COMMITTEE REPORT

THE REPORTER'S PRIVILEGE:

CAN IT BE PRESERVED IN A CIVIL LAWSUIT AGAINST THE PRESS?

Prepared by the Pre-Trial Committee
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APRIL 2008

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ACKNOWLEDGMENTS

The Pre-Trial Committee Co-Chairs, Michael L. Raiff and John P. Borger, wish to thank all the members of the Pre-Trial Committee for their assistance with this project. We wish to acknowledge in particular those members who bore responsibility for researching and drafting this paper.

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Executive Summary

- Individual journalists and their media employers often find it difficult to protect confidential sources and newsgathering materials while defending themselves from civil lawsuits arising from their news reports. This paper examines this dilemma and offers suggestions and observations for lawyers defending media clients in civil cases involving confidential sources and newsgathering materials.

- Courts in forty-nine states and the majority of federal circuits recognize some form of the reporter's privilege, based on either the United States Constitution or legislative enactments. Thirty-four states and the District of Columbia offer some form of statutory protection, or "shield law," for media reporters. Many of these jurisdictions offer a qualified privilege against the disclosure of confidential sources while the rest offer an absolute privilege against disclosure. Most states without a shield law—and courts in some of the jurisdictions that do—have recognized a constitutional or common law privilege.

- Although the majority of states do not differentiate significantly between how they apply the reporter's privilege generally and how they apply it when the media is a defendant, the countervailing interests of the defamation plaintiff in states with a qualified privilege weigh more heavily in favor of disclosure in the balancing test.

- Most state and federal courts apply a qualified privilege, which generally involves consideration of four factors: (1) the relevance of the information sought, (2) the availability of alternative sources for the information, (3) the importance of confidentiality, and (4) whether, in a defamation case, a plaintiff can make a *prima facie* showing that allegedly defamatory statements are false.

- Courts and shield laws offer much greater protection to confidential sources and unpublished material that would reveal the identity of the confidential source than to nonconfidential newsgathering information. Although some courts have applied the reporters' privilege to nonconfidential, unpublished information, such information does not enjoy much (or any) protection in most jurisdictions.

- The status of the plaintiff as a public or private figure can affect the privilege determination. The heightened proof requirements for a public figure (*i.e.*, the requirement of proof of actual malice) factor into the privilege balancing test, and courts are more willing to pierce the reporter's privilege when a plaintiff is required to prove actual malice. There are fewer cases involving private figure plaintiffs, but it appears that courts are less inclined to pierce the privilege when there is no actual malice requirement.

- A reporter's refusal to disclose confidential information or unpublished materials may result in significant legal consequences, particularly when the media is a defendant in the case. Civil penalties available for reporters who refuse to disclose confidential source information include: (1) precluding evidence of the existence of the confidential source or information, (2) a presumption of actual malice or a shift in the burden of proof, or (3) "death penalty sanctions" (*i.e.*, directed verdict, declaratory judgment, or summary

judgment), which are rare and generally applied only after other penalties are unsuccessful in compelling disclosure.

- In evaluating whether to choose between a penalty and disclosure, certain considerations are important. First, criminal contempt is infrequently used as a penalty for nondisclosure in the defamation context, but may be used to sanction reporters who refuse to reveal sources in other civil matters when there is a compelling interest at stake. Second, although voluntary disclosure of confidential sources can expose the media to suits, compulsory disclosure in the context of litigation is not actionable. Third, nonconfidential sources are not protected by the law, but disclosure can chill newsgathering efforts and color testimony. Finally, when determining whether to disclose nonconfidential source information, the balance usually comes out in favor of disclosure. Media counsel should take precautions, however, to ensure that the production of this information is not deemed a waiver of the privilege for other materials by, for example, including a "non-waiver" provision into a protective order.

- Media companies and reporters need to think carefully about whether to grant confidentiality to a source and whether to use information given by a confidential source. Media companies also should consider what kind of confidential source and document retention policies they should implement.

- In determining whether to encourage a confidential source to reveal herself, the media and its lawyers should consider: (1) whether the defense would be helped or harmed if the source does not reveal herself, (2) whether the source would be harmed by revealing herself, (3) whether the source is consenting out of duress, (4) whether the source lied in connection with the story, (5) whether the source has waived confidentiality, and (6) the nature of the source's relationship with the reporter.

- When counsel is made aware of a potential or pending lawsuit, counsel should immediately begin to obtain information from the reporter about, among other things, the confidential source, the promise of confidentiality, the reporter's relationship with the source, and potential problems with disclosure. Counsel should consider an early deposition of a third party who can corroborate the confidential source's information, and search for alternative bases for the reporter's belief in the truth of the information at issue. Media defendants should be cautious of directly or indirectly revealing the identity of the confidential source during discovery.

- Because any case involving the press will likely implicate the law of several states, it is important for media counsel to consider which state's law governs the question of privilege. There is no clear-cut rule for determining which state's law governs the reporter's privilege, and therefore, the unique facts of each case and the laws of the relevant states will be important to the choice of law analysis.

