to be filed not less than forty-eight hours from the date the person receives such notice why he should not be found guilty of contempt and punished accordingly. The person so charged shall be granted an oral hearing on the charge if he submits a written request to the clerk of the appellate court within forty-eight hours after receiving notice of the charge. Such notice from the court of appeal may be sent by registered or certified mail or may be served by the sheriff. In all other cases,

[69] 200 La. 137 (1942).
[70] 314 U.S. 252 (1941).
[71] 328 U.S. 331, 66 S.Ct. 1029 (1946).

a certified copy of the motion, and of the rule to show cause, shall be served upon the person charged with contempt in the same manner as a subpoena at least forty-eight hours before the time assigned for the trial of the rule.

B. If the person charged with contempt is found guilty the court shall render an order reciting the facts constituting the contempt, adjudging the person charged with contempt guilty thereof, and specifying the punishment imposed.

Thus, there must be a hearing held, at which time the person charged is given an opportunity to show cause why he or she should not be adjudged guilty of constructive contempt.

RIGHT TO PRIVACY

The Louisiana Constitution of 1974, Art. 1, §5, entitled "Right to Privacy," provides in part:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy.[72]

Louisiana jurisprudence generally recognizes that the right of privacy embraces four (4) different interests, each of which may be invaded in a distinct fashion:

(1) The appropriation of an individual's name or likeness, for the use or benefit of another;

(2) When one unreasonably intrudes upon another's physical solitude or seclusion;

(3) Publicity which unreasonably places one in a false light before the public; and

(4) Unreasonable public disclosure of embarrassing private facts.

Since the situation or activity which is intruded upon must be private, an invasion does not occur when an individual makes a photograph of a public site which anyone is free to see.[73] Generally, anything visible in a public place can be recorded and given circulation by means of a photograph.

For an invasion of privacy to be actionable, it is not necessary that there be malicious intent on the part of the defendant. The publicity must contain either falsity or fiction and it must be objectionable to a reasonable person under the circumstances. The reasonableness of a defendant's conduct in an action for an invasion of privacy is determined by balancing the plaintiff's interest in protecting his privacy from invasions and the defendant's interest in pursuing his course of conduct. For example, it was found reasonable for a school board, during the war effort, to inquire

[72] A review of the Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts leaves open the question of whether this section was intended to provide constitutional protection against private conduct. In "The Declaration of Rights of the Louisiana Constitution of 1974," 35 La.L.Rev. 1 (1974), Professor Lee Hargrave concluded that the protection afforded by this provision is not limited to state action, but also protects a person from private action. In Louisiana jurisprudence, the right to privacy has been defined as "the right to be let alone," "the right to an 'inviolate personality,'" and "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity." ***Jaubert v. Crowley Post-Signal, Inc.***, 375 So.2d 1386 (1979); ***Pack v. Wise***, 155 So.2d 909 (La. App. 3rd Cir. 1963); ***Hamilton v. Lumbermen's Mutual Casualty Company***, 82 So.2d 61 (La. App. 1st Cir. 1955), *writ denied* (1955).

[73] ***Jaubert v. Crowley Post-Signal, Inc.***, 375 So.2d 1386 (La. 1979); ***Taylor v. State***, 617 So.2d 1198 (La. App. 3rd Cir. 1993), *writ denied,* 620 So.2d 875 (1993).

into a teacher's use of his after-school time.[74] On the other hand, it was held unreasonable for a private employer to utilize medical photographs of an employee's work-related injury in its safety campaign without either obtaining the employee's consent or withholding his name.[75]

In ***Jaubert v. Crowley Post-Signal, Inc.***,[76] homeowners brought suit against a newspaper for an alleged invasion of privacy arising from the newspaper's publication of a photograph depicting the Jaubert's home accompanied by a caption which read: "One of Crowley's stately homes, a bit weatherworn and unkempt, stands in the shadow of a spreading oak." The Louisiana Supreme Court held that the publication of the photograph, which was taken from the middle of a public street and which did not place the Jauberts in a false light, was not an actionable invasion of privacy.

Similarly, in ***Roshto v. Hebert***,[77] an action for invasion of privacy arose out of the publication of a 25 year-old article containing the details of local criminal convictions for which the plaintiffs were subsequently pardoned. This article originally appeared on the front page of the newspaper and was randomly selected as part of a regular feature the newspaper had run for years. The article, at the time it was written, accurately described local criminal activity which were issues of public concern at that time. Thus, this case deals with the publication of an offensive but truthful matter which was once one of public concern and is still of public record.

The Louisiana Supreme Court in ***Roshto*** held that the determination of whether a person's conduct constitutes invasion of privacy depends on the facts and circumstances of each case. The lapse of time between the original publication and the republication was only one of the facts to be considered in determining liability. Further, the Supreme Court explained that the intentional nature of the disclosure, the lack of the legitimate public interest in an ancient crime committed in a faraway town, and the disclosure of the private facts regarding the criminal's new name and address, were all pertinent factors in determining whether liability should be imposed under the circumstances. The Supreme Court stated that a newspaper cannot be allowed unrestricted freedom to publish any true statement of public record, regardless of the purpose or manner of publication or of the temporal and proximal relationship of the published fact to the present situation.

The Supreme Court in ***Roshto*** ultimately held that the plaintiff failed to carry the burden necessary to warrant the imposition of damages. The Supreme Court recognized that newspapers do not have unbridled freedom to publish any information or story they desire. However, more than insensitivity or simple carelessness is required for the imposition of liability, when the publication is truthful, accurate and non-malicious.

MEETINGS OPEN TO THE PUBLIC

Louisiana law relating to an individual's right of access to meetings of public bodies originates in the Louisiana Constitution, Art. 12, §3, which states:

§3. Right to Direct Participation

Section 3. No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.

[74] ***Reed v. Orleans Parish School Board***, 21 So.2d 895 (La. App. Orl. Cir. 1945).
[75] ***Lambert v. Dow Chemical Company***, 215 So.2d 673 (La. App. 1st Cir. 1968).
[76] 375 So.2d 1386 (1979).
[77] 439 So.2d 428 (1983).

The legislature has enacted the Open Meetings Law, R.S. 42:11, *et seq*., which defines "public body" and "meeting" and identifies exceptions to the general premise that the meetings of public bodies should be open to the public. The purposes of the Open Meetings Law are to protect citizens from secret decisions made without any opportunity for public input and to prevent private meetings of public bodies in which only the "end result" is observed by the public in open meetings, after all important discussions have taken place behind closed doors.[78]

R.S. 42:12 provides instruction as to how the Open Meetings Law is to be construed and states:

§12. Public policy for open meetings; liberal construction

It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, the provisions of this Chapter shall be construed liberally.

R.S. 42:14(A) provides:

§14. Meetings of public bodies to be open to the public

A. Every meeting of any public body shall be open to the public unless closed pursuant to R.S. 42:16, R.S. 42:17, or R.S. 42:18.

R.S. 42:16 specifically addresses the issue of "Executive Sessions." R.S. 42:17 addresses the "Exceptions to Open Meetings," and R.S. 42:18 addresses the issue of "Executive or Closed Meetings of Legislative Houses and Committees." These statutes are discussed below.

A "meeting," for purposes of the Open Meetings Law, means:

The convening of a quorum of a public body to deliberate or act on a matter over which the public body has supervision, control, jurisdiction, or advisory power. It shall also mean the convening of a quorum of a public body by the public body or by another public official to receive information regarding a matter over which the public body has supervision, control, jurisdiction, or advisory power. R.S. 42:13(A)(1).

A quorum means a "simple majority of the total membership of a public body," or 50% plus one of the body. [79]

By example, a town's Board of Aldermen may not conduct pre-meetings during which they perform ministerial functions relative to their office and discuss items on the agenda for the meeting without violating the Open Meetings Law.[80] A supper meeting of parish planning and zoning board members, the sole purpose of which was to discuss a proposed rezoning matter scheduled for public hearing two days later, was a "meeting" under the Open Meetings Law which should have been open to the public with proper notice having been given.[81]

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[78] ***Delta Development Company, Inc. v. Plaquemines Parish Commission Council***, 451 So.2d 134 (La. App. 4th Cir. 1984), *writ denied*, 456 So.2d 172 (1984); **Op. Atty. Gen.,** No. 77-1508, November 15, 1977.
[79] R.S. 42:13(A)(2).
[80] **Op. Atty. Gen.,** No. 80-939, July 25, 1980.
[81] **Op. Atty. Gen.,** No. 77-1508, November 15, 1977.

For purposes of the Open Meetings Law, "public body" is defined as:

Village, town, and city governing authorities; parish governing authorities; school boards and boards of levee and port commissioners; boards of publicly operated utilities; planning, zoning, and airport commissions; and any other state, parish, municipal, or special district boards, commissions, or authorities, and those of any political subdivision thereof, where such body possesses policy making, advisory, or administrative functions, including any committee or subcommittee of any of these bodies enumerated in this paragraph.[82]

Zoning Boards of Adjustment are quasi-judicial in nature and function and are not subject to the Open Meetings Law.[83] The Louisiana High School Athletic Association ("LHSAA"), and its official committees and subcommittees, constitute collective committees or subcommittees of either the parish school boards or the State Board of Elementary and Secondary Education, and are a "public body" for purposes of the Open Meetings Law.[84] Advisory committees to police juries are subject to the substantive requirements of the Open Meetings Law.[85] Meetings of the medical staff of the Vermilion Parish Hospital Service District No. 2 are subject to the Open Meetings Law requirements.[86] A committee appointed by the mayor of the city of Bastrop is a public body and its meetings should be open to the public.[87]

Voting

Consistent with the broad public policy of openness, the Open Meetings Law contains several provisions relative to voting by members of a public body. R.S. 42:14(B) and (C) provide:

§14. Meetings of public bodies to be open to the public

* * *

B. Each public body shall be prohibited from utilizing any manner of proxy voting procedure, secret balloting, or any other means to circumvent the intent of this chapter.

C. All votes made by members of a public body shall be viva voce and shall be recorded in the minutes, journal, or other official, written proceedings of the body, which shall be a public document.

A telephone poll cannot be used to authorize action by a board and would result in a violation of the Open Meetings Law.[88] The requirement of R.S. 42:14 that all votes made by persons in a representative capacity be made by voice vote is satisfied by using an electronic machine which displays by lights how individual representatives voted.[89]

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[82] R.S. 42:13(A)(4).
[83] ***Central Metairie Civic Association v. Parish of Jefferson***, 478 So.2d 1298 (La. App. 5th Cir. 1985).
[84] ***Spain v. Louisiana High School Athletic Association***, 398 So.2d 1386 (1981).
[85] **Op. Atty. Gen.,** No. 88-398, August 30, 1988.
[86] **Op. Atty. Gen.,** No. 87-799, December 17, 1987.
[87] **Op. Atty. Gen.**, No. 79 1392, December 14, 1979.
[88] **Op. Atty. Gen.,** No. 88-238, July 19, 1988.
[89] **Op. Atty. Gen.,** No. 80-2, January 8, 1980.

Executive Sessions

The Open Meetings Law contains a number of exceptions to the public's right of access to meetings of a public body. The most important exception is a public body's authority to hold executive sessions. R.S. 42:16 states:

> **§16. Executive sessions**
>
> *A public body may hold executive sessions upon an affirmative vote, taken at an open meeting for which notice has been given pursuant to R.S. 42:19, of two-thirds of its constituent members present. An executive session shall be limited to matters allowed to be exempted from discussion at open meetings by R.S. 42:17; however, no final or binding action shall be taken during an executive session. The vote of each member on the question of holding such an executive session and the reason for holding such an executive session shall be recorded and entered into the minutes of the meeting. Nothing in this Section or R.S. 42:17 shall be construed to require that any meeting be closed to the public, nor shall any executive session be used as a subterfuge to defeat the purposes of this Chapter.*

A public body need not adjourn a regularly scheduled meeting and wait twenty-four (24) hours in order to give notice of its intent to go into an executive session. Further, Louisiana's Open Meetings Law does not require that a public body give notice of its intent to go into executive session at a properly noticed regular or special meeting, even if it has advance knowledge that an executive session will be required.[90] The Orleans Parish School Board's use of multiple executive sessions with no specific termination date for considering and interviewing applicants for position of superintendent did not violate the Open Meetings Law.[91] A public body may exclude non-members from an executive session, unless their attendance is required by law or necessity. Further, the public body may permit anyone to attend an executive session if that person's presence is necessary and if the executive session is not being used as a subterfuge to defeat the purposes of the Open Meetings Law requirement.[92] R.S. 42:17 provides an exclusive list of reasons as to why a public body may hold an executive session pursuant to R.S. 42:16. It provides:

> **§17. Exceptions to open meetings**
>
> *A. A public body may hold an executive session pursuant to R.S. 42:16 for one or more of the following reasons:*
>
> *(1) Discussion of the character, professional competence, or physical or mental health of a person, provided that such person is notified in writing at least twenty-four hours before the meeting and that such person may require that such discussion be held at an open meeting. However, nothing in this Paragraph shall permit an executive session for discussion of the appointment of a person to public body or, except as provided in R.S. 39:1593(C)(2)(c), for discussing the award of a public contract. In cases of extraordinary emergency, written notice to*

[90] **Op. Atty. Gen.,** No. 88-462, October 17, 1988.
[91] ***Parent-Community Alliance for Quality Education, Inc. v. Orleans Parish School Board***, 385 So.2d 33 (La. App. 4th Cir. 1980).
[92] **Op. Atty. Gen.,** No. 87-639, October 6, 1987.

such person shall not be required; however, the public body shall give such notice as it deems appropriate and circumstances permit.

(2) Strategy sessions or negotiations with respect to collective bargaining, prospective litigation after formal written demand, or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public body.

(3) Discussion regarding the report, development, or course of action regarding security personnel, plans, or devices.

(4) Investigative proceedings regarding allegations of misconduct.

(5) Cases of extraordinary emergency, which shall be limited to natural disaster, threat of epidemic, civil disturbances, suppression of insurrections, the repelling of invasions, or other matters of similar magnitude.

(6) Any meeting of the State Mineral Board and Energy Board at which records or matters entitled to confidential status by existing law are required to be considered or discussed by the board with its staff or with any employee or other individual, firm, or corporation to whom such records or matters are confidential in their nature, and are disclosed to and accepted by the board subject to such privilege, for the exclusive use in evaluating lease bids or development covering state-owned lands and water bottoms, which exception is provided pursuant to and consistently with the Public Records Act, being Chapter I of Title 44 of the Louisiana Revised Statutes of 1950, as amended, and other such statutes to which the board is subject.

