COMMITTEE REPORT

# Pre-Publication/Pre-Broadcast Committee Report:

## Media Liability for Breach of Promise to Maintain a Source's Confidentiality After *Cohen v. Cowles Media Co.*

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## Pre-Publication/Pre-Broadcast Committee

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## I. INTRODUCTION

The First Amendment is not offended when generally applicable laws that do not target or single out the press are enforced against the press with *incidental* effects on its ability to gather and report the news, and when such laws are not used to avoid the strict requirements for establishing a libel or defamation claim. In *Cohen v. Cowles Media Co. dba Minneapolis Star & Tribune Co.,* 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) ("*Cowles Media*"), the United States Supreme Court, reciting the general principle that media are subject to laws of general application, held that the First Amendment of the United States Constitution does not prohibit a plaintiff from recovering damages for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. The specific "generally applicable law" at issue was a state promissory estoppel cause of action. The Minnesota State supreme court had considered, but rejected as "inappropriate for the particular circumstances," plaintiff's breach of contract claim.

Since this decision, courts in over l00 cases across the country have cited *Cowles Media* in written opinions. However, most of these have not involved contract-based disputes between the press and its sources; rather they merely have cited it for the proposition that laws of general applicability do not offend the First Amendment when their effect on media is incidental. The less than half-dozen citing cases that have arisen in the breach of contract or promissory estoppel context do not seriously question the general principle of *Cowles Media*.

Additionally, a misrepresentation claim against a media defendant was upheld in *Veilleux v. National Broadcasting Co., Inc*., 206 F.3d 92 (1st Cir. 2000).

## II. MEDIA LIABILITY UNDER STATE LAW FOR BREACH OF CONTRACT/PROMISE OF CONFIDENTIALITY

The courts in the earliest (1991) and most recent (2003) post-*Cowles Media* decisions, from New York and Ohio, respectively, acknowledge the principles that laws of general applicability, including contract-based or promissory estoppel rules, can apply to a reporter-source confidentiality arrangement, but they reach opposite results based on expressed extra-relationship public policy factors driven by the specific factual contexts that gave rise to the promises.

In New York, which upheld the contract-based claims and modest damages award, the source was an AIDS patient and the public policy was the state health law favoring confidentiality for patients in order to encourage testing and treatment.

In Ohio, a federal court sitting in diversity found that even if the media had identified the source, the public policy promoting cooperation by crime witnesses with law enforcement would excuse any contract claim, particularly where the source broke the law to obtain the information.[1]

[1] Philosophically, production of source-identifying data and media cooperation with law enforcement raise troubling and complicating issues in contexts divorced, perhaps, from the factual situation of this decision (*Ventura*, *infra*), but these are best reserved for discussion in another paper.

### A. New York: Contract Liability Upheld (1991).

Following immediately on the *Cowles Media* decision, *Anderson v. Strong Memorial Hospital*, 151 Misc.2d 353, 573 N.Y.S.2d 828 (Sup. Ct. Monroe Co. 1991) was decided.[2] The plaintiff, Anderson, sued a hospital, his physician and a newspaper based on the publication of his photograph in a news article regarding AIDS research and treatment. The newspaper photographer and reporter had given express assurance to Anderson and the hospital that he would not be recognizable in the photograph. When the photograph appeared, however, he was identifiable in it. Although Anderson's direct action against the newspaper was dismissed, the plaintiff's estate was awarded damages against the hospital and physician based on breach of the patient-physician privilege. In a third-party action by the hospital and doctor against the newspaper, the court held that the newspaper's promise to them, which they had conveyed to plaintiff, was a proximate cause of the damages sustained by the hospital and physician, and the newspaper was held liable for contribution.

The court relied on *Cowles Media* to reject the press' First Amendment defense and determined there was no reasonable policy basis to invoke the often broader guarantees of free speech and press contained in the New York State Constitution, there being no strong policy interest in knowing the identity of someone who is afflicted with HIV or AIDS. The court found the converse true--New York's public policy, as codified in the AIDS anonymity statute, requires strict confidentiality.[3]

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[2] In *Doe v. American Broadcasting Co.*, 152 A.D.2d 482, 543 N.Y.S.2d 455 (1st Dep't 1989) *appeal dismissed*, 74 N.Y.2d 945, 549 N.E.2d 480 (1989), a case preceding *Cowles Media*, the court affirmed denial of a defense motion for summary judgment as to a cause of action for breach of contract where plaintiffs, following assurances of anonymity, participated in a special report on rape in which they were identifiable.

