FLORIDA MEDIA LAW

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DONNA LEE DICKERSON

Florida Media Law

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Donna Lee Dickerson

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Florida Media Law

for my parents

Preface

In his book *Florida Law of the Press,* Kenneth Ballinger said there were no major trends in First Amendment interpretation in this state because no major Florida case involving freedom of the press had been heard by the U.S. Supreme Court. That was more than 30 years ago. By 1990, the Court had heard more than two dozen cases from Florida, representing almost every major news medium and every region of the state. These cases have been either landmarks such as *Adderley* v. *Florida* and *Miami Herald Publishing Co.* v. *Tornillo* or First Amendment stepping-stones such as *Pennekamp* v. *Florida, Time, Inc.* v. *Firestone,* and *Chandler* v. *Florida.* Florida cases have set national precedents in libel, privacy, cameras in the courtroom, and right of access to the media. At lower court levels, major precedents and important persuasive cases have dealt with privacy, libel, news gathering, and reporter's privilege. Additionally, the Florida Legislature has become a leader in opening up government meetings and records.

Florida Media Law provides the editor, news reporter, public official, attorney, or student of the media an exhaustive yet readable guide to the law of the press in this state. By analyzing statutes, the common law, provisions of the Florida and U.S. constitutions, and court decisions, this book helps the user understand and deal with current legal problems. Areas covered include prior restraint, libel, invasion of privacy, reporter's privilege, restrictive and exclusionary orders, news gathering, and

the Florida open meetings and open records laws. These areas are explored first by examining federal precedents, then by juxtaposing state cases and laws against the national trend.

There are many questions in communications law that have yet to be answered by the U.S. Supreme Court. When dealing with these questions, each state must find answers that fall within the broad mandates of the First Amendment. Such areas include intrusive news gathering, the use of tape recorders, restrictive access to court records, retraction laws, and access to records, meetings, and prisons.

Legal advice is expensive. For those media without access to a staff counsel, this book will explain current law. It can be used as a tool for self-protection, providing the legal precedents necessary for an editor to decide whether or not to pursue a certain course of action. Editors may use it to thwart those who harass with empty threats. It should be used by every reporter preparing sensitive material. The problems of libel, privacy, news gathering, and covering the courts are the same whether a newspaper reporter or a broadcast journalist is covering the story. The additional obligations of license requirements that fall on broadcasters should not overshadow their need to know basic communications law.

With access to a law library, a lawyer can use this book as a base for advice, research, and argument. The book should be especially valuable to the lawyer who only occasionally represents the media and thus does not make communications law a specialty.

The Judicial System

Both the federal and state judicial systems are hierarchical with many courts at the bottom and one court of final resort at the top. The systems are parallel; they only overlap when a case involving a constitutional issue is appealed from a state supreme court to the U.S. Supreme Court or when the ruling of a state court is considered by a federal district court to result in irreparable harm to the public or the parties involved.

At the foot of the federal system are the district courts, which are the only trial courts in the system. District courts handle diversity cases, federal question cases, and certain other enumerated cases. These courts are distributed across the country within state boundaries. States may contain from one to four federal district courts; Florida has four. The majority of district court cases are appealable to a U.S. circuit court of appeals. The country is divided geographically into 12 circuits. Eleven of the circuits are numbered; the twelfth is the U.S. Court of Appeals for the District of Columbia. The courts of appeals review lower court decisions and decisions of certain federal administrative agencies. Effective November 1981, Florida, Alabama, and Georgia were removed from the Fifth Circuit to create the new Eleventh Circuit, which sits in Atlanta. Cases filed from these three states before November 1, 1981, were heard by the "old" Fifth Court of Appeals.

A court of appeals decision may be appealed to the U.S. Supreme Court, which is the court of last resort in this country.

Appeals will only be accepted when a federal question—one involving the U.S. Constitution or a federal law or treaty—is at issue and when the resolution is of importance to more than just the parties involved.

The Florida state court system has three parts with numerous inferior courts on the bottom and a court of final resort at the top. The circuit court is the trial court. Thee are 20 judicial circuits in Florida with any number from 3 to 51 judges in each. The circuit courts have exclusive and original jurisdiction in all actions not covered by county and municipal courts. They also may hear appeals from inferior courts (municipal and county). Circuit court decisions as well as administrative actions are appealable to a district court of appeal. There are five district courts in the state. Three judges hear each case. The Florida Supreme Court, composed of seven justices, is the state's court of last resort and may hear appeals from circuit courts or district courts of appeal. Circuit and district judges and supreme court justices are nominated to their posts and retain their position by running against their own record every four years. Inferior court judges are elected in the same manner as other public officials.

The U.S. Supreme Court may review a decision of the Florida Supreme Court if the Florida court has declared a federal treaty or statute invalid. Similarly, it may review final decisions where the state supreme court has ruled that a state law is valid in face of challenges that it is repugnant to the Constitution, treaties, or laws of the United States.

The American judicial system is responsible for interpreting constitutions, statutes, treaties, and the common law. When a higher court hands down an interpretation, that interpretation must be followed by all lower courts within its jurisdiction. A precedent gives lower courts direction on how to decide similar cases. Precedents set by the U.S. Supreme Court must be followed by all state and federal courts. Decisions of a U.S. court of appeals must be followed by all federal district courts within that circuit. Likewise, when the Florida Supreme Court hands

down a decision, it must be followed by all state courts in Florida.

