

Chapter 11

REPORTER'S PRIVILEGE

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I. INTRODUCTION

Over the years, thirty-one states and the District of Columbia¹ have enacted reporter's shield laws. In addition, the courts in a number of other states have found that there is a state-law privilege for members of the media based on common-law, state constitutions, or both.² Missouri does not have a shield law, and no Missouri state court has yet expressly set out, in a published opinion, the common law privilege based upon state law.

In addition to common law rights arising out of state law, many courts recognize a qualified privilege based upon the First Amendment to the United States Constitution that protects certain information acquired during newsgathering at certain times. The First Amendment qualified privilege became widely recognized after the United States Supreme Court's opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Curiously, in *Branzburg v. Hayes*, discussed in more detail below, the Supreme Court held that the reporters had to testify before a grand jury before the privilege would apply. However, Justice Powell wrote a concurring opinion stating that, depending upon the situation, reporters could be entitled to have a subpoena quashed, even if the subpoena was issued by a grand jury. Justice Powell stated that courts should strike "a proper balance, between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."³

The courts that recognize the privilege do not apply it equally to all situations. In general, situations can be broken into several categories: (1) grand jury proceedings, (2) criminal trials, (3) civil trials in which the media is not a party, (4) libel/invasion of privacy cases, in which the media is a defendant, and (5) civil trials in which the media is a plaintiff. Each category can again be broken down by whether the information sought involves a confidential source. Each category will be discussed in turn.

II. GRAND JURIES

In 1972, the United States Supreme Court decided *Branzburg v. Hayes*.⁴ In *Branzburg v. Hayes*, the Supreme Court ruled that there is no absolute privilege on behalf of the media to refuse to testify in front of a grand jury. As a practical matter, the rights of the media are probably at their weakest when dealing with grand juries.

Branzburg was a staff reporter for the Louisville Courier-Journal who, in 1969, wrote a story about his observations of two young area residents synthesizing hashish from marijuana, from which they earned about \$5,000 in three weeks. Branzburg promised the two that he would not reveal their identities.⁵ Branzburg was subpoenaed by a grand jury, and he appeared, but refused to identify anyone he saw in possession of marijuana or making hashish.⁶ Branzburg later spent two weeks in the Frankfurt, Kentucky "drug scene" and wrote an article stating that he had observed some drug users smoking marijuana. Branzburg was again subpoenaed before a grand jury, and this time he moved to quash the subpoena.⁷

Consolidated with *Branzburg's* two cases were those of *Pappas* and *Caldwell*. Pappas was a reporter who spent several hours with the Black Panthers and refused to tell a grand jury what he learned on the grounds that, as a condition of entry, he could not reveal what he saw or heard.⁸ Caldwell had been assigned to cover the Black Panthers and was twice subpoenaed to testify about what he had seen and heard and learned from them. Caldwell, too, refused to testify.⁹

In *Branzburg*, the Supreme Court noted that news gathering qualifies "for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."¹⁰ But the Supreme Court held that the grand jury subpoenas did not invade that First Amendment protection because they did not involve intrusions upon speech or assembly, prior restraints or restrictions on what the press may publish, or an express or implied command that the press publish what it prefers to withhold.¹¹ According to the Supreme Court, because neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that was received in confidence, the media would be absolutely immune from subpoenas only if the press were entitled to special status.

However, the Supreme Court emphasized that the “publisher of a newspaper has no special immunity from the application of general laws.”¹² The Supreme Court, therefore, did not find it surprising “that the great weight of authority from state courts is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.”¹³ While ruling that the media cannot avoid all grand jury subpoenas, and that the reporters in the cases before the Supreme Court had to testify, the Supreme Court left open whether there could be situations in which a grand jury subpoena to a member of the media would be a violation of that person’s rights under the First Amendment.