[3] 151 Misc.2d 353,356, 573 N.Y.S.2d 828, 831 (N.Y. Sup. Ct. 1991).

### B. Ohio: Contract Performance Excused (2003).

By contrast, the most recent decision, *Ventura v. The Cincinnati Enquirer,* 246 F.Supp.2d 876, 31 Media L. Rep. 1513 (S.D. Ohio 2003),[4] invoked public policy to disable a breach of contract claim. In essence, the court held that even if the elements of breach of contract had been pleaded, failure to perform would be excused because of the countervailing public policy of encouraging disclosure by witnesses to a crime.

The *Ventura* action arose out of the media entity's alleged identification of plaintiff as a confidential source of information with regard to a series of articles in The Cincinnati Enquirer ("Enquirer") regarding the business activities of Chiquita Brands, International, Inc. ("Chiquita"). The plaintiff, a former Chiquita employee, provided reporters Michael Gallagher and Cameron McWhirter with voice mail codes that Gallagher used to access voice mailboxes of Chiquita employees. Plaintiff was indicted and convicted on criminal charges for securing voice mail information. Although it is undisputed that the reporters promised plaintiff they would not disclose his identity, they concealed the fact that both were secretly taping many of their conversations with him and lied when asked if they were doing so.

Following publication of the first story, Chiquita provided the Enquirer with information demonstrating illegal entries into its voice mail system and threatened civil litigation. The Enquirer settled with Chiquita for monetary damages and a public apology.

A grand jury subpoenaed the Enquirer and Gallagher directing production of materials in connection with the investigation and methods of information gathering for the Chiquita story. The Enquirer terminated the employment of Gallagher, the reporter who entered the voice mail system. In response to the subpoena, the Enquirer and Gallagher asserted the Ohio Shield Law to protect materials

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[4] MLRC member and Pre-Publication/Pre-Broadcast Committee Co-Chair, John C. Greiner (Graydon, Head & Ritchy), who litigated this case, consulted on this presentation, and generously reviewed and commented on earlier drafts of the balance of this paper, as well.

identifying confidential sources. Pursuant to the subpoena, the Enquirer produced a post-it note providing the plaintiff's initials and telephone numbers. Gallagher had removed source identifying materials from the Enquirer office and brought them to his home. He subsequently gave the materials to his attorney and they were sealed pursuant to court order. As part of Gallagher's plea agreement the sealed evidence, including audio tapes of phone conversations with plaintiff in which he gave the voice mail codes to one of the reporters, was released to the grand jury and special prosecutor. Plaintiff was convicted of four misdemeanors, suspended from the practice of law for 90 days and lost his partnership and employment with his law firm.

Plaintiff brought an action against the Enquirer and Gannett Company, Inc. including claims for breach of contract, promissory estoppel and promissory fraud, the essence of which are that (1) defendants breached a contract and/or promise not to disclose plaintiff's identity as a confidential source by providing identifying materials to the prosecutor's office; (2) defendants breached a duty owed to plaintiff by failing to take steps to prevent Gallagher from disclosing plaintiff's identity to the special prosecutor; and (3) defendants breached a duty owed to plaintiff by negligently revealing plaintiff's identity to the special prosecutor and grand jury by providing them with a post-it note with his initials and telephone numbers written on it.

The court granted defendants summary judgment on all claims on the basis of Ohio law, which provides an absolute privilege, granting immunity from civil liability, for disclosure of information relating to the reporting and prosecution of a crime to the prosecutor's office or grand jury. The court refused to make a distinction between statements provided to a grand jury and documentary or other evidence supplied by an informant or produced pursuant to a subpoena. The court found this conclusion consistent with Ohio's doctrine of promissory estoppel- - enforcement of the promise would not avoid injustice. To the contrary, it would undermine the public policy underlying the absolute privilege. By refusing to recognize the breach of contract claim, the reporting of criminal activity would be

encouraged and criminal investigation aided.