Introduction

Courts and legislatures in the United States afford inconsistent and confusing protection to journalists and the information they gather in the course of investigating and reporting the news. Although journalists have occupied a special position in America since before the Revolution,[1] the United States Supreme Court's 1972 decision in *Branzburg v. Hayes*[2] established that reporters were not immune from testifying before federal grand juries. That case opened a vast debate on when, where, and how reporters could refuse to reveal sources and information to different tribunals.[3] State and federal courts have recognized constitutional or common-law privileges for reporters and some state legislatures have enacted statutes to shield reporters from the reach of courts and other official bodies, but the types of protection vary considerably as to who can invoke the protection, what information is protected, and exceptions to the protection.

The treatment of journalists who reported on events leading up to the Valerie Plame investigation has focused attention on the need to protect journalists' confidential sources and confidential newsgathering materials in the context of a criminal proceeding. The protections afforded journalists in the context of a civil suit against the media have not received the same level of scrutiny. Individual journalists and their media employers often find it difficult to protect confidential sources and newsgathering materials while defending themselves from civil

[1] The first recorded example of a journalist's refusal to identify his sources occurred during the 1735 trial of Peter Zenger for seditious libel. Zenger was indicted for refusing to identify authors of anti-crown columns in his paper, but a jury acquitted him of all charges. *See* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 18 (2d ed. 1972).

[2] 408 U.S. 665 (1972).

[3] In *Branzburg*, the Supreme Court considered three cases in which journalists refused to testify before grand juries regarding individuals and events under government investigation. Justice White's majority opinion held that the reporters lacked a constitutional right to refuse to testify before those bodies, but a concurrence by Justice Powell and a dissent by Justice Stewart (joined by Justices Brennan and Marshall) suggested that the Constitution and public policy justify some qualified protection for journalists attempting to keep sources and information confidential. Justice Douglas's separate dissent favored "blanket protection" for confidential sources.

lawsuits arising from their news reports. This paper examines this dilemma and offers suggestions and observations for lawyers defending media clients in civil cases involving confidential sources and newsgathering materials.

Rather than a detailed survey of the law in every state and at the federal level, this paper provides a broad overview of the protections that might be afforded to journalists as parties in civil actions and identifies strategic considerations that arise in such cases. Parts I and II of this paper examine the varying protections journalists enjoy for confidential sources and materials and how those protections apply in a case against the media. Part III discusses how the various privileges can be pierced in a civil case against the media. Part IV addresses potential consequences for withholding privileged information in a civil case. Finally, Part V identifies common strategic issues and suggests ways to deal with those issues. Of course, attorneys defending the press in civil cases involving confidential sources or materials will need to go beyond the bounds of this paper to consult the specific laws applicable to the action, to determine the available privileges or protections, and to assess the risks of asserting those privileges on the unique facts of the case.

I. The Five Ws of the Reporter's Privilege

A. The Reporter's Privilege: Where Does It Come From?

Courts in forty-nine states and the majority of federal circuits recognize some form of reporter's privilege, based either on the United States Constitution or legislative enactments.[4]

[4] *See generally* C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, NEWSGATHERING AND THE LAW § 18.02–18.03 (3d ed. 2005); THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REPORTER'S PRIVILEGE COMPENDIUM (2007), http://www.rcfp.org/privilege/index.php (last visited Feb. 7, 2008); Maherin Gangat, *Reporter's Privilege Issues: Continuing Attacks in 2006,* MLRC BULLETIN, December 2006, at 1; Theodore J. Boutrous, Jr., Thomas H. Dupree, Jr., and Michael Dore, *The Four Myths Surrounding the Common Law Reporter's Privilege,* MLRC BULLETIN, December 2006, at 51.

1. The Federal View

Most federal courts, combining Justice Powell's concurring opinion and Justice Stewart's dissent, have interpreted *Branzburg* to provide some level of qualified privilege based on the First Amendment. All federal circuit courts of appeal except the Seventh Circuit recognize a qualified privilege based on the First Amendment in some contexts. Five circuits have recognized such a qualified privilege for confidential sources and information sought in criminal cases.[5] Ten circuits recognize a qualified privilege in civil cases.[6]

Journalists also have sought protection under federal procedural rules, with limited success. Rule 26(c) of the Federal Rules of Civil Procedure protects individuals when revealing the information would harass, oppress, or unduly burden them. In *Herbert v. Lando*, the Supreme Court suggested that this rule could afford protection to journalists, and some district courts have utilized this theory to quash subpoenas of reporters.[7] Rule 17(c) of the Federal Rules of Criminal Procedure protects individuals from subpoenas when the court determines that "compliance would be unreasonable or oppressive," and at least one court of appeals suggested this might provide protection for journalists.[8] In *United States v. Libby*, however, a district court

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[5] The First, Third, Ninth, Eleventh, and D.C. Circuits recognize this privilege. *See United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2006); *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976).

[6] *See Price v. Time, Inc.*, 416 F.3d 1327, 1345–46 (11th Cir. 2005); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 599 (1st Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–37 (10th Cir. 1977); *Cervantes v. Time, Inc.*, 464 F.2d 986, 996 (8th Cir. 1972). Although the Seventh Circuit refused to recognize a First Amendment privilege for journalists, it has suggested that federal common law or subpoena procedure could offer protection to journalists. *See McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003).