(7) Discussions between a city or parish school board and individual students or the parents or tutors of such students, or both, who are within the jurisdiction of the respective school system, regarding problems of such students or their parents or tutors; provided, however, that any such parent, tutor, or student may require that such discussions be held in an open meeting.

(8) Presentations and discussions at meetings of civil service boards of test questions, answers, and papers produced and exhibited by the office of the state examiner, municipal fire and police civil service, pursuant to R.S. 33:2492 or 2552.

(9) The portion of any meeting of the Second Injury Board during which records or matters regarding the settlement of a workers' compensation claim are required to be considered or discussed by the board with its staff in order to grant prior written approval as required by R.S. 23:1378(A)(6).

(10) Or any other matters now provided for or as may be provided for by the legislature.

B. The provisions of this Chapter shall not apply to judicial proceedings.

C. The provisions of this Chapter shall not prohibit the removal of any person or persons who willfully disrupt a meeting to the extent that orderly conduct of the meeting is seriously compromised.

D. The provisions of R.S. 42:19 and R.S. 42:20 shall not apply to any meeting of a private citizens' advisory group or a private citizens' advisory committee established by a public body, when the members of such group or committee do not receive any compensation and serve only in an advisory capacity, except textbook advisory committees of the State Department of Education or the Board of Elementary and Secondary Education. However, all other provisions contained in this Chapter shall be applicable to such group or committee and the public body which established such group or committee shall comply with the provisions of R.S. 42:19 in providing the required notice of meetings of such group or committee.

The eight enumerated exceptions in the Open Meetings Law are in derogation of the broad public policy of openness and such exceptions for executive session are exclusive.[93]

There are many case law examples to consider. Where the University Board of Supervisors voted at a private, informal meeting to reject a recommendation to reinstate the Dean of College of Education, there was no violation so as to entitle the Dean to an injunction requiring reinstatement where that "secret decision" was never made public and, in fact, no decision was ever made on the recommendation.[94] The actions of a committee formed to select a new school superintendent exceeded the scope of the exception to the Open Meetings Law allowing discussion of character, professional competence or physical or mental health of the person, because the committee moved from "discussions" to a selection process by a vote or polling of committee members.[95] Screening meetings and interview sessions of candidates for state superintendent of education may be held in executive session, but these should be limited to a discussion of the applicant's professional competence, character or health.[96] Personality, qualifications and a history of the individual being considered for appointment may be discussed in executive session unless the individual requests an open meeting; however, the final decision as to appointment must be made in open session.[97] The notice required for a public body to proceed to executive session to discuss litigation does not need to reveal the names of the litigants.[98] However, a public body which holds an executive session under R.S. 42:6.1 to discuss prospective litigation must identify the parties to be involved by name.[99]

No provision of the Open Meetings Law authorizes a public body to discuss property negotiation matters in executive session.[100]

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[93] ***Brown v. East Baton Rouge Parish School Board***, 405 So.2d 1148 (La. App. 1st Cir. 1981).
[94] ***Hicks v. Stone Fort***, 425 So.2d 807 (La. App. 1st Cir. 1982), *writ denied*, 429 So.2d 129 (1983).
[95] ***Brown v. East Baton Rouge Parish School Board***, *supra.*
[96] **Op. Atty. Gen.,** No. 88-186, April 5, 1988.
[97] **Op. Atty. Gen.,** No. 77-1, January 11, 1977.
[98] ***Norris v. Monroe City School Board***, 535 So.2d 840 (La. App. 2nd Cir. 1988), *writ denied,* 536 So.2d 1199 (1988).
[99] **Op. Atty. Gen.,** No. 80-325, March 13, 1980.
[100] **Op. Atty. Gen.,** No. 88-358, August 31, 1988.

Notice of Meetings

Unless there is a specific exemption, a public body must give written public notice at least twenty-four hours before the meeting of its intent to hold the meeting. In cases of extraordinary emergency, such notice shall not be required; however, the public body shall give notice of the meeting as it deems appropriate and circumstances permit. R.S. 42:19 provides:

§19. Notice of meetings

A. (1) (a) All public bodies, except the legislature and its committees and subcommittees, shall give written public notice of their regular meetings, if established by law, resolution, or ordinance, at the beginning of each calendar year. Such notice shall include the dates, times, and places of such meetings.

(b) (i) All public bodies, except the legislature and its committees and subcommittees, shall give written public notice of any regular, special, or rescheduled meeting no later than twenty-four hours before the meeting.

(ii) (aa) Such notice shall include the agenda, date, time, and place of the meeting. The agenda shall not be changed less than twenty-four hours prior to the meeting.

(bb) Each item on the agenda shall be listed separately and described with reasonable specificity. Before the public body may take any action on an item, the presiding officer or his designee shall read aloud the description of the item except as otherwise provided in Subitem (dd) of this Item.

(cc) Upon unanimous approval of the members present at a meeting of a public body, the public body may take up a matter not on the agenda. Any such matter shall be identified in the motion to take up the matter not on the agenda with reasonable specificity, including the purpose for the addition to the agenda, and entered into the minutes of the meeting. Prior to any vote on the motion to take up a matter not on the agenda by the public body, there shall be an opportunity for public comment on any such motion in accordance with R.S. 42:14 or 15. The public body shall not use its authority to take up a matter not on the agenda as a subterfuge to defeat the purposes of this Chapter.

(dd) If an agenda of a meeting of a governing authority of a parish with a population of two hundred thousand or more according to the latest federal decennial census or municipality with a population

of one hundred thousand or more according to the latest federal decennial census contains more than fifty items, the governing authority may take action on items listed on a consent agenda without reading the description of each item aloud. However, before any action is taken on items listed on a consent agenda, the governing authority shall allow a public comment period. Any item listed on a consent agenda may be removed from the consent agenda by an individual member of the governing authority if a person objects to the presence of the item on the consent agenda and provides reasons for individual discussion at the meeting. The name of the person who objects to a consent agenda item and the reasons for the objection shall be included in the minutes of the meeting.[101]

(iii) Following the above information there shall also be attached to the written public notice of the meeting, whether or not such matters will be discussed in an executive session held pursuant to R.S. 42:17:

(aa) A statement identifying the court, case number, and the parties relative to any pending litigation to be considered at the meeting.

(bb) A statement identifying the parties involved and reasonably identifying the subject matter of any prospective litigation for which formal written demand has been made that is to be considered at the meeting.

(iv) In cases of extraordinary emergency, such notice shall not be required; however, the public body shall give such notice of the meeting as it deems appropriate and circumstances permit.

(2) Written public notice given by all public bodies, except the legislature and its committees and subcommittees, shall include, but need not be limited to:

(a) Posting a copy of the notice at the principal office of the public body holding the meeting, or if no such office exists, at the building in which the meeting is to be held, or by publication of the notice in an official journal of the public body no less than twenty-four hours before the meeting. If the public body has a website, additionally by providing notice via the Internet on the

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[101] A "Consent agenda" is defined as a grouping of procedural or routine agenda items that can be approved with general discussion. R.S. 42:19(A)(1)(b)(ii)(bb).

website of the public body for no less than twenty-four hours immediately preceding the meeting. The failure to timely post notice via the Internet pursuant to this Subparagraph or the inability of the public to access the public body's website due to any type of technological failure shall not be a violation of the provisions of this Chapter.

(b) Mailing a copy of the notice to any member of the news media who requests notice of such meetings; any such member of the news media shall be given notice of all meetings in the same manner as is given to members of the public body.

B. Reasonable public notice of day to day sessions of either house of the legislature, and of all matters pertaining to such meetings, including but not necessarily restricted to the content of notice, quorums for the transaction of business, proxy voting, viva-voce votes, and recordation of votes, shall be governed by the provisions of the Louisiana Constitution, the rules of procedure of the Senate and the House of Representatives, and the Joint Rules applicable to both houses. Reasonable public notice of meetings of legislative committees and subcommittees shall be given in accordance with such rules as are adopted by the respective houses for the purpose.

R.S. 42:19(A) requires that a written notice of each regular meeting of a city council be given, notwithstanding the fact that written notice has been given once at the beginning of the year.[102] The failure to include in the written notice of a special meeting the parish police jury's intention to consider appointments to a hospital service district board precluded the police jury from considering such appointments, absent a showing in the minutes of the meeting that two-thirds of those present expressly approved enlarging the agenda to consider such appointments.[103] The Board of Commissioners for the Housing Authority of New Orleans awarded a contract in violation of the Open Meetings requirement where the contract was not on the agenda for the meeting and a vote was not taken to consider a matter not on the agenda.[104] In addition to notice requirements of 42:19, a political subdivision may also be required to give additional notice pursuant to 42:19.1, which provides:

§42:19.1. Procedure for the levy, increase, renewal, or continuation of a tax or for calling an election for such purposes by political subdivisions.

A. (1) In addition to any other requirements provided for in R.S. 42:19 or other provisions of law, public notice of the date, time, and place of any meeting at which a political subdivision as defined in Article VI, Section 44 (2) of the Constitution of Louisiana intends to levy, increase, renew, or continue, any ad valorem property tax or sales and use tax or authorize the calling of an election for submittal of such question to the voters of the political subdivision shall be both published in the official

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[102] **Op. Atty. Gen.,** No. 79-884, Aug. 30, 1979.

[103] ***Wagner v. Beauregard Parish Policy Jury***, 525 So.2d 166 (La. App. 3rd Cir. 1988).

[104] ***Jackson v. Board of Commissioners for Housing Authority of New Orleans***, 514 So.2d 628 (La. App. 4th Cir. 1987), *writ denied*, 515 So.2d 1111 (1987).

journal of the political subdivision no more than sixty days nor less than thirty days before such public meeting and shall be announced to the public during the course of a public meeting of such political subdivision no more than sixty days nor less than thirty days before such public meeting.

(2) (a) In the event of cancellation or postponement of a meeting at which consideration of or action upon a proposal to levy, increase, renew, or continue any ad valorem or sales and use tax or authorize the calling of an election for submittal of such questions to the voters of the political subdivision was scheduled, notice of the date, time, and place of any subsequent meeting to consider such proposal shall be published in the official journal of the political subdivision no less than ten days before such subsequent meeting.

(b) However, in the event that consideration of or action upon any such proposal was postponed at the scheduled meeting, or any such proposal was considered at the scheduled meeting without action or vote, then any subsequent meeting to consider such proposal shall be subject to the requirements of Subparagraph (a) of this Paragraph unless the date, time, and place of a subsequent meeting for consideration of such proposal is announced to the public during the course of such meeting.

B. The provisions of this Section shall not apply to any consideration of or action upon a proposal to levy additional or increased ad valorem property tax millages on property without voter approval to which the provisions of R.S. 47:1705(B)(2)(c) and (d) apply.

Prior to an amendment in the 2008 legislative session, Subsection A (1) of R.S. 42:19 required a two-thirds vote of all members present in a public meeting to consider an item not previously on the agenda. Now, a unanimous approval is required before the public body may take up a matter not on the agenda. Abstentions must be counted as "no's," contrary to Robert's Rules of Order which require that abstentions (blanks) not be counted at all.[105] As the language of the statute provides, frequent use of the agenda amendment procedure found in R.S. 42:19 should be avoided because it may be interpreted as a subterfuge for avoiding proper public notice of the actual agenda.[106] Written notice to be given to members of the news media who have so requested must contain an agenda and must be mailed at such time to insure receipt no later than twenty-four hours before the meeting.[107] Conflicts between vote-counting requirements in the Open Meetings Law and Robert's Rules of Order must be resolved in favor of the Open Meetings Law.[108]

Although a parish agency may have technically violated the Open Meetings Law by failing to give notice of the meeting in which the agency terminated its executive director and by failing to record and enter into the minutes the members' vote on question of going into executive session,

[105] **Op. Atty. Gen.,** No. 88-434, October 17, 1988.
[106] R.S. 42:19; **Op. Atty. Gen.,** No. 87-649, October 13, 1987.
[107] **Op. Atty. Gen.,** No. 79-884, August 30, 1979.
[108] **Op. Atty. Gen.,** No. 88-434, October 17, 1988.

the terminated executive director was not entitled to relief where the director had actual notice of the meeting and both he and his lawyer were present.[109]

Audio/Video Recording of Meetings

It is particularly important for the media to know that public meetings can be mechanically reproduced. R.S. 42:23 states:

§23. Sonic and video recordings; live broadcast

A. All of the proceedings in a public meeting may be video or tape recorded, filmed, or broadcast live. However, any nonelected board or commission that has the authority to levy a tax shall video or audio record, film, or broadcast live all proceedings in a public meeting.

B. A public body shall establish standards for the use of lighting, recording or broadcasting equipment to insure proper decorum in a public meeting.

Voidability of Actions by Public Body

R.S. 42:24 provides a judicial remedy for any violation of R.S. 42:12 through R.S. 42:23. The only stipulation is that a suit to void any action must be commenced within sixty days of the action. R.S. 42:24 provides:

§24. Voidability

Any action taken in violation of this Chapter shall be voidable by a court of competent jurisdiction. A suit to void any action must be commenced within sixty days of the action.

R.S. 42:24 provides that any action taken in violation of the Open Meetings Law is only voidable, but not absolutely null and void.[110] The legislature has limited the right of an aggrieved party to have actions of a public body voided for failure to comply with the Open Meetings Law to sixty days to confer a degree of certainty for actions taken by a public body.[111]

Enforcement and Remedies

R.S. 42:25 addresses the issues of who enforces the provisions of the Open Meetings Law and how to initiate such an action. It states:

§25. Enforcement

A. The attorney general shall enforce the provisions of this Chapter throughout the state. He may institute enforcement proceedings on his own initiative and shall institute such proceedings upon a complaint filed with him by any person, unless written reasons are given as to why the suit should not be filed.

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[109] ***Daigre v. Terrebonne Association for Retarded Citizens***, 543 So.2d 1108 (La. App. 1st Cir. 1989), *writ denied*, 548 So.2d 333 (1989).

[110] ***Delta Development Company, Inc. v. Plaquemines Parish Commission Council***, 451 So.2d 134 (La. App. 4th Cir. 1984), *writ denied*, 456 So.2d 172, (1984).