The court dismissed the vicarious liability claims due to the absence of an agency relationship subsequent to Gallagher's termination. With regard to direct liability, the court held that a reasonable jury could not find that defendants breached their promise of confidentiality by providing the post-it note. While the post-it note, in conjunction with other evidence, may have helped link plaintiff to the crime, it fell short of revealing him as a source.

### C. Other Post--*Cowles Media* Decisions.

While not articulating larger "public policy" analyses, the several cases decided in the period between these New York and Ohio decisions suggest a judicial attitude that is uncomfortable imposing contract principles on the reporter-source relationship. However, the available opinions are too few to provide a reliable indication of a general judicial policy or a trend in the law.

It is fair to say only that the right facts will support at least *prima facie* statement of cognizable promise-based causes of action, though some states prefer to relegate such theories to the equitable realm rather than according them the status of legal contract claims. And we are aware of no officially reported decisions imposing high damages awards--or any damages at all, for that matter, since the 1991 *Anderson* case--on media defendants in the promissory context.[5]

Three other published decisions were rendered in the period between *Anderson* and *Ventura*.

#### *1. Minnesota--Again*

*Ruzicka v. Conde Nast Publs.*, 999 F.2d 1319, 21 Media L. Rep. 1821 (8th Cir. 1993), was decided under the law of Minnesota, the state that spawned the *Cowles Media* decision. The district court rejected the plaintiff's promissory estoppel claim, but the Circuit Court reversed. In *Ruzicka v. The Conde Nast Publications, Inc.*, 939 F.2d 578 Media L. Rep. 1048 (8th Cir. 1991), plaintiff

[5] If MLRC members are aware of unreported or unofficially reported decisions (or settlements), we would appreciate your advice for the Center's files and for future reference by members.

consented, on the condition that she not be identified or identifiable, to be interviewed by a magazine for an article regarding sexual abuse by therapists. The article contained Ruzicka's account of sexual abuse by her therapist, referring to her by a pseudonym but revealing that she was a Minneapolis attorney and indicating, among other things, that she was a member of the state task force that helped write a 1985 law criminalizing sexual exploitation by therapists.[6] Plaintiff alleged that her interviewer violated the promise of confidentiality by referring to her service on the task force, which made her absolutely identifiable because she was the only female on the task force's public report list of participants. The writer contended that she had only promised to do some "masking" of identity. The district court held that the promise was too indefinite as a matter of law to be sustained. Like the courts in *Ventura*, *supra*, and *Steele*, *infra*, the district court's decision seemed to strain to reject plaintiff's claim.

The circuit court vacated the district court's decision finding it erred in holding the promise indefinite as a matter of law. It held that the promise made by the writer was sufficiently specific: "the plain meaning of the promise was that [the writer] would mask the identity of the plaintiff in such a way that a reasonable reader could not identify Jill Ruzicka by factual description."[7] The circuit court held that the elements of promissory estoppel are fact dependent and can not be summarily decided as a question of law.

### *2. The District of Columbia*

In *Steele v. Isikoff*, 130 F.Supp.2d 23, 28 Media L. Rep. 2630 (D.D.C. 2000), the plaintiff brought suit against a reporter, news magazine and newspaper based on alleged failure to honor an agreement not to reveal her as a source of information with regard to an alleged sexual encounter between President Clinton and a White House employee ("Willey"). After gaining the promise of

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[6] 939 F.2d 578, 580, 19 Media L. Rep. 1048 (8th Cir. 1991).

[7] 999 F.2d 1319,1321, 21 Media L. Rep. 1821 (8th Cir. 1993).

confidentiality from the reporter, plaintiff fabricated a connection to the Clinton-Willey saga, at Willey's request, which served to corroborate her allegations. At her initial meeting with the reporter she substantiated Willey's allegations. Before the story was printed, plaintiff again spoke to the reporter with an assurance that the conversation would be "off the record." It was at this time that she admitted that she had no knowledge of an encounter between Willey and the President.