[7] 441 U.S. 153, 177 (1979). The two clearest instances of this use of the Federal Rules of Civil Procedure to protect journalists took place in district courts within the Seventh Circuit after *McKevitt*. *See Hobley v. Burge*, 223 F.R.D. 499, 504–05 (N.D. Ill. 2004) (quashing a subpoena for a reporter's notes under FRCP 45(c)(3)(B)(1) as protected, confidential research); *Bond v. Utreras*, 2006 WL 1806387, at *5–6 (N.D. Ill. June 27, 2006) (quashing a subpoena for a reporter's notes on grounds that impact on his ability to use local sources created undue burden).

[8] *See Cuthbertson*, 630 F.2d at 144.

restated the prevailing view that the criminal subpoena requirements of specificity, relevance, and admissibility alone were sufficient to safeguard the work of reporters.[9]

Commentators and some federal courts also have suggested that a common law reporter's privilege should exist.[10] Rule 501 of the Federal Rules of Evidence authorizes federal courts to develop testimonial privileges by interpreting common law principles based on public policy and experience. No court of appeals has expressly adopted such a privilege, but none has expressly rejected the possibility.[11]

Finally, Congress has considered but not enacted legislation that would establish a federal Shield Law.[12]

2. The State View

At the state level, thirty-four states and the District of Columbia offer some form of statutory protection or "Shield Law" for media reporters.[13] Maryland passed the first such law in

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[9] 432 F. Supp. 2d 26, 47–48 (D.D.C. 2006). *But see In re Grand Jury Subpoenas to Mark Fainaru-Wada & Lance Williams*, 438 F. Supp.2d 1111, 1121 (N.D. Cal. 2006) (suggesting, in the BALCO steroids case, that if the journalists provided evidence of a likely harm to a specific professional relationship, the court would consider quashing a subpoena under the "unreasonable and oppressive" standard of Rule 17(c)).

[10] *See*, *e.g.*, *Riley*, 612 F.2d at 714.

[11] *See, e.g.*, *New York Times Co. v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006) (finding that a reporter's privilege might be appropriate under Rule 501 of the Federal Rules of Evidence and *Jaffee v. Redmond*, 518 U.S 1 (1996), but declining to decide the issue under the facts at issue).

[12] The "Free Flow of Information Act of 2007," the latest iteration, passed in the full House on October 16, 2007 and a similar version was approved by the Senate Judiciary Committee on October 4, 2007. The prospects for the bill becoming law remain uncertain in the 110th Congress. The current version of the bill would apply to both civil and criminal proceedings and offer a qualified privilege. Journalists would be protected from disclosing sources or information unless the requesting party (i) exhausts all alternative sources; and establishes that (ii) the information is critical and (iii) non-disclosure is contrary to the public interest enough to overcome the preference for maintaining the free flow of information. A special provision allows for requests that could reveal information necessary to prevent imminent harm to national security, significant bodily injury or death to an individual, or violations of certain federal laws. Information on federal Shield Law legislation was gathered from the following sources: RESOURCES ON REPORTER'S PRIVILEGE, MEDIA LAW RESOURCE CENTER, http://www.medialaw.org/Content/NavigationMenu/Hot_Topics/Reporters_Privilege/Reporters_Privilege.htm (last visited Apr. 22, 2008); THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SPECIAL REPORT: REPORTERS AND FEDERAL SUBPOENAS (2007), http://www.rcfp.org/shields_and_subpoenas.html (last visited Feb. 7, 2008); Editorial, *Finally, A Set of Rules for America's Watchdogs,* OAKLAND TRIBUNE, June 20, 2007.

[13] *See generally* STATE SHIELD LAW STATUTES, MEDIA LAW RESOURCE CENTER http://www.medialaw.org/Template.cfm?Section=State_Shield_Law_Statutes (last visited Apr. 22, 2008); C.

1896 following the imprisonment of a *Baltimore Sun* reporter who refused to reveal a source to a grand jury. By 1972, the year of the *Branzburg* decision, fourteen states had enacted shield statutes. Nine more enacted them in the immediate wake of *Branzburg*. Washington State and Utah passed or implemented Shield Laws in the Spring of 2007[14] and January 2008, respectively.[15]

About half of the thirty-five Shield Law jurisdictions provide an expressly qualified privilege, compelling disclosure under certain circumstances, while the rest of the jurisdictions offer some degree of absolute privilege.[16] Several of these jurisdictions, however, have clear exceptions to absolute protection either within the statute or through constitutional or common law. The primary exception to the privilege arises in criminal cases, when a defendant's Sixth Amendment rights are implicated. Other jurisdictions limit the applicability of the privilege based upon a variety of factors, including whether the information sought is unpublished or confidential.

Courts in states with Shield Laws sometimes recognize a constitutional or common law reporter's privilege as well. Some assert that their Shield Law reflects the limits of a First Amendment privilege. Other states have utilized a First Amendment privilege to extend constitutional protection beyond those enactments. Courts in a few Shield Law states have held that the First Amendment privilege is limited and that their statutes offer greater protection.[17]

THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, NEWSGATHERING AND THE LAW § 17.02 (3d ed. 2005); THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REPORTER'S PRIVILEGE COMPENDIUM (2007), http://www.rcfp.org/privilege/index.php (last visited Mar. 5, 2008).