[111] ***Kennedy v. Powell***, 401 So.2d 453 (La. App. 2nd Cir. 1981), *writ denied*, 406 So.2d 607 (1981).

B. Each district attorney shall enforce the provisions of this Chapter throughout the judicial district within which he serves. He may institute enforcement proceedings on his own initiative and shall institute such proceedings upon a complaint filed with him by any person, unless written reasons are given as to why the suit should not be filed.

C. Any person who has been denied any right conferred by the provisions of this Chapter or who has reason to believe that the provisions of this Chapter have been violated may institute enforcement proceedings.

Therefore, one who has reason to believe that the provisions of the Open Meetings Law have been violated has a choice between the attorney general, the local district attorney, or his own personal attorney to institute enforcement proceedings. In reality, given the size of their dockets and broad purview, the district attorney and the attorney general are slow to take up open meetings violations.

The types of remedies available to a plaintiff who has instituted enforcement proceedings are stated in R.S. 42:26, which provides:

§26. Remedies; jurisdiction; authority; attorney fees

A. In any enforcement proceeding the plaintiff may seek and the court may grant any or all of the following forms of relief:

(1) A writ of mandamus.

(2) Injunctive relief.

(3) Declaratory judgment.

(4) Judgment rendering the action void as provided in R.S. 42:24.

(5) Judgment awarding civil penalties as provided in R.S. 42:28.

B. In any enforcement proceeding the court has jurisdiction and authority to issue all necessary orders to require compliance with, or to prevent noncompliance with, or to declare the rights of parties under the provisions of this Chapter. Any noncompliance with the orders of the court may be punished as contempt of court.

C. If a person who brings an enforcement proceeding prevails, he shall be awarded reasonable attorney fees and other costs of litigation. If such person prevails in part, the court may award him reasonable attorney fees or an appropriate portion thereof. If the court finds that the proceeding was of a frivolous nature and was brought with no substantial justification, it may award reasonable attorney fees to the prevailing party.

Although the plaintiff did not prevail in its attempt to have actions of the parish school board set aside and was unsuccessful in having the gathering of six board members declared to be an illegal closed meeting of the board, the plaintiff's success in obtaining injunctive relief was so important to the enforcement of the Open Meetings Law that the trial court's total denial of attorneys' fees

to the plaintiff was clearly wrong. The plaintiff was entitled to attorneys' fees for both the trial and the appeal.[112]

R.S. 42:28 imposes civil penalties for violations of the Open Meetings Law under certain circumstances, as follows:

§28. Civil penalties

Any member of a public body who knowingly and willfully participates in a meeting conducted in violation of this Chapter, shall be subject to a civil penalty not to exceed one hundred dollars per violation. The member shall be personally liable for the payment of such penalty. A suit to collect such penalty must be instituted within sixty days of the violation.

Miscellaneous Provisions

The law does contain some specific provisions for various entities to hold executive sessions.

Hospital Service District Commission

R.S. 46:1073 provides, in part:

§1073. Market strategies and strategic planning

B. Notwithstanding the provisions of R.S. 42:11, et seq., or any other law to the contrary, a hospital service district commission may hold an executive session for the discussion and development of marketing strategies and strategic plans.

C. Notwithstanding the provisions of R.S. 44:1, et seq., or any other law to the contrary, any marketing strategy and strategic plan of a hospital service district commission and the facility owned or operated by the district shall not be public record and shall be confidential but shall be subject to court subpoena.

Louisiana Lottery Corporation

R.S. 47:9004(G) provides:

§9004. … Open board meetings

G. All meetings of the board [board of directors of the "Louisiana Lottery Corporation"] shall be open and governed by the provisions of R.S. 42:11 et seq., Security personnel, plans and devices as listed in R.S. 42:17(A)(3) shall include but not be limited to the security portions or segments of lottery requests for proposals, proposals by vendors to conduct lottery operations, and records of the security division of the corporation.

Subcommittee of Joint Legislative Committee on the Budget

R.S. 39:1535(D)(2) provides:

§1535. Duties and Responsibilities

[112] ***Brown v. East Baton Rouge Parish School Board***, 405 So.2d 1148 (La. App. 1st Cir. 1981).

D. (2) Notwithstanding any other provision of law to the contrary, the subcommittee may meet in executive session to consider such agreement.

INSPECTION OF PUBLIC RECORDS

Louisiana law relating to an individual's right to examine public documents originates in the Louisiana Constitution, Art. 12, §3, which provides:

§3. Right to Direct Participation

Section 3. No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.

The legislature has enacted the Public Records Act, R.S. 44:1, *et seq*., which defines "public body" and "public records" and it identifies exceptions to the general premise that the records of public bodies should be open to the public. The Public Records Act was intended to implement the inherent right of the public to be reasonably informed as to the manner, basis and reasons upon which governmental affairs are conducted.[113] Therefore, citizens have an unequivocal constitutional and statutory right to examine public records, and access to these records can be denied only when the law specifically provides for such denial.[114] The Louisiana jurisprudence is clear that the Public Records Act must be liberally interpreted to enlarge, rather than restrict, the public's access to public records.[115] R.S. 44:31 provides:

§31. Right to examine records

A. Providing access to public records is a responsibility and duty of the appointive or elective office of a custodian and his employees.

B. (1) Except as otherwise provided in this Chapter or as otherwise specifically provided by law, and in accordance with the provisions of this Chapter, any person of the age of majority may inspect, copy, or reproduce any public record.

(2) Except as otherwise provided in this Chapter or as otherwise specifically provided by law, and in accordance with the provisions of this Chapter, any person may obtain a copy or reproduction of any public record.

(3) The burden of proving that a public record is not subject to inspection, copying, or reproduction shall rest with the custodian.

For purposes of the Public Records Act, a "public body" is defined as:

…any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, or any other instrumentality of state, parish, or municipal

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[113] ***Trahan v. Larivee***, 365 So.2d 294 (La. App. 3rd Cir. 1978), *writ denied,* 366 So.2d 564 (1979); ***Bartels v. Roussel***, 303 So.2d 833 (La. App. 1st Cir. 1974), *writ denied,* 307 So.2d 372 (1975).

[114] ***Treadway v. Jones***, 583 So.2d 119 (La. App. 4th Cir. 1991).

[115] ***Treadway v. Jones***, *supra*; ***Amoco Production Company v. Landry***, 426 So.2d 220 (La. App. 4th Cir. 1982), *writ denied,* 433 So.2d 164 (1983).

government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function.[116]

Further, "public records" are defined in R.S. 44:1(A)(2) as follows:

> *(2) All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are "public records," except as otherwise provided in this Chapter or as otherwise specifically provided by law.*

As used in the Public Records Act, the word "custodian" means:

> *…the public official or head of any public body having custody or control of a public record, or a representative specifically authorized by him to respond to requests to inspect any such public records.*[117]

Exemptions

The Public Records Act also contains a number of exemptions to the public's right to inspect, copy or reproduce or obtain a reproduction of any public record. Any exemption to the Public Records Act is in derogation of the public's right to be reasonably informed as to the manner, basis and reasons upon which governmental affairs are conducted, and, therefore, must be interpreted narrowly.[118] The exemptions to the Public Records Act are fully set forth in the appendix.

Initial Report

Contained within the exemptions to the Public Records Act is a provision relating to the initial report of an officer or officers investigating a complaint. R.S. 44:3(A)(4) provides, in pertinent part:

> **§3. Records of prosecutive, investigative, and law enforcement agencies, and communications districts**
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> *A. (4) (a) …However, the initial report of the officer or officers investigating a complaint, but not to apply to any follow up or subsequent report or investigation, records of the booking of a*

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[116] LA R.S. 44:1(A)(1).
[117] *R.S. 44:1(A)(3).*
[118] ***Amoco Production Company v. Landry***, *supra*.

person as provided in Louisiana Code of Criminal Procedure Article 228, records of the issuance of a summons or citation, and records of the filing of a bill of information shall be a public record.

(b) The initial report shall set forth:

(i) A narrative description of the alleged offense.

(ii) The name and identification of each person charged with or arrested for the alleged offense.

(iii) The time and date of the alleged offense.

(iv) The location of the alleged offense.

(v) The property involved.

(vi) The vehicles involved.

(vii) The names of investigating officers.

For purposes of this provision, the "initial report" does not merely refer to a document but to information contained in the documents. It is this information, which comprises the facts learned by the officer or officers who conducted the initial investigation of a complaint that is public record.[119] Although the entire initial report of investigating officers of a complaint is a public record pursuant to the Public Records Act, any subsequent report which concerns investigation by police beyond investigating the complaint is not a public record.[120]

In 1992, the Louisiana Legislature enacted R.S. 32:398(H) (which was subsequently amended in 1993), which provides:

§398. Accident reports; when and to whom made; information aid; fees for copies; fees for accident photographs

H. The reports required by this Section, and the information contained in the reports, shall be confidential, shall be exempt from the provisions of R.S. 44:1, et seq., and shall be made available only to the parties to the accident, parents or guardians of a minor who is a party to the accident, and insurers of any party which is the subject of the report, or to the succession representatives of those parties, or to the attorneys of the parties or succession representatives, or to a news-gathering organization that requests documents related to the accident. All persons and their agents are prohibited from screening accident reports if the person or his agent does not represent any of the persons involved in a particular accident, the report for which could reasonably be expected to be available. However, this limitation shall not prevent any person from requesting particular reports regardless of whether the person represents any party in the accident. The information in the reports may be tabulated and included in the statistical information published under the provisions of Subsection G of this Section. Nothing in this

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[119] ***State v. Campbell***, 566 So.2d 1038 (La. App. 3rd Cir. 1990); ***Elliott v. Taylor***, 614 So.2d 126 (La. App. 4th Cir. 1993).

[120] ***State v. Baker***, 582 So.2d 1320 (La. App. 4th Cir. 1991), *writ denied*, 590 So.2d 1197 (1992).

Section shall prohibit the sale of police accident reports or other driving record information to consumers of on-line driving records under written contract for purchase of records with the Department of Public Safety and Corrections. Further, the information in the reports may be used by the office of motor vehicles for the purpose of maintaining operating records.

In ***DeSalvo v. State***,[121] the Louisiana Supreme Court held that this provision which limited access to state motor vehicle accident reports to parties, their representatives, attorneys and insurers, the press and contractors for on-line driving records, was constitutional in that it served a significant governmental interest in protecting an individual's right to privacy.

In 1984, the Louisiana Legislature enacted R.S. 46:1073, which provides:

§1073. Market strategies and strategic planning

C. Notwithstanding the provisions of R.S. 44:1, et seq., or any other law to the contrary, any marketing strategy and strategic plan of a hospital service district commission and the facility owned or operated by the district shall not be public record and shall be confidential but shall be subject to court subpoena.

The Louisiana Supreme Court in ***Title Research Corporation v. Rausch***,[122] held that, whenever there is doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right to see the records. In ***Rausch***, Title Research Corporation and its president sought a writ of mandamus to compel the clerk of court to permit them to microfilm certain conveyance and mortgage records. The Supreme Court held that the president of the title company, as a member of the public, was entitled to reproduce on microfilm the parish conveyance and mortgage records in the custody of the clerk of court, by any safe means during normal business hours in a non-discriminatory manner and free of charge, even if the president's purpose in copying such documents was commercial.

Most disputes arising under the Public Records Act relate to whether or not a particular record or document is classified as a public record. Accordingly, the right to examine and obtain copies of public records is not absolute and unqualified, but must be determined in light of all reasonable circumstances.[123] Since issues involving the Public Records Act are vitally important to Louisiana's newspapers, the following are selected court cases and Attorney General Opinions relating to whether certain documents are "public records": [124]

Selected Cases:

Petitioner, as a member of the public, was entitled to inspect and copy the records of the clerk of district court concerning a civil case to which petitioner was not a party.[125]

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[121] 624 So.2d 897 (1993).
[122] 450 So.2d 933 (1984).
[123] ***Title Research Corporation v. Rausch***, 433 So.2d 1105 (La. App. 1st Cir. 1983), *reversed on other grounds*, 450 So.2d 933 (1984).
[124] Obviously, Court cases are more persuasive in a potential lawsuit than an Attorney General's Opinion; therefore, they are separated out as such.
[125] ***Keko v. Lobrano,*** 497 So.2d 353 (La. App. 4th *Cir. 1986), writ denied, stay denied, 497 So.2d 1003 (1986).*

A newspaper was entitled to inspect financial records of the World's Fair Corporation dating from first day it received public monies, where World's Fair had received $25,000,000.00 which had been spent either on World's Fair operations or to pay its creditors. Such financial records were "public records" regardless of whether the corporation was a public body.[126]

Work files of state senators relating to two legislative bills were "legislative acts" and therefore, were exempt from provisions of the Public Records Act, and were privileged under the legislative privileges and immunities clause of the Louisiana Constitution.[127]

Where public information about non-confidential telephone numbers of parish employees was contained on personnel forms with private information, the custodian faced with a request for the telephone numbers had a legal duty to segregate public from non-public information or make a written statement, showing that segregation would be unreasonably burdensome or expensive; however, the custodian was not required to comply with a request for information as to employees' race and gender, where such information was not contained in any written records.[128]

Although district attorney correctly concluded that his office is excluded by the Public Records Act, which directs custodians of public records to provide records to persons requesting them, the office is clearly included in the Public Records Act in the section of the Public Records Act which provides that public records custodians of state agencies must provide records to persons requesting them.[129]

The fact that a municipality labels a name or address as a part of a confidential personnel record does not elevate the name or address to the status of a constitutionally protected private thing. The Public Records Act is not limited to records affecting only the public fisc, but covers all records unless specifically excepted by statute, or unless the disclosure involves information to which the employee has a reasonable expectation of privacy, such as personnel evaluation reports, the disclosure of which might affect the employee's future employment or may cause embarrassment or humiliation.[130]

Where all state police headquarters are required to keep current logs regarding the activities and events occurring within their respective jurisdictions, and the logs were paid for and furnished by the state and contained the name of any person arrested and the charge for which each person was arrested, then the logs were an official "public record" upon which newspapers could rely in their publications.[131]

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[126] ***Lewis v. Spurney**, 456 So.2d 206 (La. App. 4th Cir. 1984), writ denied, 457 So.2d 1183, writ denied, 458 So.2d 488 (1984).*