In his concurring opinion, Justice Powell stated that newsmen summoned before a grand jury retain constitutional rights. And indeed, the Supreme Court’s main opinion notes that the outcome of the cases might have been different if the grand juries had forced “wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed.”¹⁴ The Supreme Court also claimed that “newsgathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.”¹⁵ According to Justice Powell, although a newsmen subpoenaed to a grand jury must attend the grand jury rather than ignore the subpoena, if the reporter then asserts a privilege, the court must balance the freedom of the press and the duty of all citizens to testify regarding criminal conduct.¹⁶

Federal courts generally have appeared deferential towards a journalist’s refusal to testify as to information learned during the course of their newsgathering and reporting activities in the past 30 years, largely as the result of a number of circuits following Justice Powell’s concurrence in *Branzburg* to establish a qualified reporter’s privilege. Although, a Seventh Circuit opinion by Judge Posner in 2003 demonstrated some hostility towards the privilege. In *McKevitt v. Pallasch*, 339 F.3d 530, a case involving a district court’s order that two reporters turn over witness interview tapes to a criminal defendant, Judge Posner criticized the widely-accepted notion that *Branzburg* created a special reporter’s privilege, writing, “a large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter’s privilege, although they do not agree on its scope. It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoena.”¹⁷

During 2004-2005, federal courts held several journalists in contempt of court for refusing to testify before grand juries. Judith Miller, a reporter for the *New York Times*, spent 85 days in jail after being held in contempt of court for refusing to testify about information received from a confidential source before a grand jury investigating the leak of a CIA operative’s identity by government officials. Matthew Cooper, a journalist from *Time* magazine, was also held in contempt of court for refusing to answer questions in the same investigation. Both Cooper and Miller lost at the appellate level, and the Supreme Court refused to hear the cases, allowing the contempt orders to stand. Cooper avoided jail time by agreeing to answer questions, and Miller was released from jail when she agreed to testify after the source released from her confidentiality promise. Five reporters from the *New York Times*, the *Los Angeles Times*, CNN, the Associated Press, and *The Washington Post* were held in contempt and fined for refusing to reveal their sources of information about former nuclear scientist Wen Ho Lee.¹⁸ Another reporter refused to name the source of an FBI videotape, and was sentenced to six months of home confinement.¹⁹ Despite these widely reported losses, the press still won a majority of privilege cases, with most courts recognizing a common-law privilege or its functional equivalent.²⁰

In Missouri, the existence and scope of a reporter’s privilege is not as developed, or as muddled, depending on your point of view, as it is in the federal courts. About ten years after *Branzburg v. Hayes*, a Missouri Court of Appeals in *CBS v. Campbell* required a reporter and television station to produce video “out takes” pursuant to a grand jury subpoena.²¹ In *CBS v. Campbell*, there was no confidential source involved. Portions of the videotaped interviews that the grand jury sought had already been broadcast. The only question was whether the grand jury was entitled to the unbroadcast portions. According to the Missouri Court of Appeals, most courts that had been faced with the issue had not found even a qualified privilege, and the courts that had found a qualified privilege had done so only in connection with a journalist’s confidential sources or information.²² The court in *CBS v. Campbell* did note that there appears to be “a greater willingness to provide protection for the news media in cases involving civil and criminal trials than in grand jury proceedings.”²³ Because the case involved a grand jury and no claim of confidential sources or information or any promises of confidentiality, and because there was no evidence that the grand jury had been impaneled or conducted other than in good faith or that its actions constituted impermissible harassment, the court ordered CBS to comply with the subpoena.²⁴ Since *CBS v. Campbell*, no Missouri court has had occasion to resolve the issues left open by the opinion in that case.

III. CRIMINAL TRIALS

Missouri courts have not issued a written opinion determining whether the media have a qualified privilege when subpoenaed to testify or produce information at a criminal trial. *CBS v. Campbell*, a case dealing with grand jury subpoenas,

stated that there is a “greater willingness to provide protection for the news media in cases involving civil and criminal trials than in grand jury proceedings.”²⁵ In the criminal trial context, courts have generally recognized that they must strike a balance between the reporter’s First Amendment rights and the criminal defendant’s Sixth Amendment right to a fair trial.²⁶ Most courts generally apply the same basic procedures, placing the initial burden to raise the privilege on the media, and then, once the privilege is raised, shifting the burden to the party seeking information from the press. Generally, in order to obtain information from the press, the party seeking the information must prove that the information is highly material and relevant, necessary or critical to the claim and unavailable from other sources.²⁷ However, before that burden must be met, the media must respond to the subpoena and raise the privilege.