[14] *See* www.cjr.org/behind_the_news/a_new_shield_law_in__washington.php (last visited Mar. 5, 2008).

[15] *See* www.rcfp.org/sidebar/index.php (last visited Mar. 5, 2008).

[16] Throughout this paper, "reporter's privilege" is generally used to refer to all forms of protection for journalists who are asked to reveal confidential sources and newsgathering materials, including Shield Laws, common law privileges, and constitutional privileges.

[17] *See, e.g., Price*, 416 F.3d 1343.

Finally, a few shield states have not had occasion to rule on whether a constitutional privilege exists because they rely wholly on their legislative enactments.[18]

Most of the states that do not have a Shield Law tend to recognize some form of common law or constitutional privilege, often looking to *Branzburg* and its progeny for guidance.[19] Only Wyoming courts have not yet addressed the issue. As Wyoming also lacks a Shield Law, it stands as the only state that in no way recognizes any form of reporter's privilege.[20] A small group of states, including Texas, Massachusetts, and Idaho, vacillate on their support of the privilege and maintain contrary rulings.[21]

B. The Reporter's Privilege: When Does It Apply?

Journalists receive protection in three broad categories of proceedings: criminal matters, civil matters where the journalist is not a party, and civil matters where the press stands as a party to the litigation.[22] Most state Shield Laws specifically identify the proceedings to which their protections apply. Some shield states and the non-shield states that acknowledge protection for reporters have allowed courts to define when and how the privilege applies on a case-by-case basis. In federal courts, the applicability of the reporter's privilege and the degree of protection in a particular case are entirely judge-made.

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[18] *See, e.g., Diaz v. Eighth Judicial District Court*, 993 P.2d 50, 59 n.7 (Nev. 2000).

[19] *See, e.g.*, *Winegard v. Oxberger*, 258 N.W.2d 847, 849–50 (Iowa 1977).

[20] It is unclear whether Hawaii recognizes any form of reporter's privilege. In *Appeal of Goodfader*, 367 P.2d 472 (Haw. 1961), the Hawaii Supreme Court rejected the existence of a privilege for confidential sources, but *Goodfader* is a pre-*Branzburg* decision, and at least one Hawaii trial court has held since then that there is a qualified reporter's privilege under some circumstances. *See, e.g.*, *Belanger v. City and County of Honolulu*, Civil No. 93–4047–10 (Haw. Ct. App. May 4, 1994).

[21] *Compare, e.g.*, *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 685 (Tex. App. 1991) (holding that trial court abused its discretion by ordering disclosure of the reporter's confidential sources; plaintiffs failed to overcome qualified reporter's privilege) *with State ex rel. Healey v. McMeans*, 884 S.W.2d 772, 775 (Tex. Crim. App. 1994) (stating that "recognition of a 'newsman's privilege' is clearly contrary to well-settled law").

[22] *See generally* C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, NEWSGATHERING AND THE LAW §§ 17.02, 18.02 (3d ed. 2005).

Criminal proceedings present numerous issues that affect the reporter's privilege. Grand juries, which operate under required secrecy, are viewed as playing a vital investigatory role that demands participation from all persons except those who hold a strong privilege. Thus, non-shield states and federal courts, following *Branzburg*, have tended to deny the reporter's privilege before grand juries,[23] and reporters face jail time for contempt for refusing to comply with court orders to reveal their sources or unpublished materials.[24]

Nevertheless, courts continue to grant a qualified privilege to reporters called to testify at criminal trials. These courts, however, recognize the tension between assertions of the privilege and criminal defendants' Sixth Amendment right to confront all adverse witnesses.[25] Courts give more weight to the criminal defendant's—or prosecutor's—need for the information and are

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[23] For example, after the September 11, 2001 attacks on the World Trade Center, the Pentagon, and near Shanksville, Pennsylvania, the federal government intensified investigations into the funding of terrorist activities by organizations raising money in the United States. *See New York Times v. Gonzales*, 459 F.3d 160, 162 (2d. Cir. 2006). Reporters for *The New York Times* learned of the government's plans to freeze the assets or search the premises of two foundations. *Id*. The reporters called the foundations on the eve of the government's actions. *Id*. The government began a grand jury investigation to determine who had disclosed its plans to the *Times*, and threatened to obtain the reporters' phone records. *Id*. The *Times* sought a declaratory judgment that its reporters' phone records were shielded by the reporter's privilege. *Id*. The Second Circuit found that the qualified privilege had been overcome and noted the federal grand jury's "serious law enforcement concerns as the goal of its investigation." *Id*. at 170. The court continued:

> The government has a compelling interest in maintaining the secrecy of imminent asset freezes or searches lest the targets be informed and spirit away those assets or incriminating evidence. At stake in the present investigation, therefore, is not only the important principle of secrecy regarding imminent law enforcement actions but also a set of facts – informing the targets of those impending actions – that may constitute a serious obstruction of justice.

Id.