[127] ***Copsey v. Baer**, 593 So.2d 685 (La. App. 1st Cir. 1991), writ denied, 594 So.2d 876 (1992).*

[128] ***Association for Rights of Citizens, Inc. v. Parish of St. Bernard**, 557 So.2d 714 (La. App. 4th Cir. 1990).*

[129] ***Carter v. Connick**, 623 So.2d 670 (La. App. 4th Cir. 1993).*

[130] ***Webb v. City of Shreveport**, 371 So.2d 316 (La. App. 2nd Cir. 1979), writ denied, 374 So.2d 657 (1979).*

[131] ***Francois v. Capital City Press**, 166 So.2d 84 (La. App. 3rd Cir. 1964).*

Applicants for public employment generally have no right of privacy in their resume or application for public employment. However, the Louisiana Supreme Court recognized an exception to the general rule: "[I]f the resume or application contains facts which would expose the applicant to public disgrace, are clearly private in nature, or are protected by law from disclosure, then that resume or application, or the private matters contained therein, may not be disclosable depending on the circumstances."[132]

Private, non-profit animal welfare organization which contracted with the City of New Orleans to provide animal control, services as required by the City of New Orleans code of ordinances was subject to the public records law.[133]

Selected Attorney General Opinions:

Right to privacy would protect a public employee's personally identifiable information from public scrutiny, so that a public records custodian may deny the public access to information relative to a public employee's health and life insurance deductions, credit union deductions, garnishments, savings bonds, United Givers, retirement contributions, and state and federal income tax withholding.[134]

The records of the Louisiana School Board Association, the Louisiana Municipal Association and the Louisiana Police Jury Association are public records.[135]

Restrictions limiting the availability of CPA candidate list cannot be imposed by the Board of Certified Public Accountants; the Board must make its list of candidates available to electors or taxpayers.[136]

Unofficial tape recordings made solely for the personal use of a supervisor to assist him in making a recommendation regarding an employee's grievances are not subject to examination as public records.[137]

All writings prepared by coroner for use in conduct of any business performed under authority of law is subject to public inspection.[138]

Production of business telephone records of a municipality to members of village counsel is mandated by the Public Records Law, and does not violate the right of privacy of municipal employees who use village telephones.[139]

Committee meetings of a school board must be public and minutes kept.[140]

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[132] ***Capital City Press v. East Baton Rouge Parish Metropolitan Council***, 96-1979 (La. 7 /1/97), 696 So.2d 562.
[133] ***New Orleans Bulldog Soc'y v. Louisiana Soc'y for the Prevention of Cruelty to Animals,*** 2016-1809 (La. 5/3/17), 222 So. 3d 679, 681.
[134] ***Op. Atty. Gen.,*** *No. 87-282, April 24, 1987.*
[135] ***Op. Atty. Gen.,*** *No. 78-282, March 14, 1978.*
[136] ***Op. Atty. Gen.,*** *No. 81-1008, October 26, 1981.*
[137] ***Op. Atty. Gen.,*** *No. 89-24, February 14, 1989.*
[138] ***Op. Atty. Gen.,*** *No. 89-604, January 8, 1990.*
[139] ***Op. Atty. Gen.,*** *No. 90-159, May 25, 1990.*
[140] ***Op. Atty. Gen.,*** *No. 89-602A, June 15, 1990.*

All written communications by a school superintendent are public except those explicitly exempt by statute.[141] *Records of assessors, including computer records, are public records available for inspection, except for certain forms.*[142]

Job applications, cover letters and resumes to a public charter high school are subject to disclosure, although "score sheets" and "handwritten notes about interview committee members" are likely protected by the candidate's individual privacy interest.[143]

E-mails of Public Employees

Due to an increase in the use of technology and electronic messaging in the workplace, Louisiana courts and the Attorney General have been faced with the challenge of determining whether or not electronic communications sent on publicly owned equipment or sent by a public employee during working hours are automatically deemed public records under the Public Records Act. In ***Bartles v. Roussel,***[144] the Louisiana Court of Appeal, First Circuit, found that only writings used in the performance of the functions of the public body should be classified as public records.[145] However, this case did not specifically deal with e-mails.

Public records are those records which have been used, are being used, or which were prepared for use in the conduct of business. Relying partially on the decision in ***Bartles***, the Attorney General opined that e-mails of a purely personal nature received or transmitted by a public employee which have no relation to any function of public office are not public records subject to disclosure under the Public Records Act.[146] The Attorney General further opined that the definition of "public record" requires a content driven analysis for a connection between the record and the conduct of the public business or the functioning of a public body. ***Id.*** In 2013, a new Attorney General's Opinion, again calling for a highly "content-driven analysis," attempted to clarify that "purely personal e-mails" are not subject to the Public Records Act, even if they were sent on a public account but have no relation to the function of the public body, so long as there is no evidence of illegal activity, and the public body has not determined that disciplinary action is appropriate.[147]

In 2015's *Shane v. Parish of Jefferson,* the Louisiana Supreme Court found that e-mails in the custody of Jefferson Parish were public records because "even though the content of the email ostensibly related only to private matters, when that email has been used in the performance of any work, duty, or function of a public body, under the authority of state or local law, unless an exception, exemption, or limitation, under the Louisiana Constitution or in the Public Records Law applies to prevent public disclosure of the record."[148]

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[141] ***Op. Atty. Gen.,*** *No. 89-602A, June 15, 1990.*
[142] ***Op. Atty. Gen.,*** *No. 87-301, May 4, 1987.*
[143] ***Op. Atty. Gen.,*** *No. 14-0074, July 24, 2014.*
[144] 303 So.2d 833 (La. App. 1 Cir. 1974).
[145] *See also* ***Op. Atty Gen.,*** *No, 79-242.*
[146] ***Op. Atty. Gen.,*** *No. 10-0272, April 13, 2011.*
[147] ***Op. Atty. Gen.,*** *No. 13-0141, October 15, 2013.*
[148] ***Shane v. Par. of Jefferson***, 2014-2225 (La. 12/8/15), 209 So. 3d 726, 746

Public Records Awareness Program

In 1999, the Legislature enacted R.S. 44:31.2, which provides:

§44:31.2 Public Records Awareness Program

The attorney general shall establish a program for educating the general public, public bodies, and custodians regarding the provisions of this Chapter. Such program may include brochures, pamphlets, videos, seminars, and Internet access to information which provides training on the provision of this Chapter, including the custodian's responsibilities in connection with a request for records and the right of a person to institute court proceedings if access to a record is denied by the custodian.

Duty to Present Records

R.S. 44:32 imposes a duty on the custodian of any public records and provides:

§32. Duty to permit examination; prevention of alteration; payment for overtime; copies provided; fees

A. The custodian shall present any public record to any person of the age of majority who so requests. The custodian shall make no inquiry of any person who applies for a public record, except an inquiry as to the age and identification of the person and may require the person to sign a register and shall not review, examine or scrutinize any copy, photograph, or memoranda in the possession of any such person; and shall extend to the person all reasonable comfort and facility for the full exercise of the right granted by this Chapter; provided that nothing herein contained shall prevent the custodian from maintaining such vigilance as is required to prevent alteration of any record while it is being examined; and provided further, that examinations of records under the authority of this Section must be conducted during regular office or working hours, unless the custodian shall authorize examination of records in other than regular office or working hours. In this event the persons designated to represent the custodian during such examination shall be entitled to reasonable compensation to be paid to them by the public body having custody of such record, out of funds provided in advance by the person examining such record in other than regular office or working hours.

B. If any record contains material which is not a public record, the custodian may separate the nonpublic record and make the public record available for examination.

C. (1) (a) For all public records, except public records of state agencies, it shall be the duty of the custodian of such public records to provide copies to persons so requesting. The custodian may establish and collect reasonable fees for making copies of public records. Copies of records may be furnished without charge or at a reduced charge to indigent citizens of this state.

(b) For all public records in the custody of a clerk of court, the clerk may also establish reasonable uniform written procedures for the mechanical reproduction of any such public record. Additionally, in the parish of Orleans, the recorder of mortgages, the register of conveyances, and the custodian of notarial records may each establish reasonable uniform procedures for the mechanical reproduction of public records in his custody.

(c) The use or placement of mechanical reproduction, microphotographic reproduction, or any other such imaging, reproduction, or photocopying equipment within the offices of the clerk of court by any person described in R.S. 44:31 is prohibited unless ordered by a court of competent jurisdiction.

(d) Any person, as provided for in R.S. 44:31, may request a copy or reproduction of any public record and it shall be the duty of the custodian to provide such copy or reproduction to the person so requesting.

(2) For all public records of state agencies, it shall be the duty of the custodian of such records to provide copies to persons so requesting. Fees for such copies shall be charged according to the uniform fee schedule adopted by the commissioner of administration, as provided by R.S. 39:241.

Copies shall be provided at fees according to the schedule, except for copies of public records the fees for the reproduction of which are otherwise fixed by law. Copies or records may be furnished without charge or at a reduced charge to indigent citizens of this state or the persons whose use of such copies, as determined by the custodian, will be limited to a public purpose, including but not limited to use in a hearing before any governmental regulatory commission.

(3) No fee shall be charged to any person to examine or review any public records, except as provided in this Section, and no fee shall be charged for examination or review to determine if a record is subject to disclosure, except as may be determined by a court of competent jurisdiction.

D. In any case in which a record is requested and a question is raised by the custodian of the record as to whether it is a public record, such custodian shall within three days, exclusive of Saturdays, Sundays, and legal public holidays, of the receipt of the request, in writing for such record, notify in writing the person making such request of his determination and the reasons therefor.

R.S. 44:33 relates to the availability of records maintained by the custodian and it further clarifies the duty of the custodian to permit public examination of the records. It provides:

§33. Availability of records

A. (1) When a request is made for a public record to which the public is entitled, the official, clerks of court and the custodian of notarial records in and for the parish of Orleans excepted, who has responsibility for the record shall have the record segregated from other records under his custody so that the public can reasonably view the record.

(2) If, however, segregating the record would be unreasonably burdensome or expensive, or if the record requested is maintained in a fashion that makes it readily identifiable and renders further segregation unnecessary, the official shall so state in writing and shall state the location of the requested record.

B. (1) If the public record applied for is immediately available, because of its not being in active use at the time of the application, the public record shall be immediately presented to the authorized person applying for it. If the public record applied for is not immediately available, because of its being in active use at the time of the application, the custodian shall promptly certify this in writing to the applicant, and in his certificate shall fix a day and hour within three days, exclusive of Saturdays, Sundays, and legal public holidays, for the exercise of the right granted by this Chapter.

(2) The fact that the public records are being audited shall in no case be construed as a reason or justification for a refusal to allow inspection of the records except when the public records are in active use by the auditor.

The Fourth Circuit Court of Appeal, in ***Association for Rights of Citizens, Inc. v. Parish of St. Bernard***,[149] summarized R.S. 44:32 and 33 as follows:

> *The custodian, however, has a statutory duty to provide access to public records, immediately, if the records are available, or, if they are unavailable, within three (3) business days of a request for access. If the records are not readily available, "the custodian shall promptly certify this in writing to the applicant." LSA-R.S. 44:33(B)(1). When a record has been requested and there is a question whether the record is public, the custodian must make a determination and notify the person requesting the record of its determination within three days [exclusive of Saturdays, Sundays, and legal public holidays].*[150]

R.S. 44:34 addresses the issue of a public record not being in the custody or control of the person to whom an application is made, and provides:

§34. Absence of records

If any public record applied for by any authorized person is not in the custody or control of the person to whom the application is made, such person shall

[149] 557 So.2d 714 (La. App. 4th Cir. 1990).
[150] LSA-R.S. 44:32(D). 557 So.2d at p. 716.

promptly certify this in writing to the applicant, and shall in the certificate state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person then has custody of the record and the manner and method in which, and the exact time at which it was taken from his custody or control. He shall include in the certificate ample and detailed answers to inquiries of the applicant which may facilitate the exercise of the right granted by this Chapter.

With respect to obtaining copies of court records utilizing privately owned copying equipment, C.C.P. art. 251 was amended in 1995 and 2005 to provide:

Art. 251. Custodian of court records; certified copies; records public

A. The clerk of court is the legal custodian of all of its records and is responsible for their safekeeping and preservation. He may issue a copy of any of these records, certified by him under the seal of the court to be a correct copy of the original. Except as otherwise provided by law, he shall permit any person to examine, copy, photograph, or make a memorandum of any of these records at any time during which the clerk's office is required by law to be open. However, notwithstanding the provisions of this Paragraph or R.S. 44:31, et seq., the use, placement, or installation of privately owned copying, reproducing, scanning, or any other such imaging equipment, whether hand-held, portable, fixed, or otherwise, within the offices of the clerk of court is prohibited unless ordered by a court of competent jurisdiction.

B. Notwithstanding the provisions of Paragraph A of this Article, a judge issuing a court order may certify a copy of that order for service of process, if the order is issued in an emergency situation and at a time when the clerk of court's office is not open. A determination of when an emergency situation exists shall be made by the judge issuing the order.

Enforcement of Right of Inspection of Public Records

Procedures to enforce the right of inspection of public records and the awards for prevailing in any such enforcement action are set forth in R.S. 44:35, which provides:

§35. Enforcement

A. Any person who has been denied the right to inspect or copy a record under the provisions of this Chapter, either by a final determination of the custodian or by the passage of five days, exclusive of Saturdays, Sundays, and legal public holidays, from the date of his request without receiving a final determination in writing by the custodian, may institute proceedings for the issuance of a writ of mandamus, injunctive or declaratory relief, together with attorney's fees, costs and damages as provided for by this Section, in the district court for the parish in which the office of the custodian is located.

B. In any suit filed under Subsection A above, the court has jurisdiction to enjoin the custodian from withholding records or to issue a writ of mandamus ordering the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the

burden is on the custodian to sustain his action. The court may view the documents in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

C. Any suit brought in any court of original jurisdiction to enforce the provisions of this Chapter shall be tried by preference and in a summary manner. Any appellate courts to which the suit is brought shall place it on its preferential docket and shall hear it without delay, rendering a decision as soon as practicable.

D. If a person seeking the right to inspect or to receive a copy of a public record prevails in such suit, he shall be awarded reasonable attorney's fees and other costs of litigation. If such person prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion thereof.