Plaintiff's claims against defendants included breach of contract, promissory estoppel and breach of fiduciary duty/duty of confidentiality. Plaintiff alleged that the reporter breached two separate contracts formed when the reporter, on two separate occasions, promised her confidentiality in exchange for the information she provided to him.

The court held that plaintiff's suit could not be completely dismissed on First Amendment grounds,[8] but held that each individual cause of action merited dismissal for failure to state a cognizable claim. The court applied the law of the forum, the District of Columbia, to all claims except promissory estoppel, to which it applied Virginia law.[9] Virginia does not recognize the doctrine of promissory estoppel so the claim was dismissed.

As to plaintiff's breach of contract claims the court, citing the Minnesota Supreme Court decision in *Cowles Media* as "...the only published decision from any jurisdiction that addresses this question," concluded that contract law was not the appropriate vehicle for enforcement of a reporter's promise of confidentiality. "We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract."[10] With regard to her breach of duty/duty of confidence claim, the court noted that no court in any jurisdiction

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[8] The defendants had argued that the claims were a subterfuge to avoid the constitutional proof requirement of a defamation action. The court, construing the pleadings in the light most favorable to the plaintiff, disagreed: it dismissed so much of the claims as sought reputational damages; then it addressed each cause as to non-reputational damages.

[9] The application of Virginia law was the result of a choice of law analysis. The parties had agreed that the laws of the competing forums were indistinguishable except insofar as the promissary estoppel cause was concerned. An interest analysis led the court to conclude Virginia had the greater interest in applying its law on promissory estoppel.

[10] 130 F.Supp.2d 23 at 31, 2000 U.S. Dist. LEXIS 20501, 28 Media L. Rep. 2630 (D.D.C. 2000).

had ever recognized the existence of a fiduciary or confidential relationship between a reporter and his or her source. The court held that even ignoring the absence of precedent, the scope and duration of the relationship was too limited to give rise to such a duty.

### *3. Florida*

A mid-level Florida appellate court addressed the issue in *Doe v. Univision Television Group, Inc. dba WLTV-Channel 23*, 717 So.2d 63, 26 Media L. Rep. 2342 (Fla. Dist. Ct. App. 3d Dist. 1998), *rehearing denied* (Oct. 1, 1998). Plaintiff agreed to be interviewed for a news program designed to alert the public to the potential danger of obtaining low cost plastic surgery in Costa Rica, on the condition that her identity be concealed. The television station agreed to obscure plaintiff's face and electronically disguise her voice. During the broadcast, plaintiff's voice was not disguised and the special effect designed to conceal her face was improper and she was visually recognizable.

Plaintiff's suit alleged various torts, plus breach of contract and promissory estoppel. The trial court dismissed them all, but the appellate court reversed. On the promise-based causes, it noted that promissory estoppel and contract are "alternatives for each other," 717 So.2d at 65, the former applied to avoid injustice when the contract requisites have not been established.

The court expressly interpreted *Cowles Media* as holding that "...a breach of promise of confidentiality to a source does not create a contract but is actionable under the doctrine of promissory estoppel." *Id.*

In the context of a motion on the pleadings, the court held:

> "the contract and promissory estoppel claims are before us after having been dismissed at the pleading stage. For present purposes we need only hold that plaintiff may plead the contract and promissory estoppel claims in the alternative. We remand for reinstatement of those claims...."

*Id.*

Thus, this Florida court appears to recognize that a promise-based claim can be stated in the jurisdiction at the pleading stage, but fails to instruct on the merits.

## III. MISREPRESENTATION FOR INDUCING PARTICIPATION

*Veilleux, supra,* upheld a misrepresentation claim against a media defendant. Here, plaintiffs charged that defendants secured the participation of plaintiffs, a truck driver (Kennedy) and his employer (Veilleux), by assuring them that the broadcast would portray the "positive" side of the trucking industry and would not include coverage of Parents Against Tired Truckers (PATT), which was formed because of a recent fatal accident. Instead of positively countering the negative publicity truckers received from the accident, however, the broadcast focused on the dangers posed by tired truck drivers. It showed Kennedy discussing his failed drug test and admitting that he falsified his Department of Transportation driving logs to make it appear that while on the road he rests more frequently than he actually does. Additionally, the broadcast included footage of PATT, some of which had been recorded prior to the asserted representations by defendants.