Some courts have found that a criminal defendant’s Sixth Amendment right to a fair trial is as compelling as the requirement that a person testify before a grand jury. For instance, in *In re Farber*, the New Jersey Supreme Court required a reporter to produce to the court for in camera review documents and materials compiled during an investigation.²⁸ It was claimed that Farber’s investigation and reporting contributed to the indictment. The New Jersey Supreme Court held that the media’s duty to respond to a subpoena in a criminal case was at least as strong as its duty to do so in front of a grand jury. Relying on *Branzburg v. Hayes*, the New Jersey Supreme Court therefore held that in the criminal trial context, there is no First Amendment right to “remain silent with respect to confidential information and the sources of such information.”²⁹ The New Jersey Supreme Court held that forcing the reporter to produce the materials for in camera inspection did not invade the reporter’s privilege.³⁰ In other words, although most courts have recognized a qualified privilege, some do not believe that production to the court in camera invades the privilege and will require it if the balancing cannot be done based solely upon the argument of the parties.

IV. CIVIL TRIALS

A. Libel - Media As Defendant

In 1972, the Eighth Circuit was forced to decide whether a reporter could be compelled to reveal the names of informants in a libel suit against the reporter in which the plaintiff was required to prove actual malice. The court noted that it was “aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources.”³¹ However, the court determined that it was necessary to review the validity of the libel claim prior to determining whether to force the reporter to turn over the information or to testify.³² According to the Eighth Circuit, to compel a newsperson to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity.³³

The court determined that where there is a concrete demonstration that the identity of the defendant’s news source will lead to persuasive evidence on the issue of malice, a district court should not reach the merits of a defendant’s motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known.³⁴ Therefore, if, in pretrial discovery, the plaintiff uncovers substantial evidence that published assertions are inherently improbable, the reasons for compelling disclosure of the sources of the information become more compelling. Similarly, where discovery produces some factor which would support the conclusion that defendant in fact entertained serious doubts as to the truth of the matters published, identity and examination of the sources would seem to be in order.³⁵

Moreover, the Missouri Court of Appeals for the Western District in *State of Missouri, ex rel. Classic III Incorporated and Carl Danberry, relators, Pulitzer Publishing Company, and Missouri Press Association, amicus curiae v. Hon. William E. Eli*, 954 S.W. 2d 650, (W.D.Mo. 1997), held that when the facts demonstrate that a media defendant in a libel case promised confidentiality to sources and did not rely upon the sources in actually preparing the alleged libelous article, the media defendant is entitled to a “reporter’s shield privilege.”³⁶ While the Missouri Court of Appeals limited its holding to the facts before it, the court adopted the balancing test used by most courts, suggesting that the reporter’s privilege in Missouri may be broader than the limited facts addressed in *Classic III*. The court adopted the following balancing test: (1) whether the seeker of information “has exhausted alternative sources of information; (2) the importance of protecting confidentiality in the circumstances of the case; (3) whether the information sought is crucial to the plaintiff’s case; and (4) whether plaintiff has made a prima facie case of defamation.”³⁷ The court’s broad discussion of authorities not involving libel cases and not involving confidential sources supports arguments that the court was merely limiting its holding to the facts at hand, and that it was not intending to define the reaches of the privilege.

In 1979, the United States Supreme Court addressed the issue of compelling a defendant news media to turn over otherwise confidential information in a defamation case in which the plaintiff had to prove actual malice.³⁸ In that case, deposition questions were given to the producer of a program regarding his state of mind, specifically, his belief in the veracity of the informants and the details of conversations between the producer and the reporter regarding what should be in and what

should be out of the story.³⁹ The Supreme Court stated that in scores of libel cases, courts agreed to the general relevancy of the type of evidence that would be excluded by the reporter's privilege claimed in the case before it.⁴⁰ Given the fact that courts allow evidence of defendant's good faith belief in the truth of a story, the Court determined that it should allow inquiry into that belief.