E. (1) If the court finds that the custodian arbitrarily or capriciously withheld the requested record or unreasonably or arbitrarily failed to respond to the request as required by R.S. 44:32, it may award the requester any actual damages proven by him to have resulted from the actions of the custodian except as hereinafter provided. In addition, if the court finds that the custodian unreasonably or arbitrarily failed to respond to the request as required by R.S. 44:32 it may award the requester civil penalties not to exceed one hundred dollars per day, exclusive of Saturdays, Sundays, and legal public holidays for each such day of such failure to give notification.

(2) The custodian shall be personally liable for the payment of any such damages, and shall be liable in solido with the public body for the payment of the requester's attorney's fees and other costs of litigation, except where the custodian has withheld or denied production of the requested record or records on advice of the legal counsel representing the public body in which the office of such custodian is located, and in the event the custodian retains private legal counsel for his defense or for bringing suit against the requester in connection with the request for records, the court may award attorneys' fees to the custodian.

The custodian has the burden of proving that he lawfully withheld any information that is part of the requested public record.[151] The Public Records Act provision providing for personal liability for damages if the custodian arbitrarily denies a records request did not preclude an award of attorneys' fees against a sheriff who withheld the production of the requested documents on advice of legal counsel.[152] While attorneys' fees are generally mandatory, the granting of attorneys' fees in a mandamus proceeding brought pursuant to the Public Records Act was discretionary, rather than mandatory, where the information originally requested by the plaintiff from the Commissioner of Agriculture was different than that allowed by the judgment.[153] A newspaper,

[151] ***Elliot v. Taylor***, 614 So.2d 126 (La. App. 4th Cir. 1993).
[152] ***Ferguson v. Stephens***, 623 So.2d 711 (La. App. 4th Cir. 1993).
[153] ***T. L. James and Company, Inc. v. Odom***, 558 So.2d 1209 (La. App. 1st Cir. 1990).

which was only partially successful in an action for disclosure of records relating to the selection of a new fire chief, was not entitled to an award of attorneys' fees, where the defendants had acted out of a legitimate concern for the privacy interests of job applicants and could point to case law supporting their position and acted in good faith.[154]

Civil and Criminal Penalties for Denying Access to Records

As set forth in R.S. 44:35, a person prevailing in a suit to enforce the right to inspect public records shall be awarded reasonable attorneys' fees and other costs of litigation. Further, a court may award actual damages and also civil penalties as stated in R.S. 44:35(E).

While exceptional circumstances may warrant consideration of the custodian's good faith in determining whether to award attorneys' fees under the Public Records Act, that consideration must be the exception rather than the rule. Ordinarily, if the person seeking access to the public records prevails, that person shall be awarded reasonable attorneys' fees and other costs of litigation.[155] In *Hays v. Lundy*, the Second Circuit stated that the trial court did not abuse its discretion in not refusing to award attorneys' fees under the Public Records Act to a newspaper that only partially prevailed in seeking social security numbers and home addresses of university employees.[156] The court found that the university president, as custodian, had acted in good faith in attempting to protect the employees' rights to confidentiality, even if the social security numbers could not have been withheld as confidential. The Louisiana Supreme Court, in granting writs, cited 42 U.S.C. §405(c)(2)(C)(vii)(I)[157] as a basis for amending the judgment to delete the social security account numbers from the order to disclose.

R.S. 44:37 imposes criminal fines and imprisonment for violations of the Public Records Act as follows:

> **§37. Penalties for violation by custodians of records**
>
> *Any person having custody or control of a public record, who violates any of the provisions of this Chapter, or any person not having such custody or control who by any conspiracy, understanding or cooperation with any other person hinders or attempts to hinder the inspection of any public records declared by this Chapter to be subject to inspection, shall upon first conviction be fined not less than one hundred dollars, and not more than one thousand dollars, or shall be imprisoned for not less than one month, nor more than six months. Upon any subsequent conviction he shall be fined not less than two hundred fifty dollars, and not more than two thousand dollars, or imprisoned for not less than two months, nor more than six months, or both.*

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[154] ***Gannett River States Publishers v. Hussey***, 557 So.2d 1154 (La. App. 2nd Cir. 1990), *writ denied*, 561 So.2d 103 (1990).
[155] R.S. 44:35. ***Ferguson v. Stephens***, 623 So.2d 711 (La. App. 4th Cir. 1993); ***Hays v. Lundy***, 616 So.2d 265 (La. App. 2nd Cir. 1993), *review granted and affirmed as amended,* 621 So.2d 616 (1993).
[156] 616 So.2d 265.
[157] 42 U.S.C. §405(c)(2)(C)(vii)(I) provides that "social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law … shall be confidential, and no authorized persons shall disclose any such social security account number or related record."

Special Provisions

Louisiana law contains several special provisions relating to certain classes of documents which, by statute, are deemed public records and thus must be made available to the public for inspection, or are deemed confidential, and thus not subject to disclosure. Following are highlights of several of the more important provisions:

Records of Registrar of Voters

The registrars of voters in the various parishes are required by law to keep and maintain permanent records, including all original applications for registration, originals of all affidavits made pursuant to the Louisiana Election Code, originals of each report made by any person required to make a report to the registrar, and copies of each notice published prior to cancellation of any registration.[158]

The records that the registrars keep and maintain are deemed public records. These records shall be open to inspection during regular office hours. When twenty-five or more qualified voters of a parish request in writing that the registrar permit the copying of any part of his records, then he shall allow this to be done by hand or otherwise, unless such inspection or reproduction seriously interferes with the performance of the duties imposed on his office by law. In such a case, the registrar shall cause the reproduction of certified copies to be made by his employees and deliver them to the voters.[159]

R.S. 18:155 provides, in pertinent part:

§155. Refusal or neglect to grant right of inspection; remedies

A. *If the registrar fails or refuses to comply with any provision of R.S. 18:154, the voter or voters may apply to the district court having jurisdiction for a peremptory order to the registrar to comply therewith. The rule shall be returnable within forty-eight hours, and the court shall hear the rule in summary manner and by preference, in term line or vacation, and shall decide it within twenty-four hours after submission.*

B. *If the court finds that the plaintiff is entitled to the relief sought, it shall enter its order requiring performance by the registrar and shall hold the registrar in contempt if he does not comply within three days after entry of the order.*

Records of Election Officials

As stated in R.S. 18:403, election officials are statutorily charged to compile and maintain records dealing with the qualifications of individuals who are nominated to run for public office:

§403. Election records and papers; preservation; public record

Except as otherwise provided by law, every election official shall retain and preserve, for at least six months after the date of a primary or general election, all records and papers which come into his possession relating to the qualifying of candidates, the selection of commissioners, alternate commissioners, and watchers,

[158] R.S. 18:152.
[159] R.S. 18:154.

and the conduct or results of a primary or general election. These records and papers shall be public records open to inspection by anyone.

Further, the law provides that all nominating petitions filed with the Secretary of State shall be open to public inspection, and the Secretary of State shall preserve them in his office for at least one year.[160]

Records of Louisiana Lottery Corporation

R.S. 47:9006 provides that all records of the Louisiana Lottery Corporation are deemed public records and are subject to public inspection unless the record pertains to certain matters, as follows:

§9006. Records of corporation deemed open; exceptions

A. All records of the corporation [Louisiana Lottery Corporation] shall be deemed public records and subject to public inspection as provided by the provisions of R.S. 44:1, et seq., unless:

(1) The record relates to or was provided by a confidential source or informant and relates to lottery security, applicant, vendor, or retailer qualifications or conduct;

(2) The record involves a trade secret of the corporation or of a vendor; or

(3) The disclosure of the record would endanger the security of the lottery or its retailers.

B. Records pertaining to the security of lottery operations, whether current or proposed, the security director, and the security division of the corporation shall be deemed to be records containing security procedures, investigative techniques, or internal security information for purposes of R.S. 44:3(A)(3).

C. The exclusive venue for any action or matter regarding the records of the lottery corporation is the parish where the lottery corporation is domiciled, and the district court for that parish has exclusive jurisdiction thereof.

Records Relating to Minors

Louisiana has adopted a comprehensive body of laws dealing with minors. This law is compiled in what is known as the Children's Code. In the interest of protecting the privacy of juveniles who are involved in litigation, juvenile cases are docketed and handled separately from regular criminal and civil cases and juvenile case records are confidential and kept separately.[161]

With the exceptions of delinquency proceedings pursuant to Ch.C. art. 879, child support proceedings, and misdemeanor trials of adults pursuant to Ch.C. art. 1501, *et seq.*, proceedings before the juvenile court shall not be public. Ch.C. art. 407. Most juvenile records are sealed and thus, are not subject to public inspection. However, Ch.C. art. 412 provides in part:

Art. 412. Confidentiality of records; disclosure exceptions

[160] R.S. 18:1255.
[161] Ch.C. art. 404.

A. Records and reports concerning all matters or proceedings before the juvenile court, except traffic violations, are confidential and shall not be disclosed except as expressly authorized by this Code. Any person authorized to review or receive confidential information shall preserve its confidentiality in the absence of express authorization for sharing with others.

B. Nonidentifying information of a general nature, including statistics, is not confidential and may be released without a court order. By court order, an individual may be authorized to review confidential records and reports, including case file samples, for the purpose of collecting nonidentifying general information, including statistics. The court order shall specify the type of information authorized for review and bind the reviewer to preserving the confidentiality of any identifying information reviewed.

C. Records and reports in individual cases may be released to parties, their counsel or other legal representatives, and court-appointed special advocates (CASAs) in accordance with discovery and disclosure provisions of this Code.

D. When such information is relevant and necessary to the performance of their respective duties and enhances services to the child or his family, the court may authorize the release of records, reports, or certain information contained therein to appropriate individuals representing:

(1) Other courts and court-affiliated programs.

(2) The Department of Children and Family Services.

(3) The office of juvenile justice of the Department of Public Safety and Corrections.

(4) The Department of Health and Hospitals.

(5) The Department of Education or the local school in which the child is a student.

(6) The local district attorney's office.

(7) A multidisciplinary investigative child abuse team.

(8) A child advocacy center.

(9) A truancy and assessment center.

(10) Other child serving agencies or programs.

(11) The attorney general's office.

E. For good cause when the information is material and necessary to a specific investigation or proceeding, the court may order the release of individual records and reports, or certain information contained therein, to a petitioner, limited to the specific purpose for which the court authorizes release.

F. The court may release records and reports concerning any proceeding, except adoption, to an adult who, as a child, was the subject of the proceeding. For good cause, the court may also order release of records and reports to the

counsel or other appropriate legal representative of a child, still a minor, who was the subject of any proceedings, except adoption.

G. *In accordance with Articles 811.1 and 811.3, the district attorney or court may release to the victim of a delinquent act constituting a crime of violence as defined in R.S. 14:2(B), or to the victim's legal representative or designated family member:*

(1) *The results of adjudication and disposition hearings.*

(2) *Notice of the taking into custody, release pursuant to Chapter 6 of Title VIII of this Code, release due to a rejection of charges by the district attorney, escape, or re-apprehension of the child accused of the crime of violence against the victim.*

(3) *Advance notice of court proceedings relating to the delinquent act.*

(4) *Certain information contained in the predisposition report to the court pursuant to Article 890, limited to those items described in Subparagraphs (A)(1) and (2) and (D) of that Article.*

H. *The district attorney, law enforcement agency, or court may release to the public the following identifying information concerning an alleged or adjudicated delinquent child, provided the child was at least fourteen years old at the commission of the delinquent act:*

(1) *The name, age, and delinquent act for which the child is being charged whenever, in accordance with Articles 813 or 820, the court has found probable cause that the child committed a crime of violence as defined by R.S. 14:2(B) or a second or subsequent felony-grade offense.*

(2) *The name, age, delinquent act, and disposition of a child who has been adjudicated delinquent for a crime of violence as defined by R.S. 14:2(B), for a second or subsequent felony-grade offense, or for the distribution or possession with the intent to distribute a controlled dangerous substance as defined in R.S. 40:961 et seq.*

I. *In order to assist in finding and taking into custody a child wanted for a felony-grade delinquent act involving an offense against the person or involving a dangerous weapon, law enforcement agencies may release to the public identifying information regarding the child if a court has issued an order for taking the child into custody pursuant to Article 813, or if probable cause that the child committed the alleged delinquent act has already been established pursuant to Article 820. Identifying information may include the child's name, age, alleged delinquent act, physical description, photograph, address, and, when appropriate, social security number and driver's license number.*

J. *Any violation of the confidentiality provisions of this Article shall be punishable as a constructive contempt of court pursuant to Article 1509(E).*

K. *Whenever a child escapes from a juvenile detention center, law enforcement agencies are hereby authorized to release to the public the child's name, age,*

physical description, and photograph. This article and other Louisiana Children's Code articles contain several other disclosure exceptions. For a complete list, consult the Louisiana Children's Code.[162] In certain limited circumstances, the law allows disclosure of reports and records dealing with juveniles.

Information dealing with children who have been adjudged in need of care and treatment services provided by the public welfare and assistance programs are also protected from invasions of privacy. R.S. 46:1923(A) provides:

§1923. Restrictions on use of records

A. With respect to any child for whom care and treatment services are either directly or indirectly provided by the department pursuant to this Chapter to a child alleged or found to be delinquent or in need of supervision, it shall be unlawful, except for purposes directly connected with the administration of this Chapter or upon the consent of such child or the attorney for such child, or upon the specific order of the court pursuant to the provisions of Code of Criminal Procedure art. 875 and R.S. 13:1564 through R.S. 13:1724, both inclusive, for any individual agency, organization, or facility to knowingly solicit, disclose, receive, or make use of, or authorize, permit, participate in, or acquiesce in the use of any information in or derived from such child's legal, social, medical, or psychological records, or obtained, directly or indirectly, from the records, papers, files, or communication by or to the department of any individual, agency, organization, or facility utilized by the department for the provision of such care and treatment services for such child.

The law respecting information available on juveniles is explicit. Unless a situation falls under one of the exceptions, access to information will be restricted and unavailable for inspection.

Records of Hospital Service District Commission

R.S. 46:1073(C) provides that any marketing strategy and strategic plan of a hospital service district commission and the facility owned or operated by the district are deemed confidential, as follows:

§1073. Market strategies and strategic planning

C. Notwithstanding the provisions of R.S. 42:4.1, et seq. or any other law to the contrary, any marketing strategy and strategic plan of a hospital service district commission and the facility owned or operated by the district shall not be public record and shall be confidential but shall be subject to court subpoena.