[24] *See e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005) (after losing her appeal and after her continued refusal to testify to a grand jury, *New York Times* reporter Judith Miller spent 85 days in jail); *In Re Grand Jury Subpoena, Joshua Wolf*, 201 F.App'x 430, 2006 U.S. App. LEXIS 23315 (9th Cir. 2006) (following the Ninth Circuit's affirmance of a lower court's civil contempt order, freelance video blogger Wolf spent 226 days in jail for refusing to comply with a federal prosecutor's subpoena seeking his unaired video of a protest in San Francisco in which a police car was allegedly damaged); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004) (following the First Circuit's affirmance of a civil contempt order, James Taricani, investigative reporter for Providence, R.I., television station WJAR, spent four months in home confinement for refusing to reveal the confidential source of a videotape showing a Providence official taking a bribe from an FBI informant). *See also Hatfill v. Mukasey*, --- F.Supp.2d ----, No. Civ. A. 03-1793-RBW, 2008 WL 623586, (D.D.C. Mar. 07, 2008) (holding USA Today reporter in contempt for failure to disclose confidential source).

[25] *See United States v. Criden*, 633 F.2d 346, 353 (3d Cir. 1980).

more likely to find that the reporter's privilege is overcome in criminal cases.[26] Similarly, many state laws expressly provide journalists less protection in the criminal context than in the civil context.[27] Some statutes that appear to provide broad protection in all proceedings have been limited in the criminal context by state courts.[28]

In civil cases, courts often find a lesser public interest in revealing a journalist's confidential sources and will allow the privilege to prevail.[29] The highest degree of protection is available in civil cases in which journalists play a third-party role. When the press itself is a party, particularly in defamation actions against reporters and news outlets, the privilege is sometimes weakened slightly but is typically still stronger than in the criminal context. A small group of state shield statutes expressly provide different protection when the press is a party.[30] In states where the statute does not differentiate, some courts limit the scope of the privilege in cases involving press defendants, while most apply full protection.[31] Non-Shield Law states vary, but most apply any recognized reporter's privilege less vigorously in defamation cases. Federal courts have tended to scrutinize the competing interest more closely, but still uphold the qualified privilege in civil cases involving a media defendant.[32]

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[26] *See, e.g.*, *Gonzales*, 459 F.3d at 170 (finding that no privilege applied in part because the reporters, as recipients of the leaked information about the federal government's plans, were the only witnesses other than the confidential sources).

[27] *See, e.g.*, R.I. GEN. LAWS § 9-19.1-3.

[28] *See, e.g.*, *Delaney v. Superior Court*, 789 P.2d 934, 946 (Cal. 1990).

[29] *See infra*, Section III.B.1.

[30] *See, e.g.*, GA. CODE ANN. § 24-9-30.

[31] *See Sands v. News Am. Publ'g Inc.*, 560 N.Y.S.2d 416, 421 (N.Y. App. Div. 1990) (holding that Shield Law is limited in defamation actions); *Maressa v. New Jersey Monthly*, 445 A.2d 376, 379 (N.J. 1982) (holding that Shield Law protection is absolute in all civil contexts).

[32] *See, e.g.*, *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986).

C. The Reporter's Privilege: What Information Does It Protect?

Court decisions and state Shield Laws establishing a reporter's privilege provide a spectrum of protection for journalistic information. Generally, courts and Shield Laws grant the greatest deference to confidential sources or unpublished materials that would identify confidential sources.[33]

In some jurisdictions, the privilege attaches regardless of whether the source's information was relied on in the published article[34] or whether the source requests anonymity.[35] Most states, however, give less protection to non-confidential newsgathering information.[36] For example, in *McKevitt v. Pallasch*,[37] a criminal defendant in Ireland asked a federal district court in Illinois to order a group of journalists to disclose tape-recorded interviews with a key witness for the prosecution.[38] The district court granted the request, and the journalists asked the Seventh Circuit to stay the trial court's ruling.[39] The Seventh Circuit denied the stay, explaining, "There is no conceivable interest in confidentiality in the present case. Not only is the source . . . known, but he has indicated that he does not object to the disclosure of the tapes of his

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[33] *See infra*, Section III.B.

[34] *State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 658 (Mo. Ct. App. 1997).

[35] *Gastman v. North Jersey Newspapers, Co.*, 603 A.2d 111, 114 (N.J. Super. Ct. App. Div. 1992) (holding that "the privilege may be asserted whether or not the source of information requests or is promised anonymity").

[36] *See, e.g.*, *Cont'l Cablevision, Inc. v. Storer Broad. Co.*, 583 F. Supp. 427, 434 (E.D. Mo. 1984) (indicating that although the reporter's privilege may apply to both confidential and non-confidential information, "a lesser showing of need and materiality may be required in the situation where discovery of non-confidential material is sought than where the identity of confidential sources is sought"); *Classic III*, 954 S.W.2d at 656 n.5 ("[T]he identity of [confidential] sources is the type of information which courts are most willing to protect.").

[37] 339 F.3d 530 (7th Cir. 2003).

[38] *Id*. at 531.