B. Media As A Third Party

In *Continental Cablevision, Inc. v. Storer Broadcasting Company*, 583 F.Supp. 427 (E.D.Mo. 1984), a defendant in a libel suit indicated that some of the information that was allegedly libelous had come from a third-party reporter. The plaintiff served deposition upon written questions on the reporter, who moved to quash. The federal court in Missouri claimed that it is undisputed that Missouri state law does not have a common law reporter's privilege.⁴¹ The court determined that it would follow a three-part test based upon the First Amendment to determine whether the reporter should be compelled to testify. The three-part test required the plaintiff to prove (1) an effort was made to obtain the information from all other possible sources, (2) that the only access is through the journalist, and (3) that the information is crucial.⁴² The court noted that it is easier to meet this test in criminal, grand jury and libel cases in which the media is a defendant than it is in a civil case to which the reporter is not a party.⁴³ According to the Eastern District of Missouri court, the privilege extends to confidential and nonconfidential sources and materials, but that less need must be shown when the information is nonconfidential.⁴⁴

The final conclusion of the court was that there is a qualified privilege based upon the First Amendment that applies to both confidential and nonconfidential sources, materials or other information, where disclosure would impinge upon the ability of the media to gather and disseminate news.⁴⁵ To overcome the privilege, the seeker of the information must demonstrate that the testimony, material or information sought is relevant enough and otherwise unavailable; a balancing analysis is the benchmark.⁴⁶ The court did note that the reporter cannot ignore the discovery request altogether,⁴⁷ but must respond to the subpoena and raise the privilege issue. Once the privilege is claimed, the media must provide the court with particularized allegations or facts that support the claim of the privilege. For instance, if the media is asked to identify a source, the media must say by affidavit or otherwise under oath that there is an express or implied understanding of confidentiality. Additionally, if the media is asked about, the circumstances of a particular interview or the results of a particular investigation, the media must state with specificity how the answer sought might impinge upon the reporter's ability to gather news or otherwise implicitly reveal the identity of a confidential source.⁴⁸ Once a prima facie showing is made by the media that discovery will impinge upon the First Amendment, the burden shifts to the seeker of the information to show what efforts were made to obtain the information elsewhere and the extent to which the information is relevant.⁴⁹ If the court cannot strike the proper balance based upon the above information, the court is free to conduct an in camera review of the information sought.⁵⁰ Finally, the court noted that a statement by the media saying that there was a report and a confidential source simply is not enough.⁵¹

C. Media As Plaintiff

Although there are no Missouri cases addressing this issue, courts appear more likely to require disclosure of information when the reporter or media entity is the plaintiff, because the media entity voluntarily sought the use of the courts. Courts appear reluctant to allow the press to use the First Amendment as both a sword and a shield.

For instance in *Anderson v. Nixon*, 444 F. Supp. 1195 (D.D.C. 1978), Jack Anderson filed suit against 19 members of the Nixon administration alleging a conspiracy to deprive him of his rights as a journalist.⁵² Some of the issues concerned when Anderson learned of the alleged conspiracy, what his sources knew, what they told him and how his relationship with them was hurt.⁵³ However, Anderson refused to divulge the identity of the sources that told him of the overt acts he alleged the plaintiffs had engaged in.⁵⁴ The court ruled that the reporter was "not being obliged to disclose his sources" because he voluntarily filed the suit.⁵⁵ "Plaintiff's pledge of confidentiality would have remained unchallenged had he not invoked the aid of the court seeking compensatory and punitive damages based on his claim of conspiracy."⁵⁶

V. THE PRIVACY PROTECTION ACT

So far this chapter has dealt with subpoenas to media entities, but has not touched upon search warrants. Search warrants, whether by state or federal authorities, are covered by federal statute. The federal statute, called the Privacy Protection Act,⁵⁷ generally makes it unlawful for any government to issue search warrants to the news media, although there are some exceptions. The goal of the Privacy Protection Act is to require governments to use subpoenas to obtain information, because subpoenas provide the media with the opportunity to invoke the reporter's privilege and allow courts to balance the competing interests. Search warrants do not allow for such oversight.