While one court's decision may not be a binding precedent on another court, it may be persuasive. In other words, a decision from one jurisdiction can be used to bolster or even form a legal argument in another jurisdiction. For example, while the Florida Supreme Court is not bound by decisions announced in Georgia, it may listen to arguments that incorporate Georgia precedents. The court may even adopt the Georgia precedent as its own if it is persuasive enough.

Media law is evolving so fast that it is no longer sufficient just to look at the precedents established in this state. Precedents are being set every day in courts all over this country dealing with problems Florida has not yet encountered but may in the near future. To help understand some of the changes that are occurring in other parts of the country, this volume uses numerous cases outside of Florida that may be perceived as persuasive precedents. What is the rule in a neighboring state this year may be the rule in Florida next year, because persuasive precedents were tactfully used by persuasive lawyers.

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Chapter One

The First Amendment in Florida

The First Amendment to the U.S. Constitution reads, "Congress shall make no law . . . abridging the freedom of speech, or of the press." This prohibition against the U.S. Congress presumably left to the states the power to regulate expression. However, many states also included in their own constitutions statements guaranteeing press freedom. Section Four of the Declaration of Rights of the Florida Constitution reads, "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right . . . no laws shall be passed to restrain or abridge the liberty of speech or of the press."

As long as sanctions against the press occurred after publication and not before, it was considered within the state's power to define how it would punish the abuse of that right. The result was state laws dealing with such press misconduct as libel and invasion of privacy. In 1925, the U.S. Supreme Court in *Gitlow* v. *New York* held through the Fourteenth Amendment that the prohibition of the First Amendment's order against Congress applied also to the states.[1] The Fourteenth Amendment forbids states to deprive any citizen of "life, liberty, or property, without due process of law." Of those liberties protected against state infringement, the liberties of speech and press are considered the most vital. By making the First Amendment applicable to the

1. 268 U.S. 652 (1925).

states, the Court was clearly protecting the freedom of the press against state laws or actions.

The *Gitlow* case created no major changes in state law. In fact, many states had already conferred greater privilege upon the press than even the federal courts had acknowledged. Other states, such as Florida, had not encountered enough press freedom cases to have established any major precedents contrary to the First Amendment.

The Extent of Permissible Regulation

The First Amendment is not absolute nor has it ever been considered so by a majority of the U.S. Supreme Court. A civilized society requires the promulgation of rules to maintain an ordered system, and some of those rules may limit expression in order to promote certain desired ends. As Chief Justice Frederick Vinson said in *Dennis* v. *United States,* "[T]he societal value of speech must, on occasion, be subordinated to other values and considerations."[2]

In 1931, the U.S. Supreme Court suggested in *Near* v. *Minnesota* that the three types of expression that fell clearly outside the boundaries of the First Amendment were obscenity, expression that threatens national security, and expression that results in a breach of peace or property.[3] The Supreme Court repeatedly has upheld the right of government and states to censor and regulate material that has fallen into these categories.[4] However, because our form of government depends upon freedom of expression, any restraint carries with it "a heavy presumption against its constitutional validity."[5] To protect freedom of expression from unjustified restraint, important guidelines have been developed for each of the proscribed categories.

Traditionally in the United States, these guidelines have been

2. 341 U.S. 494, 508 (1951).
3. 283 U.S. 697 (1931).
4. *See* Roth v. United States, 354 U.S. 476 (1957).
5. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

set in cases involving persons or organizations that hold opinions that run against the current popular belief. The 1920s and 1930s saw cases involving socialists, Marxists, and Jehovah's Witnesses; the 1940s and 1950s, Communist sympathizers; the 1960s, atheists and antiwar and civil rights demonstrators; and the late 1970s and 1980s, Nazis and the Ku Klux Klan. All of these groups have sought public access to challenge ideas and change opinion. Because such groups and others have been outside the mainstream of contemporary society, they have been the targets of arbitrary state and local laws that have impinged on their expression of opinion.[6] Hence, in our constitutional development, atheists have strengthened religious freedoms, Nazis have reaffirmed freedom of speech, Communists have given greater meaning to freedom of association, and pornographers have buttressed a sometimes sagging freedom of the press.

National Security

In cases involving national security, the Court has held that expression cannot be censored unless it creates a clear and present danger to national security. This danger, said the Court in *Brandenburg* v. *Ohio,* must be imminent; mere advocacy of an idea is not sufficient justification for censorship.[7] Rather, the expression must be likely to incite or produce immediate lawless action.

The bulk of First Amendment cases touching upon national security were litigated during the cold war years of the 1950s and 1960s. Fear of communism was rampant, stirred first by Senator Joseph McCarthy and later by the Cuban missile crisis. Florida was the source of only two major cases involving expression and national security; even those cases sat on the periphery of the issue as national security became synonymous with internal security. Congress as well as state legislatures established numerous investigative committees to detect Communist infiltration

6. *E.g.,* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

7. 395 U.S. 444 (1969); *see also* Yates v. United States, 354 U.S. 298 (1957).