[39] *Id*.

interviews . . . ."[40] Nevertheless, non-confidential information is sometimes afforded protection, depending on the facts of the case at hand.[41]

D. The Reporter's Privilege: Why Is It Necessary?

In *Branzburg v. Hayes*, the media argued that forcing reporters to reveal their confidential sources would undermine the free flow of the press.[42] The Court held that requiring a journalist to appear and testify before a grand jury does not curtail the First Amendment guarantee of freedom of the press, reasoning that the public interest in news about crime gathered from confidential sources does not surmount the public interest in prosecuting crimes reported to the press.[43] Nevertheless, the *Branzburg* Court acknowledged that the First Amendment does provide some privileges and "without some protection for seeking out the news, freedom of the press could be eviscerated."[44] It is that goal of protecting the fundamental constitutional tenet of a free press that motivates courts and legislative bodies to create or recognize privileges—albeit qualified ones—for reporters who are summoned to give testimony or produce sensitive information in court proceedings.

E. The Reporter's Privilege: Who May Invoke It?

The privilege is the journalist's to hold or to waive.[45] But who is a journalist? In 2001, aspiring book author Vanessa Leggett unsuccessfully invoked the privilege against a federal grand jury subpoena for her testimony to a grand jury investigating a Houston murder. The

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[40] *Id*. at 532.

[41] *See, e.g.*, *Steaks Unlimited, Inc. v Deaner*, 80 F.R.D. 140, 141 (W.D. Penn. 1978); *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Ct.*, 761 P.2d 849, 853 (Nev. 1988) (holding that Shield Law applies to both sources and information), *overruled on other grounds by Diaz v. Eighth Judicial Dist. Ct.*, 993 P.2d 50, 58 (Nev. 2000).

[42] 408 U.S. 665, 679–81 (1972).

[43] *Id.* at 690.

[44] *Id.* at 681.

[45] *See, e.g.*, *Ventura v. Cincinnati Enquirer*, 396 F.3d 784, 792–93 (6th Cir. 2005) (noting that a journalist, not a source, holds the privilege under the Ohio Shield Law).

subpoena also sought disclosure of her research materials. In upholding a civil contempt order against Leggett, the Fifth Circuit found that no reporter's privilege applied in the context of federal grand jury proceedings.[46] The court did not decide whether Leggett qualified for a reporter's privilege, noting only that Leggett was "a virtually unpublished free-lance writer, operating without an employer or a contract for publication."[47] However, it indicated that if it had to decide whether Leggett was a journalist, it would examine whether she intended at the time she gathered the material to disseminate it to the public.[48] The Second, Third, and Ninth Circuits have formulated similar tests to determine whether a person claiming a reporter's privilege is a journalist.[49]

Some state Shield Laws define a journalist as someone who is employed by or connected with mainstream media.[50] A proposed federal Shield Law might extend the privilege to bloggers, as long as they are "gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing . . . news or information that concerns local, national or international events or other matters of public interest for dissemination to the public."[51] Under the current state of the law, courts are reluctant to apply the privilege to bloggers.[52]

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[46] Reporters Committee for Freedom of the Press, *Appellate Panel Finds No Reporter's Privilege Exists Before Grand Juries,* NEWS MEDIA UPDATE, Aug. 18, 2001, http://www.rcfp.org/news/2001/0818inregr.html. The case, *In re Grand Jury Subpoena to Vanessa Leggett*, Cause No. 01-20745, is sealed. For more information, see http://www.rcfp.org/leggett.html.

[47] *Id*.

[48] *Id*.

[49] *See, e.g.*, *In re Madden*, 151 F.3d 125, 129–30 (3d Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993); *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

[50] *See, e.g.*, OHIO REV. CODE ANN. §§ 2739.04 (broadcasters), 2739.12 (newspapers) (requiring that a person be "engaged in the work of, or connected with, or employed by" a television station, newspaper or press association for the purpose of newsgathering); KY. REV. STAT. ANN. § 421.100 (applicable to a person who is engaged, employed or connected with a newspaper or radio or television station).

[51] H.R. 2102, 110th Cong. (2007); S. 1267, 110th Cong. (2007).

[52] *See*, *e.g.*, *In Re Grand Jury Subpoena, Joshua Wolf*, 201 F.App'x 460, 433, n.1 (9th Cir. 2006).

II. Application of the Reporter's Privilege in Cases Against Media Defendants

When the media is a defendant in civil litigation, rather than merely the target of a subpoena, and invokes the reporter's privilege, courts must "reconcile the conflict between [a] Plaintiff's legitimate interest in attempting to meet his burden of proof . . . in a defamation action and the equally legitimate interest of Defendants in protecting the confidentiality of their sources and thereby presumably promoting the viability of a free press."[53] The courts reason that "[w]hen the journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure."[54] How courts balance these considerations varies greatly among the jurisdictions recognizing a privilege.

A. Basic Approaches of the States

The approaches of various jurisdictions in applying a reporter's privilege or Shield Law in cases against the media fall into three categories: (1) the privilege applies the same in cases

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[53] *Newton v. NBC*, 109 F.R.D. 522, 526 (D. Nev. 1985).