Plaintiffs sued for defamation, misrepresentation, invasion of privacy and negligent infliction of emotional distress. The district court granted defendants summary judgment on Kennedy's misrepresentation claim because he was unable to demonstrate pecuniary damages.[11] The remaining causes of action went to trial and a jury awarded Veilleux $150,000 on his misrepresentation claim. Defendants appealed.

The First Circuit acknowledged that the "Supreme Court has not yet addressed the relevant constitutional implications of a common law misrepresentation action against a media defendant."[12] It recognized that First Amendment protection adheres to other common law theories,[13] and that such theories cannot invoked to avoid the strict requirements for establishing a libel or defamation claim.

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[11] *Veilleux v. National Broadcasting Co., Inc.*, 8 F.Supp.2d 23, 26 Media L. Rep. 1929 (Dist. Ct. ME 1998).

[12] *Veilleux*, 206 F.3d 92, 126.

[13] For example, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), the court prevented the plaintiff from avoiding the strict requirements of defamation by alleging intentional infliction of emotional distress instead.

Citing *Cowles Media*, it held that misrepresentation under Maine common law is a cause of general applicability that the media is subject to.

Defendants' promise not to include PATT in the broadcast was found actionable because it was factually specific, but the promise of a positive broadcast was too vague to be actionable. The First Circuit reversed and remanded Veilleux's award because damages should only have been awarded for the PATT misrepresentation.

*Veilleux* has not been cited for its ruling that a misrepresentation claim is sustainable against a media defendant.[14] The Fourth Circuit dismissed a misrepresentation claim in *Doe 2 v. The Associated Press*, 331 F.3d 417 (4th Cir. 2003). However, the claim in *Doe 2* was based on the publication of plaintiff's name in violation of a judicial order to the contrary. Plaintiff alleged that by not objecting to the judge's order, the reporter consented to comply. The court found no sufficiently specific misrepresentation about the story.[15]

## V. PRACTICE COMMENTS

### A. Cautionary Introduction.[16]

In *Glengarry Glen Ross* one of Mamet's characters says to the other, "I'm not saying anything, I'm just telling you." That line pretty much captures the mindset and unstable expectations of many sources when they speak to reporters. Even the terms "off the record" and "on background" have different meanings for different people in different settings. They have far less settled meanings than sources and journalists often assume they bear. And even if they have an agreed meaning for some

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[14] It has been cited for proposition that a plaintiff may obtain pecuniary damages under generally applicable laws (*Crawl v. Cox Enterprises*, 2001 WL 849222 (Ga. St. Ct. 2001)) and in support of misrepresentation claims not involving the media. *See, e.g. Kearney v. J.P. King Auction Co., Inc.*, 265 F.3d 27 (1st Cir. 2001).

[15] Note: Members who may be aware of unpublished decisions (or decisions we may have overlooked) or settlements (or other extrajudicial resolutions) of sources' contract or misrepresentation claims are asked to advise us so that the MLRC can issue updates as appropriate.

[16] Thanks to David Korzenik of MLRC member firm Miller & Korzenik LLP for this Introduction.

people, they certainly will not cover most of the varied problems that can later arise between sources, reporters and the people they are talking about.

At that sensitive moment when a reporter begins an interview with a source, it would be unusual and very impractical to expect the conversation to turn to the question: "Now what exactly do you mean by the term "off the record?" The very question could chill the conversation just at the moment that the journalist seeks to induce a dialogue – or, even better, a long monologue. To make it more complicated, a journalist will typically never know how a source will be used until *after* the conversation unfolds or, in some cases, *after* the investigation of the story approaches its conclusion.

The source agreement problem presents itself in innumerable aspects, both conceivable and inconceivable, and it has as many possible solutions, depending on the kind of source that the journalist is approaching. And all of this makes guidelines--or, as we offer below, practice "comments"--extremely elusive and, perhaps, even troublesome. Indeed and as always, unique circumstances will dictate a tailored prudent solution, and departure from the following "comments" may be as appropriate in one scenario as following them might be in a different scenario.