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[162] La. Ch.C. art. 811.1(G)(1) for example allows, but does not require, the release of the name of the juvenile crime victim when the crime resulted in the death of the victim.

Records of Subcommittee of Joint Legislative Committee on The Budget

R.S. 39:1535(D) provides that an abstract of the facts and principles of law upon which claims against the state or a state agency are based and other information submitted to the subcommittee are deemed public records, with certain exceptions, as follows:

§1535. Duties and responsibilities

D. (3) The subcommittee shall be presented with a concise abstract of the facts and principles of law upon which the claim is based. The abstract shall include a detailed analysis of the calculation of damages as well as the costs of court and interest thereon. The abstract and other information submitted to the subcommittee shall be public record, with the exception of material that reflects the mental impressions, conclusions, opinions, or theories of an attorney obtained or prepared in anticipation of litigation or in preparation for trial.

(4) The amount of the settlement and terms and conditions of the agreement shall be public record.

Records of Peer Review Committees

As stated in R.S. 13:3715.3(A)(2), all records and proceedings of certain peer review committees are deemed confidential and are not subject to public inspection:

§3715. Peer review committee records; confidentiality

A. Notwithstanding the provisions of R.S. 44:7(D) or any other law to the contrary, all records, notes, data, studies, analyses, exhibits, and proceedings of:

(2) Any hospital committee, the peer review committees of any medical organization, dental association, professional nursing association, nursing home association, social workers association, group medical practice of twenty or more physicians, nursing home, ambulatory surgical center licensed pursuant to R.S. 40:2131, et seq., ambulance service company, health maintenance organization, any nationally recognized improvement agency or commission, including but not limited to the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or any committee or agency thereof, or any healthcare licensure agency of the Louisiana Department of Health and Hospitals, or healthcare provider as defined in R.S. 40:1299.41(A)(1), or extended care facility committee, including but not limited to the credentials committee, the medical staff executive committee, the risk management committee, or the quality assurance committee, any committee determining a root cause analysis of a sentinel event, established by the peer review committees of a medical organization, dental organization, group medical practice of twenty or more physicians, social workers association, ambulatory surgical center licensed pursuant to R.S. 40:2131, et seq., ambulance service company, health maintenance organization, or healthcare provider as defined in

R.S. 40:1299.41(A)(1), or private hospital licensed under the provisions of R.S. 40:2100, et seq., shall be confidential wherever located and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be available for discovery or court subpoena regardless of where located, except in any proceedings affecting the hospital staff privileges of a physician, dentist, psychologist, or podiatrist, the records forming the basis of any decision adverse to the physician, dentist, psychologist, or podiatrist may be obtained by the physician, dentist, psychologist, or podiatrist only. However, no original record or document, which is otherwise discoverable, prepared by any person, other than a member of the peer review committee or the staff of the peer review committee, may be held confidential solely because it is the only copy and is in the possession of a peer review committee.

Records Submitted to Department of Environment Quality

As stated in R.S. 30:2074(D), certain information in documents submitted to the Department of Environmental Quality, pursuant to the Louisiana Water Control Law, shall be available to the public unless certain criteria are met:

§2074. Office of the secretary of environmental quality; powers and duties

D. (1) Any information submitted to the Department of Environmental Quality, pursuant to the Louisiana Water Control Law or regulations promulgated under its authority, may be claimed as confidential in accordance with R.S. 30:2030 by the person submitting the information, except information which falls within any category listed in Paragraph (7) of this Subsection.

(2) Any such claim must be asserted at the time of submission in the manner prescribed by the application form or instructions or, in the case of other submissions, in accordance with the following:

(a) By stamping the word "CONFIDENTIAL" on each page containing such information.

(b) By submitting a written request for nondisclosure which shall specify the basis for requesting nondisclosure as provided in R.S. 30:2030.

(3) All materials clearly labeled "CONFIDENTIAL" which are submitted to the department with a written request for nondisclosure shall be afforded confidentiality pending a determination whether to grant the request. The determination shall be made within twenty-one working days from the date the request is received by the department.

(4) Confidentiality will not be afforded to any materials submitted which fall within any category of information listed in Paragraph (7) of this Subsection.

(5) If no claim is made at the time of submission, the department may make the information available to the public without further notice. If a claim is asserted, the information will be treated in accordance with the procedures specified above.

(6) If the secretary determines that any material received should not be afforded confidentiality, he shall issue a written denial of the request for nondisclosure to the requestor. No written denial of the request is necessary when the material submitted as confidential falls within any category of information listed in Paragraph (7) of this Subsection.

(7) No claim of confidentiality will be accepted and all claims of confidentiality will be denied for the following categories of information for all NPDES, LPDES, or other water discharge permit applicants or permittees:

(a) Name.

(b) Address.

(c) Effluent or discharge data.

(d) Contents of permit applications.

(e) All information required by the permit application whether accompanying it, attached to it, or submitted separately.

(f) Permits.

(8) All information obtained under the Louisiana Environmental Quality Act, R.S. 30:2001, et seq., or by regulations issued under its authority, or by any order, license, or permit term or condition adopted or issued by the Act, shall be available to the public, unless nondisclosure is requested and granted in accordance with R.S. 30:2030. No information listed in said Paragraph (7) may be claimed or determined to be confidential.

(9) Any employee of the department or any former employee of the department or any authorized contractor acting as a representative of the secretary of the department who is convicted of intentional disclosure or conspiracy to disclose trade secrets or other information which has been determined to be confidential pursuant to this Subsection is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars, imprisonment for up to one year, or both.

Motor Vehicle Accident Reports

Although motor vehicle accident reports and the information contained in the reports are deemed confidential and exempt from the Public Records Act, R.S. 32:398 provides that the accident reports and the information contained therein shall be made available, within seven working days following the completion of the accident investigation, to a "news-gathering organization that requests documents related to the accident," as follows:

§398. Accident reports; when and to whom made; information aid; fees for copies; fees for accident photographs

F. The state police, any local police department, or any sheriff's office shall provide copies of crash reports to any interested person upon request and may charge a fee, not to exceed the sum of five dollars per report that does not exceed two pages, and seven dollars and fifty cents per report that exceeds two pages.

G. The state police, any local police department, or any sheriff's office shall provide copies of photographs of accidents or other photographs required of the investigating agency, video tapes, audio tapes, and any extraordinary-sized documents, or documents stored on electronic media, to any interested person upon request and may charge a reasonable fee for such copies.

* * *

K. (1) (a) The reports required by this Section, and the information contained in the reports, shall be confidential, shall be exempt from the provisions of R.S. 44:1, et seq., and shall be made available only to the parties to the accident, parents or guardians of a minor who is a party to the accident, and insurers of any party which is the subject of the report, or to the succession representatives of those parties, or to the attorneys of the parties or succession representatives, or to a news-gathering organization that requests documents related to the accident. Upon request, accident reports shall be made available to the above-enumerated persons within seven working days following the completion of the accident investigation. For the purposes of this Subsection: "news-gathering organization" means any of the following:

(i) A newspaper, or news publication, printed or electronic, of current news intelligence of varied, broad, and general public interest, having been published for a minimum of one year and that can provide documentation of membership in a statewide or national press association, as represented by an employee thereof who can provide documentation of his employment with the newspaper, wire service, or news publication.

(ii) A radio broadcast station, television broadcast station, cable television, operator, or wire service as represented by an employee thereof who can provide documentation of his employment.

(b) In Orleans Parish, the local police department may charge a reasonable fee, not to exceed the sum of twenty dollars, to provide copies of accident reports. State departments and agencies shall not be required to pay such fees.

(2) *All persons and their agents are prohibited from screening accident reports if the person or his agent does not represent any of the persons involved in a particular accident, the report for which could reasonably be expected to be available. However, this limitation shall not prevent any person from requesting particular reports regardless of whether the person represents any party in the accident.*

(3) *The information in the reports may be tabulated and included in the statistical information published under the provisions of Subsection J of this Section.*

(4) *Nothing in this Section shall prohibit the sale of police accident reports or other driving record information to consumers of on-line driving records under written contract for purchase of records with the Department of Public Safety and Corrections.*

(5) *The information in the reports may be used by the office of motor vehicles for the purpose of maintaining operating records.*

Autopsy Reports

Autopsy reports prepared by a coroner are deemed to be public records. However, R.S. 13:5713, 13:5714, and 44:19 set forth the circumstances under which they can be made available for public inspection or copying.

§1563. Duty to hold autopsies, investigations, etc.

A. *The coroner shall either view the body or make an investigation into the cause and manner of death in all cases involving the following:*

(1) *Suspicious, unexpected, or unusual deaths.*

(2) *Sudden or violent deaths.*

(3) *Deaths due to unknown or obscure causes or in any unusual manner.*

(4) *Bodies found dead.*

(5) *Deaths due to suspected suicide or homicide.*

(6) *Deaths in which poison is suspected.*

(7) *Any death from natural causes occurring in a hospital under twenty-four hours of admission.*

(8) *Deaths following an injury or accident either old or recent.*

(9) *Deaths due to drowning, hanging, burns, electrocution, gunshot wounds, stabs or cutting, lightning, starvation, radiation, exposure, alcoholism, addiction, tetanus, strangulation, suffocation, or smothering.*

(10) *Deaths due to trauma from whatever cause.*

(11) *Deaths due to criminal means or by casualty.*

(12) *Deaths in prison or while serving a sentence.*

(13) Deaths due to virulent contagious disease that might be caused by or cause a public hazard, including acquired immune deficiency syndrome.

B. (1) The coroner may perform or cause to be performed by a competent physician an autopsy in any case in his discretion. The coroner shall perform or cause to be performed by a competent physician an autopsy in the case of any death where there is a reasonable probability that the violation of a criminal statute has contributed to the death.

(2) The coroner or the district attorney may order the disinterment of any dead body within his jurisdiction under the direction or supervision of the person ordering the disinterment or his designee, and may authorize the removal of such dead body to a place designated by the person ordering the disinterment for the purpose of examination and autopsy and, when such is completed, order the reinterment of the body.

(3) The coroner may hold any dead body for any length of time that he deems necessary. However, the coroner shall expedite any investigation at the scene of an accident involving a fatality so as not to unduly delay the removal of the dead body from the accident scene. However, if a bodily substance sample for a toxicology screen is extracted at the accident scene, the extraction procedure shall be performed outside of public view.

(4) (a) He may remove and retain for testing or examination any specimens, organs, or other portion of the remains of the deceased that he may deem necessary or advisable as possible evidence before a grand jury or court, subject to the limitation set forth in R.S. 32:661(A)(2).

(b) The coroner may also remove and retain any specimens or organs of the deceased which in his discretion are necessary or desirable for anatomical, bacteriological, chemical, or toxicological examination, subject to the limitation set forth in R.S. 32:661(A)(2).

C. (1) (a) The coroner shall perform or cause to be performed by a competent physician an autopsy in all cases of infants under the age of one year who die unexpectedly without explanation.

(b) The autopsy shall include microscopic and toxicology studies.

(c) The coroner shall furnish a death certificate based upon his autopsy with his statement, to the best of his knowledge, of the cause and means of death.

(2) If the coroner finds that the cause of death was Sudden Infant Death Syndrome, he shall notify the director of the parish health unit within forty-eight hours after such determination.

(3) In preparing the certificate of death, the coroner may not, in lieu of an autopsy, rely on statements of relatives, persons in attendance during

the last sickness, persons present at the time of death, or other persons having adequate knowledge of the facts, even if such data may be permitted in other cases in this Section.

(4) The coroner shall not perform an autopsy if the parents of the infant provide to the coroner their objection in writing, unless the coroner finds that the facts surrounding the death require that an autopsy be performed in the interest of the public safety, public health, or public welfare.

D. If the family of the deceased objects to an autopsy on religious grounds, the autopsy shall not be performed unless the coroner finds that the facts surrounding the death require that an autopsy be performed in the interest of the public safety, public health, or public welfare. In such cases the coroner shall provide the family his written reasons for the necessity of the autopsy.

E. (1) The coroner shall furnish a death certificate based on his examination, investigation, or autopsy, and he shall state as best he can the cause and means of death.

(2) If it appears that death was due to accident, suicide, or homicide, he shall so state.

(3) The cause of death, and the manner or mode in which the death occurred, as incorporated in the death certificate as provided in the Vital Statistics Laws, R.S. 40:32 et seq., filed with the division of vital records of the Department of Health and Hospitals, shall be the legally accepted cause of death, unless the court of the parish in which the death occurred, after a hearing, directs otherwise.

(4) In the case of a death without medical attendance, if there is no reason to suspect the death was due to violence, casualty, or undue means, the coroner may make the certificate of death from the statement of relatives, persons in attendance during the last sickness, persons present at the time of death, or other persons having adequate knowledge of the facts.

F. The coroner or his designee shall examine all alleged victims of rape, carnal knowledge, sexual battery, and crime against nature when such cases are under police investigation.

G. (1) Notwithstanding any provision of law to the contrary, when the coroner is required to furnish information for the issuance of a death certificate by the office of vital statistics, the coroner shall do so within ten working days after the receipt of all test and investigation results or information associated with the investigation into the cause and manner of death.

(2) If the coroner is unable to furnish the information required pursuant to Paragraph (1) of this Subsection within ten days after taking charge of the case, upon request, the coroner shall issue a written statement attesting to the fact of death, which shall constitute proof of death for

all purposes, including but not limited to, any claim under any policy of insurance issued on the life of the deceased individual.