[54] *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981); *see also Aequitron Med., Inc. v. CBS*, 1995 WL 406157, at *3 (S.D.N.Y. July 10, 1995) ("[T]he privilege is not as strictly enforced when the news entity is a defendant in a defamation or libel case."); *Dangerfield v. Star Editorial, Inc.*, 817 F. Supp. 833, 836 (C.D. Cal. 1993) ("In the context of a civil libel action brought by a public figure plaintiff, courts have noted that the balance shifts somewhat more in favor of disclosure when the privilege is asserted by a media defendant."), *mandamus denied by Star Editorial, Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 7 F.3d 856 (9th Cir. 1993); *Newton*, 109 F.R.D. at 527 (piercing the Shield Law is "particularly prevalent in libel actions" where the journalist claiming the privilege is a party defendant); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1468 (Cal. Ct. App. 2006) ("Discovery is peculiarly appropriate when the reporter is a defendant in a libel action, because successful assertion of the privilege may shield the reporter himself from a liability he ought to bear. . . . [The plaintiff's] burden may be impossible to carry if the statements can only be attributed to an unidentified source whose reliability cannot be evaluated."); *News-Journal Corp. v. Carson*, 741 So. 2d 572, 576 (Fla. Dist. Ct. App. 1999) ("[W]here the media and newspaper involved are defendants in the libel suit, upholding the privilege is also less compelling."); *Commonwealth v. Bowden*, 838 A.2d 740, 755 (Pa. 2003) ("The status of the media member as a party or non-party witness is relevant to the balancing inquiry [and] . . . it should be more difficult to compel production from a non-party witness who has no personal interest in the matter."); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995) ("Disclosure [of a reporter's confidential information] is more appropriate if the news person is a party (not merely a witness), particularly in libel cases."). *But see Rogers v. Home Shopping Network, Inc.*, 73 F. Supp. 2d 1140, 1143–44 (C.D. Cal. 1999) (stating that the fact that the media defendant "is a party should simply place the case in the category of those in which compelled disclosure may be appropriate" and observing that this factor should be subordinate to the other four factors).

against the media as in other contexts; (2) in certain situations, the privilege does not apply in cases against the media; and (3) courts are silent on the issue.

1. No Difference in Application

The majority of states do not differentiate significantly between how they apply the reporter's privilege generally and how they apply the privilege when the media is a defendant in a case.[55] The specific applications depend on each state's interpretation of the privilege.

(a) States With An Absolute Privilege

Some states, usually by statute, grant reporters an absolute privilege against disclosure of various types of information. Courts in these states often hold that this absolute privilege applies even when the media is a defendant in a libel case. For example, one court interpreting Nevada's absolute privilege law[56] came to the "inescapable conclusion" that media defendants "need not disclose the names or addresses of the confidential sources upon which said Defendants relied in preparing the broadcast news segments at issue in this case."[57] It reasoned that, because "the [shield] statute provides no exception for libel suits from its coverage," the court could not require the media defendants to reveal their sources even if this hindered the plaintiff's ability to prove actual malice.[58]

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[55] *See, e.g.*, Nevada, New York, Montana, Pennsylvania, Arkansas, Virginia, Colorado, Missouri, South Dakota, Texas, California, District of Columbia, Florida, Indiana, Kentucky, New Mexico, Pennsylvania, Washington, Montana, New Jersey, Ohio, Delaware, Maryland, Idaho, and Massachusetts. This group includes both states with statutory Shield Laws and states with a privilege deriving from the common law or the First Amendment.

[56] NEV. REV. STAT. § 49.275.

[57] *Newton*, 109 F.R.D. at 529.

[58] *Id.* at 529–30; *see also Steaks Unlimited, Inc. v. Deaner*, 80 F.R.D. 140, 141 (W.D. Penn. 1978) (holding that a television station in a defamation action was not required to turn over tapes because the state's shield statute clearly protected such information); *First United Fund Ltd. v. Am. Banker, Inc.*, 485 N.Y.S.2d 489, 494 (N.Y. Sup. Ct. 1985) (denying plaintiff's motion to compel media defendants in libel action to answer interrogatories that would require defendants to disclose confidential information or information about unidentified sources in an article because an "all-inclusive Shield Law" protects such information).

(b) States With A Qualified Privilege

Most states protect the interests of plaintiffs in libel cases by applying some type of qualified privilege or balancing test. Whether derived from statute, common law, or the First Amendment, a qualified privilege generally seeks to balance the respective interests of the parties by requiring the plaintiff to make a certain showing before compelling disclosure from a defendant. Because these tests take the plaintiff's interests into account, courts generally do not apply privilege laws differently to media defendants than they do to other defendants.

Nevertheless, these balancing tests vary substantially from one jurisdiction to the next. Some jurisdictions tip the balance in favor of the media, requiring disclosure only if the media acted in bad faith.[59] Most jurisdictions, however, have delineated multi-factor tests that require courts to consider: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information."[60] Some courts are required to make a preliminary determination of falsity as part of the balancing test.[61]

2. No Privilege in Certain Situations in Cases Against the Media

In a few states, statutes explicitly dictate how privilege laws should be applied to defendants in defamation cases.[62] These statutes serve as an exception to general privilege rules that otherwise would apply and essentially fall into two categories: (1) the privilege is

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[59] *See, e.g.*, *Saxton v. Ark. Gazette Co.*, 569 S.W.2d. 115, 117 (Ark. 1978).