There are many circumstances and characteristics of sources that often can only be managed in the first instance by the reporter as his or her relationship with the source develops and as the significance of the source and his or her behavior becomes increasingly clear.

*Guidelines Are Problematic*: There are no guidelines of general application for this area of reporting. Source agreement issues need to be discussed in "Newsroom Seminars" (and reporters in newsroom seminars seem most eager to discuss these types of issues, more than any other); but written guidelines ultimately may be more unhelpful than helpful, and they could be downright counterproductive if followed slavishly and without regard to the unique features of a given situation.

*Written Agreements*: Written agreements can be nice in special cases, but they normally have

no realistic place in the process of reporting.

*The First Question in Pre-Publication Review*: When doing pre-publication review of a significant story, one should always inquire about any agreements or understandings with sources. And reporters can, after the interview, go back to sources and stabilize their understandings. This may be most appropriate when a source is likely to be challenged or attacked by third parties later and when the reporter needs to be confident about his/her ability to keep the source steady in the face of that attack.

*Tape Recording*: The correct use of tape recording can also remedy many of the problems presented by these different kinds of sources. And appropriate instructions to newsroom staff on when recording is permissible will be important so that reporters can get maximum protection from taping.

Ultimately, it is unlikely that newsrooms will be able to manage these types of problems via guidelines and written agreements.

**B. The Practice Comments.**

The following is akin to a wish list of practices that could reduce the likelihood of promissory estoppel or breach of promise claims. They are intended more in the way of discussion starters with news personnel than a list of dos and don'ts.

1. News organizations need to understand that when reporters enter into *quid pro quo* relationships with sources, they risk such legal consequences as suits for promissory estoppel.

2. News organizations may wish to impose a requirement that a reporter should not enter into a *quid pro quo* relationship with a source that could have contract-based or other legal repercussions without the express prior informed approval of an editor or other news executive. And the news organization may wish to have the reporter make a contemporaneous record (consistent with *both* the editor's and the reporter's understandings as communicated to the source) of the arrangement, detailing precisely what was promised.

3. Although this usually will not be feasible because of the nature of the reporter/source

relationship and the source's interests, consider whether the precise nature of the arrangement can be reduced to a writing signed by both parties. In the more likely event that a signed agreement cannot be obtained, the news organization should consider whether the arrangement can be recorded by the reporter, prior to the start of the interview with the source, on either audio or videotape.

4. The scope of the promise should be as carefully limited as possible.

5. The source should be advised that, while he or she will not affirmatively be identified in the publication, the news organization cannot and does not promise that other information in the story, including information provided by the source, cannot or will not be used by others to identify the source, narrow the array of possible sources, or otherwise lead to identification.

6. A reporter should, wherever possible, discuss precisely what it is that he or she and his or her news organization is willing and able to do. For example, will it disguise the voice of the source on tape? Or will it only agree not to identify the name of the source? There are many permutations of what a news organization can do to protect a source's identity. It may be wise for the organization to discuss among editorial staff what is possible, if for no other reason than to alert the reporters on these matters. A reporter who thinks that simply failing to name the source is what he or she has agreed to do, when the source thinks the agreement is to mask all identifying and personal information, may not realize the disconnect with the source in this important respect.

7. Consider whether to expressly advise the course that, if it turns out the source has not been truthful (or has otherwise violated laws or obligations in obtaining or disclosing the information), the news organization's promise is unenforceable and, beyond that, there is no duty to maintain confidentiality. Again, simply making news people aware of this potential issue would be sensitizing

and of value. At the same time, it may be worthwhile for news organizations to have policies that deal with this 'just-in-case' possibility, policies with which their news people are familiar.

8. The organization should discuss with the source whether in the event of a defamation or other suit over the article she will assist in and cooperate with the legal defense, including reconsideration of her confidential status. Use of the source and publication of the report can then be informed by and balanced with these considerations.

9. Each news organization may wish to discuss within the editorial staff how it will enforce any promise actually made. For example, if it is a broadcast organization, the specifics of the arrangement may need to be conveyed to the editor, and to anyone else who is likely to be necessary in implementing the promise(s), and systems may need to exist to ensure that promises follow the outtakes into the archives, etc.