The Privacy Protection Act has two main sections, one applying to "work product materials" (Section a), and one applying to "other documents" (Section b). Under Section a, it is "unlawful for a government officer or employee, in connection with

the investigation or prosecution of a criminal offense to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication,” with two exceptions.⁵⁸ The two exceptions are (1) when there is “probable cause to believe that the person possessing such materials has committed or is committing a crime to which the materials relate” or (2) “there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of or serious bodily injury to a human being.”⁵⁹ Exception one does not apply if the crime merely involves receipt, possession, communication or withholding such materials (unless they are national defense, classified or restricted data or child pornography).⁶⁰

Section b applies to documents other than work product materials and is the same as Section a, except there are four exceptions: the two exceptions for Section a, and two additional exceptions. The first additional exception applies when giving notice pursuant to a subpoena would result in destruction, alteration or concealment of the documents.⁶¹ The second additional exception applies when the materials have not been produced in response to a court order enforcing a subpoena and the appeal is finished and delay by further proceedings would threaten the interests of justice.

Finally, the Privacy Protection Act allows the media to sue the government for violations of the Act. In addition to actual damages, the Act allows for the recovery of attorneys’ fees.

Footnotes

1 The following states have enacted statutory reporter’s shield privileges of one sort or another. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina and Tennessee. In addition, the District of Columbia and Guam have a statutory reporter’s shield privilege.

2 The following states have recognize various forms of a reporter’s privilege: Connecticut, Idaho, Iowa, Maine, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. The strength, scope and source of the privilege varies among these states.

3 *Branzburg v. Hayes*, 408 U.S. at 710 (Powell, J., concurring).

4 408 U.S. 665.

5 *Id.* at 667-68.

6 *Id.* at 668.

7 *Id.* at 669.

8 *Id.* at 672.

9 *Id.* at 675-76.

10 *Id.* at 681.

11 *Id.*

12 *Id.* at 683.

13 *Id.* at 685.

14 *Id.* at 700.

15 *Id.* at 707.

16 *Id.* at 711 (Powell, J., concurring).

17 *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003).

18 *Lee v. Dep’t. of Justice*, 327 F.Supp 2d 26 (D.D.C. 2004).

19 *In re Special Proceedings*, 291 F.Supp 2d. 44 (D.R.I. 2003).

20 For a full discussion of cases, see Goodale, et. al., Reporter’s Privilege, Pract. Law Inst., Nov. 12, 2005.

21 *CBS, Inc. v. Campbell*, 645 S.W.2d 30 (Mo. Ct. App. 1982).

22 *Id.* at 32.

23 *Id.*

24 *Id.*

25 *Id.*

26 See, e.g., *U.S. ex rel. Vuitton ex fils S.A. v. Karen Bags, Inc.*, 600 F.Supp. 667 (S.D.N.Y. 1985).

27 *Id.* at 670.

28 *In re Farber*, 394 A.2d 330 (N.J.), cert. denied, 439 U.S. 997 (1978).

29 See *Id.* at 333. However, New Jersey had a shield law and the court ultimately held that once a reporter asserted the privilege, the criminal defendant could only overcome it by showing (1) the material sought is material and relevant to his or her defense; (2) the information sought cannot be obtained by any less intrusive means; and (3) disclosure of the information is essential to the public interest and there is a legitimate need to see and otherwise use it.

30 *U.S. ex rel. Vuitton ex fils S.A.*, 600 F.Supp. at 670.

31 *Cervantes v. Time, Inc.*, 464 F.2d 986, 992 (8th Cir. 1972).

32 *Id.* at 993.

33 *Id.* at 993 n.10.

34 *Id.* at 994.

35 *Id.* at 994.

36 *Classic III*, 954 S.W.2d at 651.

37 *Id.* at 655.

38 *Herbert v. Lando*, 441 U.S. 153 (1979).

39 *Id.* at 157.

40 *Id.* at 165, n.15
41 *Continental Cablevision, Inc.*, 583 F.Supp. at 432.
42 *Id.* at 433.
43 *Id.*
44 *Id.*
45 *Id.* at 435.
46 *Id.*
47 *Id.*
48 *Id.* at 436.
49 *Id.*
50 *Id.*
51 *Id.*
52 444 F. Supp. at 1197.
53 *Id.* at 1199.
54 *Id.*
55 *Id.*
56 *Id.*
57 42 U.S.C. § 2000aa(a).
58 *Id.* at (a).
59 *Id.*
60 *Id.*
61 *Id.* at (b).