H. *In deaths investigated by the coroner where he is not able to establish the identity of the dead body by visual means, fingerprints, or other identifying data, the coroner shall have a qualified dentist or forensic anthropologist or forensic pathologist carry out a dental examination of the dead body. If the coroner, with the aid of the dental examination, is still not able to establish the identity of the dead body, the coroner shall prepare and forward the dental examination and other identifying records to state and local law enforcement agencies. When the dead body may be that of an individual under the age of eighteen years, the coroner shall send this information to the Missing and Exploited Children Information Clearinghouse within the Department of Public Safety and Corrections, office of state police.*

I. *The coroner shall furnish a copy of his final report or autopsy report, or both, upon written request, to the last attending physician of the deceased or to the designated family physician of the deceased, provided that the family of the deceased has given written authorization to the coroner or to the requesting physician for the release of such report.*

J. *Autopsy reports prepared by the coroner or his designee are public records. The coroner shall provide one copy of the autopsy report upon request by the next of kin at no charge to the next of kin. The coroner shall provide copies of the autopsy report at no charge to the appropriate law enforcement agencies as requested. The public records fee for any other copy of an autopsy report shall be the same as that charged by the registrar of vital records for the state for a death certificate.*

K. *(1)* *For the purposes of this Section, an autopsy report is the work product of the coroner or his designee. When a coroner investigates a death, the office of the coroner is required to make available for public inspection and copying the autopsy report which shall contain the following:*

(a) *Name, age, sex, race, and address of the deceased.*

(b) *Date and reported time of death.*

(c) *Physical location, including address if available, where the deceased was found.*

(d) *Date, time, and place of autopsy, and the name of the doctor performing the autopsy and the names of all persons present at the autopsy.*

(e) *Information regarding the autopsy, including whether the autopsy was requested or performed by operation of law, a listing of the physical findings of the autopsy, a summary in narrative form of the medical findings and conclusions, the cause of death, the manner and mechanism of death, and the classification of*

death as homicide, accidental, suicide, undetermined, or under investigation.

(2) Notwithstanding the provisions of Paragraph (1) of this Subsection, in a non-coroner case, no autopsy report shall be made available for public inspection or copying if the classification of death is that of natural causes except upon request by the next of kin or upon request in compliance with R.S. 13:3715.1.

(3) Notwithstanding the provisions of Paragraph (1) of this Subsection and notwithstanding the provisions of R.S. 13:5714(C), no autopsy report pertaining to criminal litigation as defined in and in accordance with R.S. 44:3(A) shall be required to be made available for public inspection or copying except as otherwise provided by law.

L. (1) Liability shall not be imposed on an elected coroner or his support staff based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

(2) The provisions of Paragraph (1) of this Subsection are not applicable to any of the following:

(a) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or

(b) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

(3) The legislature finds and states that the purpose of this Subsection is not to reestablish any immunity based on the status of sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the Constitution of Louisiana.

* * *

§5714. Notification of next of kin

A. The coroner or his designee shall make every reasonable effort to notify the next of kin in all cases of deaths for which he has jurisdiction including but not limited to deaths enumerated in R.S. 33:5713(A).

B. In all other cases, including cases where a person dies of natural causes, the following persons or their designees shall make every reasonable effort to notify the next of kin within forty-eight hours of discovery of the death:

(1) The administrator of the hospital in which the person dies.

(2) The administrator or executive director of the nursing home or other facility in which the person dies.

(3) The chief of police or other chief officer of a local law enforcement agency which discovers the body of the deceased.

C. The coroner or his designee shall release to the news media or any family member the reported name, age, preliminary diagnosis, and status of death, whether unclassified or classified, pending final autopsy or investigation results concerning a death under investigation. However, nothing in this Subsection shall authorize the release of the information set forth herein prior to notification of the next of kin to the deceased unless no next of kin can be determined or, despite reasonable efforts by the coroner's office, no next of kin can be located. This Subsection shall not require the release of information in non-coroner cases or in cases pertaining to criminal litigation in contravention of the provisions of R.S. 33:5713(J).

* * *

§19. Records of a coroner; autopsy photographs, video, and other visual images

A. (1) Notwithstanding any provision of this Chapter to the contrary, any medical record or personal medical history of a deceased person in the custody of a coroner shall be confidential and shall not be subject to examination, inspection, or copying pursuant to R.S. 44:31, 32, or 33.

(2) For purposes of this Subsection, the phrase "medical record or personal medical history of a deceased person" shall mean information regarding the physical, mental, or behavioral health or condition of a deceased person prior to death.

(3) The provisions of Paragraph (1) of this Subsection shall not apply to a death certificate, final report of a coroner, or autopsy report.

B. Notwithstanding any provision of this Chapter to the contrary, photographs, video, or other visual images, in whatever form, of or relating to an autopsy conducted under the authority of the office of the coroner shall be confidential, are deemed not to be "public records," and shall not be released by the office of the coroner or any officer, employee, or agent thereof except as otherwise provided in this Section.

C. Nothing in this Section shall prevent the release of information in the custody of a coroner, including autopsy photographs, video, or other visual images, in whatever form, of or relating to autopsy conducted under the authority of the office of the coroner as follows:

(1) To a family member of the deceased, or his designee;

(2) To the succession representative of the deceased's estate, or his designee;

(3) To a law enforcement agency, for official use only;

(4) To a qualified dentist, forensic anthropologist, or forensic pathologist as necessary to establish the identity of the deceased;

(5) As directed by a court order of subpoena.

D. Nothing in this Section shall prevent the inspection of photographs, video, or other visual images, in whatever form, of or relating to an autopsy.

Recall Petitions

Any public officer, excepting judges of the courts of record, may be recalled. R.S. 18:1300.5 provides that the recall petition shall be a public record, as follows:

§1300.5. Chairman and vice chairman designated in petition; petition designated as a public record

B. Upon the signature of the first elector, the recall petition, including the name, address, and signature of each elector who has signed thereon, shall be a public record. The chairman, or the vice chairman when acting as the chairman, shall be the custodian thereof. The petition and the custodian shall be subject to all of the provisions of R.S. 44:31, et seq.

911 Emergency Call Tapes

The governing authority of any parish is authorized under R.S. 33:9101 to create communications districts, which are political subdivisions of the state, to carry out the stated purposes of the E-911 system. Because communications districts are political subdivisions of the state, 911 data, including the taped telephone calls, are subject to the Public Records law.[163] Therefore, 911 information must be released unless it is specifically exempt under the Public Records law. However, the Louisiana First Circuit Court of Appeal has disagreed with the Attorney General's Opinions on the subject and found that 911 communications may be protected from disclosure due to general medical confidentiality and federal HIPAA regulations.[164]

Gaming Professional Services Report

Gaming Licensees and casino gaming operators are required to submit to the Louisiana Gaming Control Board a report naming everyone that furnishes professional services, including advertising services, to the license holder or casino gaming operator, which report is statutorily recognized as a public record in R.S. 27:21.1, which provides, in part:

§27:21.1. Quarterly reporting of professional services information

A. Each holder of a license as defined in R.S. 27:44(14) and 353(5), and the casino gaming operator shall submit to the board a report naming each individual, corporation, firm, partnership, association, or other legal entity that furnishes professional services to the license holder or the casino gaming operator.

B. As used in this Section, professional services means those services rendered in the state of Louisiana and shall include but are not limited to:

(1) Legal services.

[163] **Ops. Atty. Gen.,** Nos. 92-209 and 90-576.
[164] ***Hill v. East Baton Rouge Depart. of EMS***, 925 So.2d 17 (La. App. 1st Cir. 2005).

(2) Advertising or public relations services.

(3) Engineering services.

(4) Architectural, landscaping, or surveying services.

(5) Accounting, auditing, or actuarial services.

C. The report required by the provisions of this Section shall be submitted to the board on a quarterly basis. The report shall be forwarded to the board by certified mail no later than twenty days after the end of each quarter.

D. The report required by the provisions of this Section shall be a public record and governed by the provisions of R.S. 44:1, et seq.

E. The report required by the provisions of this Section shall contain the name and address of each individual, corporation, firm, partnership, association, or other legal entity that furnishes professional services to each holder of a license as defined in R.S. 27:44(14) and 353(5), and the casino gaming operator.

F. The report required by the provisions of this Section shall not be required to contain the amount of compensation paid to each individual, corporation, firm, partnership, association, or other legal entity in exchange for furnishing professional services to each holder of a license as defined in R.S. 27:44(14) and 353(5), and the casino gaming operator.

PROTECTION OF NEWS SOURCES

The statutory right of a reporter[165] to refuse to disclose the identity of any informant or any source of information is granted by R.S. 45:1452, which provides:

§1452. Conditional privilege from compulsory disclosure of informant or source

Except as hereinafter provided, no reporter shall be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter.

However, this right or privilege is conditional and can be revoked under certain circumstances. R.S. 45:1453 provides:

§1453. Revocation of privilege; procedure

In any case where the reporter claims the privilege conferred by this Part, the persons or parties seeking the information may apply to the district court of the

[165] "Reporter" is defined in R.S. 45:1451 as "…any person regularly engaged in the business of collecting, writing or editing news for publication through a news media. The term reporter shall also include all persons who were previously connected with any news media as aforesaid as to the information obtained while so connected."

The owner/publisher of a weekly newspaper and editor for the letters-to-the-editor was a "reporter" within the meaning of R.S. 45:1451 defining "reporter," even though he testified that he was not acting as a "reporter" in looking over and editing the subject letter. ***Becnel v. Lucia***, 420 So.2d 1173 (La. App. 5th Cir. 1982).

parish in which the reporter resides for an order to revoke the privilege. In the event the reporter does not reside within the state, the application shall be made to the district court of the parish where the hearing, action or proceeding in which the information is sought is pending. The application for such an order shall set forth in writing the reason why the disclosure is essential to the protection of the public interest and service of such application shall be made upon the reporter. The order shall be granted only when the court, after hearing the parties, shall find that the disclosure is essential to the public interest. Any such order shall be appealable under Article 2083 of the Louisiana Code of Civil Procedure. In case of any such appeal, the privilege set forth in R.S. 45:1452 shall remain in full force and effect during pendency of such appeal.

In an action challenging the dismissal of a civil service police officer, the disclosure sought from the newspaper reporter as to whether the chairman of the civil service board had informed the reporter prior to the hearing as to the probable outcome of the hearing on plaintiff's case related to the source of information and identity of informant, and not merely to the information itself, and thus, in absence of a showing that the disclosure of the identity and the source was essential to the protection of public policy, the plaintiff was not entitled to revocation of the reporter's conditional privilege from compulsory disclosure of the informant and source.[166]

In Re Michael Burns, involved a challenge to the scope of the reporter's privilege.[167] Michael Burns, a reporter for the Alexandria Daily Town Talk, was held in contempt of court and imprisoned for his refusal to answer questions about the source of his information for an article which related the existence and details of a confession by a murder defendant. The defendant invoked a hearing, under R.S. 45:1453, for the purpose of revoking the reporter's privilege and to compel the reporter to answer the question of whether his source for the story, listed in the article as a "courthouse source," was an individual employed by the clerk of court. Burns asserted the reporter's privilege and refused to answer. The judge found him in contempt of court and ordered him imprisoned.

The Louisiana Supreme Court held that the reporter's privilege includes within its protective scope not only the actual name of a confidential source of information, but any disclosure of information, such as place of employment, that would tend to identify him. The Court reasoned that otherwise, through a series of indirect questions, the identity of the informant could be obtained without the need to ask for the informant's name directly, resulting in subversion of the reporter's privilege.

Similarly, in ***In Re Grand Jury Proceedings (Ridenhour)***, the Louisiana Supreme Court held that, unless a reporter has witnessed criminal activity or has physical evidence of a crime, a reporter can assert a qualified privilege in refusing to answer questions before a grand jury.[168] However, the party seeking information must then show that disclosure is necessary to the public interest. Once such a showing has been made, the trial judge should balance the public interest in having all relevant testimony with the possible chilling effect that disclosure will have on the constitutional guarantee of freedom of the press.

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[166] ***Dumez v. Houma Municipal Fire and Police Civil Service Board***, 341 So.2d 1206 (La. App. 1st Cir. 1976), *writ denied,* 344 So.2d 667 (1977).
[167] 484 So.2d 658 (1986).
[168] 520 So.2d 372 (1988).

The superintendent of the school system, who requested that he be supplied with the name of the author of the letter concerning him that was published in the letters-to-the-editor section of a weekly newspaper, failed to show that the public interest would be harmed by withholding the information sought, and therefore, the conditional privilege invoked by the owner/publisher would not be revoked, where superintendent, by his own words, sought to serve his own interests, not that of the public.[169]

The author of the letters-to-the-editor published in a weekly newspaper was a "source of information" under R.S. 45:1452.[170]

The reporter's privilege, when asserted in a suit for damages for defamation, along with a legal defense of good faith, does not relieve the reporter from the burden of proof to sustain his defense. R.S. 45:1454 provides:

§1454. Defamation; burden of proof

If the privilege granted herein is claimed and if, in a suit for damages for defamation, a legal defense of good faith has been asserted by a reporter or by a news media with respect to an issue upon which the reporter alleges to have obtained information from a confidential source, the burden of proof shall be on the reporter or news media to sustain this defense.

<u>Subpoenas Served on News Media Organization or on Reporter</u>

With respect to subpoenas served on a news media organization or reporter, Louisiana law specifically provides at R.S. 45:1455, *et seq*., the following:

§1455. Substitution of affidavit for appearance and return; effect

A. When a subpoena is served on a news media organization or reporter as those terms are defined in R.S. 45:1451 or on any custodian of records, photographer, or other representative of a news media organization, in any judicial or administrative proceeding to which neither the news media organization nor any reporter, custodian of records, photographer, or other representative is a party, or in any legislative proceeding, it shall not be necessary for the news media organization, the reporter, the custodian of records, the photographer, or the representative thus subpoenaed to appear or to testify in response to the subpoena: (1) to confirm the circulation or the broadcast audience of the news media organization, or (2) to confirm the publication or broadcast of specified materials, if the reporter, custodian of records, photographer, or other representative of the news media organization delivers by registered mail or by hand, before or at the time specified in the subpoena, an affidavit in conformity with Subsection B of this Section together with any documents or records described in the subpoena to the clerk of the court or other tribunal, or, if there is no clerk, then to the court or other tribunal, or, with respect to a deposition subpoena, to the party requesting the issuance of the subpoena.

[169] ***Becnel v. Lucia***, 420 So.2d 1173 (La. App. 5th Cir. 1982).
[170] ***Id.***

B. An affidavit delivered pursuant to Subsection A of this Section shall state in substance each of the following:

(1) The name of the proceeding and any docket number assigned to such proceeding as shown on the subpoena itself.

(2) The name of the affiant and his business title or other description indicating his position or relationship to the party to whom the subpoena was issued if he is not the person to whom it was directed.

(3) The dates of publication or broadcast records searched and the dates of publication or broadcast of the documents or records actually produced.

(4) A statement that the documents or records produced were published or broadcast by the news media organization.

(5) If requested, a statement summarizing the circulation or broadcast audience of the news media organization.

(6) If requested, a statement describing the placement of an article within a publication.

(7) An itemization of the costs of complying with the subpoena.

C. An affidavit conforming to the requirements of Subsection B of this Section shall be received in evidence and shall be prima facie proof of its contents. A copy of any document, or the text thereof, or of any record, including, without limitation, any article, photograph, or sound or video recording, identified in the affidavit and stated in the affidavit to have been published or broadcast shall be received in evidence and shall be prima facie proof of publication or broadcast as stated in the affidavit.

D. This Section shall not affect the rights of parties to production of documents pursuant to the laws governing discovery or other laws pertaining thereto.

§1456. Service of subpoenas; motion to quash or obtain additional time; award of costs

A. Unless otherwise ordered by the court, upon a showing of good cause therefor, a subpoena issued to any news media organization, reporter, custodian of records, photographer, or other representative of any news media organization, which is governed by R.S. 45:1455 through 1458, shall be served at least ten days prior to the return date specified in the subpoena.

B. Nothing contained herein shall be construed to preclude or limit the right of the news media organization, reporter, photographer, custodian of records, or other representative of any news media organization to seek an order with respect to a subpoena pursuant to Article 1354 or Article 1426 of the Code of Civil Procedure including, without limitation, an order continuing the return date specified in the subpoena or quashing the subpoena on the ground that additional time is reasonably necessary for compliance with the subpoena.

C. *In a proceeding to quash any subpoena governed by R.S. 45:1455 through 1458, the court may, after contradictory hearing, grant reasonable attorney fees and expenses to the prevailing party in the contradictory hearing.*

§1457. Payment of cost of compliance; deposit into registry of court

A. *Upon receipt of a subpoena governed by R.S. 45:1455 through 1458, the news media organization, reporter, custodian of records, photographer, or other representative of any news media organization shall notify the party requesting the issuance of the subpoena of the reasonable cost of compliance with the subpoena and the method of calculating the cost.*

B. *Upon receipt of notification of the cost of compliance as provided in Subsection A of this Section, the party requesting the issuance of the subpoena shall deposit into the registry of the court money or other security in the amount of such cost not less than two days prior to the return date specified in the subpoena. If this amount is not timely deposited, the subpoenaed party may file an affidavit with the court or tribunal setting forth that fact and no further compliance with the subpoena shall be necessary.*

C. *The cost of compliance calculated by the subpoenaed party shall be presumed to be reasonable unless the party requesting issuance of the subpoena requests a hearing, and the court finds, after such hearing, that the cost of compliance calculated by the subpoenaed party is not reasonable, in which case the court shall make an adjustment of the amount deposited into the registry of the court. The court may, after contradictory hearing, grant reasonable attorney fees and expenses to the prevailing party in that contradictory hearing.*

D. *Any amount deposited into the registry of the court pursuant to this Section shall be taxed as court costs pursuant to the rules governing the proceeding.*

§1458. Application to other proceedings and discovery

The provisions of R.S. 45:1455 through 1458 shall apply to subpoenas issued in connection with all legislative hearings, administrative proceedings, grand jury hearings and proceedings conducted under Article 66 of the Code of Criminal Procedure. The provisions of this Chapter shall also govern all subpoenas issued in connection with depositions or other discovery authorized by law.

§1459. Qualified protection for nonconfidential news

A. *"News" shall mean any written, oral, pictorial, photographic, electronic, or other information or communication, whether or not recorded, concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare.*

B. (1) *Notwithstanding the provisions of any law to the contrary, no reporter or news media organization, as those terms are defined in R.S. 45:1451, nor any photographer, custodian of records, or other representative of any news media organization shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the*

legislature or other body having contempt powers, nor shall a grand jury seek to have such person held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any news which was not published or broadcast but was obtained or prepared by such person in the course of gathering or obtaining news, or the source of any such news, even if such news was not obtained or received in confidence, unless a court has found that the party seeking such news has made a clear and specific showing that the news:

(a) Is highly material and relevant;

(b) Is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto; and

(c) Is not obtainable from any alternative source.

(2) A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a contradictory hearing.

(3) In any proceeding brought pursuant to this Subsection, the court may, after a contradictory hearing, grant reasonable attorney fees and expenses to the prevailing party in such hearing.

C. Notwithstanding the provisions of any law to the contrary, a person entitled to claim the qualified protection provided under the provisions of Subsection B of this Section to whom a subpoena is directed may, within ten days after the service thereof, or, on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the attorney designated in the subpoena written objection specifying the grounds for his objection. Once objection is made, the party serving the subpoena shall not be entitled to compliance except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the person who served the objection for an order compelling compliance with such subpoena after a hearing in conformity with the provisions of Subsection B of this Section and based upon the findings required therein.

D. (1) In addition to the provisions of Subsection B and C of this Section, and notwithstanding the provisions of any law to the contrary, no grand jury, or official body, acting on behalf or under the authority of the attorney general or a district attorney, shall request, make arrangement for, or otherwise cause the service of a subpoena upon any person entitled to claim the exemption provided under Subsection B of this Section unless the attorney general or a district attorney, acting either alone or upon the direction of a grand jury, has certified in writing that the information sought by such subpoena:

(a) Is highly material and relevant;

(b) Bears directly on the guilt or innocence of the accused; and

(c) Is not obtainable from any alternative source.

(2) The written certification shall be made available to the subpoenaed person upon that person's request. If the certification required by this subsection is made, the provisions of subsection c (sic) of this section shall not apply.

E. Any order ordering disclosure pursuant to Subsection C of this Section or compelling compliance with a subpoena pursuant to Subsection D of this Section shall be appealable under Code of Civil Procedure Article 2083. In case of any such appeal, the qualified protection set forth in Subsection B of this Section shall remain in full force and effect during the pendency of such appeal.

MEDIA COVERAGE OF COURT PROCEEDINGS

Media coverage of court proceedings involving the use of electronic or photographic means has risen to an all time high. A primary example of this was the 1994 nationally televised "O. J. Simpson hearings." In Louisiana, the Code of Judicial Conduct,[171] Canon 3 and its Appendix, prescribe the guidelines for the broadcasting, televising, recording, and taking of photographs of public judicial proceedings and are set forth below:

Code of Judicial Conduct

Canon 3

A Judge Shall Perform the Duties of Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(9) Except as herein provided a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto at least during sessions of court or recesses between sessions.

A trial judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record for the court or for counsel, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive or ceremonial proceedings;

[171] The Code of Judicial Conduct, effective January 1, 1976, was adopted by the Supreme Court of Louisiana on March 5, 1975, to replace the Canons of Judicial Ethics adopted October 13, 1960.

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

An appellate court may permit broadcasting, televising, recording, and taking photographs of public judicial proceedings in the courtrooms of appellate courts in accordance with the guidelines set forth in an appendix to this Canon, subject, however, to the authority of each court and the presiding judge of each court or panel to (a) control the conduct of proceedings before the court, (b) ensure decorum and prevent distractions, and (c) ensure the fair administration of justice in the pending cause.

Appendix to Canon 3

Guidelines for Extended Media Coverage of Proceedings in Appellate Courtrooms

I. As used in these guidelines,

A. "Extended coverage" means any recording or broadcasting by the news media of court proceedings using television, radio, photographic or recording equipment.

B. "Presiding Judge" means the Chief Justice of the Supreme Court of Louisiana, the Chief Judge of a Court of Appeal, or the senior judge of a panel of which the Chief Justice or Chief Judge is not a member.

C. "Proceeding" means any hearing, motion, argument on appeal or other matter held in open court which the public is entitled to attend.

D. "Party" means a named litigant of record who has appeared in the case, and includes a party's counsel of record.

E. "Media" means legitimate news gathering and reporting agencies and their representatives.

F. "Court" means an appellate court and includes the Supreme Court of Louisiana and the Courts of Appeal of the several circuits.

II. All extended media coverage of court proceedings shall be governed by the principle that the decorum and dignity of the court, the courtroom and the

judicial process will be maintained at all times. Resolution of any question of coverage or procedure not specifically addressed in this section will be guided by this overriding principle.

III. A. The consent or approval of parties to extended coverage is not required. Parties may object to extended coverage by filing a written objection stating the reasons therefor with the clerk of court at least 10 days prior to the date of the proceedings. Upon objection by a party, or on the court's own motion, the presiding judge may prohibit or limit extended coverage of a proceeding.

B. Extended coverage shall not be permitted in any proceeding which by law must or may be held in private.

C. The decision of the presiding judge on any question of coverage shall be final and shall not be subject to review by any other court.

IV. Extended coverage of a proceeding shall not be permitted unless notice of intention to provide extended coverage of a proceeding is given by the media to the clerk of court at least 20 days in advance of the proceeding, provided that only reasonable notice shall be required for coverage of expedited proceedings not regularly calendared.

V. Extended coverage of court proceedings may be provided by news media agencies and their representatives. Film, videotape, photographs, and audio reproduction shall not be used for commercial or political advertising purposes. Such use of these materials will be regarded as an unlawful interference with the judicial process.

VI. Extended coverage of investitive or ceremonial proceedings at variance with these guidelines may be authorized by the court.

VII. When extended coverage is permitted, all media representatives shall have equally the right to provide coverage. When extended coverage is to be provided by more than one media representative, the media collectively should designate one representative to coordinate with the court all matters dealing with extended coverage. Any pooling arrangements among the media required by the limitations and restrictions on equipment and personnel contained in these guidelines shall be the sole responsibility of the media and must be made in advance of the court proceedings to be covered. Judges and court personnel will not mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. If pooling arrangements cannot be made or if there are unresolved media disputes, the presiding judge may deny extended coverage of proceedings.

VIII. A. No more than two portable television cameras, each operated by no more than one camera person and positioned as unobtrusively as possible at locations approved by the court, shall be permitted to be physically in the courtroom. Only television equipment which does not produce light or distracting sound will be permitted. Videotape recording equipment which is not a component part of a television

camera shall, whenever possible, be located in an area outside the courtroom.

B. *No artificial lighting device of any kind shall be employed in connection with the television camera. With the approval of the court, modifications and additions to existing courtroom lighting may be made provided such modifications or additions are installed and maintained without public expense. Multiple video/audio feeds may be permitted but must be provided by a video/audio distribution system, furnished by the media, located outside the courtroom.*

IX. A. *No more than one still photographer, using not more than two still cameras with not more than two lenses for each camera without flash or other artificial light, shall be permitted to be physically in the courtroom. Still cameras must not produce distracting sound and should produce no greater sound than the Leica M Series Rangefinder camera. Motorized film advance systems will not be permitted.*

B. *The photographer shall be positioned in a place designated by the presiding judge and remain in that area except when the proceeding is in recess. Changing of lenses or film will only be done during a recess.*

X. *Only one audio system for radio broadcast purposes will be permitted in the courtroom. Audio pickup should be made from existing audio systems in the courtroom whenever possible. If no technically suitable audio system exists in the courtroom, microphones and related wiring shall be permitted but must be unobtrusive and located in places designated in advance by the presiding judge. Multiple radio feeds rather than a pooling system may be permitted but must be provided by an audio distribution system, provided by the media, located outside the courtroom.*

XI. *When extended media coverage is authorized, individual journalists may bring tape recorders into the courtroom and use them to record proceedings so long as they do not cause any distraction. Journalists using tape recorders may sit at any place in the audience portion of the courtroom, but must keep their tape recorder on their person at all times. Changing of tape cassettes during proceedings is not permitted and should only be done during a recess.*

XII. *All camera and audio equipment must be in position at least 15 minutes before the start of the proceedings and can only be moved or removed after the proceedings are over or during a recess. Television camera persons and still photographers must remain in their designated area and are not permitted to move about the courtroom. Television cameras and radio broadcast equipment, once in position, may not be moved during the proceedings. Movement by television and still photographers should be held to a minimum and in no way should be distracting or call undue attention to the operators.*

XIII. *Camera and audio equipment authorized by these guidelines shall not be operated during a recess in a court proceeding. Extended coverage in the*

judicial area of a courthouse or other court facility is limited to proceedings in the courtroom in the presence of the presiding judge.

XIV. The dignity and decorum of the court must be maintained at all times during extended media coverage activities. Court customs, including appropriate dress, must be followed.

XV. The confidentiality of the attorney/client relationship must be protected. Therefore, there will be no audio recording, radio, television, or tape-recording, made or broadcast of any conference between attorneys and their clients, between co-counsel of a client, between counsel and the presiding judge when held at the bench, or of proceedings held in chambers. No parabolic microphones shall be used.

R.S. 13:4164 provides:

§4164. Television

A. Except as otherwise provided herein, no proceeding in any court in this state shall be televised or recorded by television equipment.

B. Each court in this state may provide by court rule for the broadcasting or recordation for broadcasting of proceedings for preservation of testimony or for use in a course of instruction in an accredited law school.

C. Unless otherwise provided by rule promulgated by the supreme court to allow a pilot project in a city court, a proceeding in court may be televised or recorded by television equipment in accordance with the terms of a motion and stipulation agreed to by all parties to the proceeding and approved by the judge hearing the matter.

The rules of the Civil District Court for the Parish of Orleans, Rule 19(i) provides the following with respect to video and electronic devices:

(i) …video recording equipment is not allowed beyond the weapons checkpoint unless authorized by a tenant judge or an elected official housed in the courthouse. Sound recording equipment is allowed to be brought into the courthouse, but may NOT be used to record any court proceedings or any conversations without the knowledge of all persons who are being recorded.

The Rules of the Nineteenth Judicial District Court, Parish of East Baton Rouge, Rule IV of the General Rules, provides the following with respect to the photographic or electronic recording of judicial proceedings for publication or otherwise:

Rule IV. Improper publicizing of judicial proceedings

Accordingly, the photographic or electronic recording of judicial proceedings for publication or otherwise, or the transmitting, broadcasting or televising of judicial proceedings, including Grand Jury sessions, whether instantaneously or delayed through the use of audio and/or visual recording methods, including the use of sound recordings, film or video tape, in any courtroom or in any Grand Jury Room, or in the hallways, or rooms adjacent thereto, or so close as to disturb the order or decorum thereof, either while the court or Grand Jury is in session, or at recesses

between sessions, or within fifteen minutes prior to or following a court or Grand Jury session, are prohibited; except that the closed circuit televising of courtroom proceedings may be permitted under court supervision for legal educational purposes and electronic recordings for the perpetuation of a record for the court may be permitted.

Proceedings, other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges in Open Court, may properly be photographed in or televised or broadcast from the courtroom with the permission and under the supervision of the court.