[60] *Philip Morris Co., Inc. v. ABC*, 1994 WL 1031488, at *8 (Va. Cir. Ct. Dec. 30, 1994); *see also Gordon v. Boyles*, 9 P.3d 1106, 1117–18 (Colo. 2000) (applying a three-part test); *State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997) (adopting a four-part test); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995) (using a five-factor test); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 680 (Tex. App.—San Antonio 1991) (applying a three-part test when considering the burden the party seeking discovery must overcome).

[61] *See, e.g.*, *Gordon*, 9 P.3d at 1121 ("As a part of the balancing test . . . the trial court must make a preliminary determination about the probable falsity of the defendant's statements.").

[62] *See* 735 ILL. COMP. STAT. 5/8-903(b), 904; LA. REV. STAT. § 45:1454; MINN. STAT. § 595.025; OKLA. STAT. tit. 12, § 2506; OR. REV. STAT. § 44.530; R.I. GEN. LAWS § 9-12.1-3; TENN. CODE ANN. § 24-1-208(b). *See also* Utah Rule of Evidence 509(d)(3) (effective January 23, 2008).

automatically waived if the defendant asserts a defense based on the information that would otherwise be shielded from disclosure[63] and (2) the privilege does not apply if a plaintiff makes a certain showing in favor of disclosure.[64] This latter approach (followed in Illinois and Minnesota) essentially incorporates a specific balancing test in the defamation context.

Although the protection that these statutes offer to media defendants varies, few states entirely preclude application of the privilege in the defamation context. Instead, some courts put media defendants to a choice as to the need to assert various defenses as compared to the need to maintain confidential information or newsgathering material, while others find another source for the privilege.

Price v. Time is an example of the latter approach.[65] In that case, Mike Price, a former college football coach, sued a magazine reporter and publisher alleging both libel and slander in Alabama state court. The allegedly defamatory statement surrounded the coach's visit to an exotic dance club and the subsequent recounting of his frolicking in a Sports Illustrated magazine article, "Bad Behavior: How He Met His Destiny at a Strip Club." The article relied on confidential sources for the most racy portions of its story, which included accounts of Price

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[63] *See, e.g.*, LA. REV. STAT. § 45:1454 (2007) ("If the privilege granted herein is claimed and if, in a suit for damages, 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."); OKLA. STAT. tit. 12 § 2506(B)(2) (indicating that the qualified privilege "does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein the defendant asserts a defense based on the content or source of such information"); OR. REV. STAT. § 44.530(3) (same); TENN. CODE ANN. § 24-1-208(b) (same).

[64] *See* 735 ILL. COMP. STAT. 5/8-903(b), 907(2) (indicating that should a plaintiff want a defamation defendant to disclose privileged information, the plaintiff must submit an application for an order of divestiture, and then the court will only compel disclosure if the plaintiff has made a prima facie showing of falsity and if "all other available sources of information have been exhausted and, either, disclosure of the information sought is essential to the protection of the public interest involved or, in libel or slander cases, the plaintiff's need for disclosure of the information sought outweighs the public interest in protecting the confidentiality of sources of information used by a reporter as part of the news gathering process"); MINN. STAT. § 595.025(1)–(2) (indicating that a person can obtain disclosure in a defamation action if "the identity of the source will lead to relevant evidence on the issue of actual malice," "there is probable cause to believe that the source has information clearly relevant to the issue of defamation," and "the information cannot be obtained by any alternative means . . . .").

[65] 416 F.3d 1327, 1346–48 (11th Cir. 2005).

engaging in extramarital sexual relations with several club dancers. After the lower court found that the Alabama Shield Law would not apply to the magazine's nondisclosure of confidential sources, the U.S. Court of Appeals for the Eleventh Circuit considered the question of whether the word "newspaper" in the statute should be construed to include Sports Illustrated. The court concluded that under a plain reading of the state Shield Law — which would have bestowed an absolute privilege from compelled disclosure — the magazine was not covered.[66]

However, the court looked to other sources to support a privilege.[67] The court acknowledged that it had affirmed the existence of a qualified First Amendment privilege from disclosure.[68] The court noted that the privilege could be overcome only upon a showing of "substantial evidence" that "[1] the challenged statement was published and is both factually untrue and defamatory; [2] reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and [3] knowledge of the identity of the informant is necessary to proper preparation and presentation of the case."[69] In this case, the only way for Price to establish recklessness on the part of the media was to examine the reliability of the confidential informant; thus, Price had shown a compelling need for the information.[70] Still, the court barred him from piercing the privilege because he had not

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[66] *Id.* at 1336.

[67] *Id.* at 1343–45; *accord Atlanta-Journal Constitution v. Jewell*, 555 S.E.2d 175, 179–80 (Ga. Ct. App. 2001) (even though statutory privilege did not apply to reporters in defamation suits, and there was no common law or federal constitutional basis for the privilege, the court still applied a general balancing test because "there is a strong public policy in favor of allowing journalists to shield the identity of their confidential sources unless disclosure is necessary in order to meet other important purposes of the law"); *Wojcik v. Boston Herald, Inc.*, 803 N.E.2d 1261, 1265 n.9 (Mass. App. Ct. 2004) ("Though there is no constitutional, statutory, or common-law privilege protecting a news reporter against such disclosure, it is well settled that, in supervising discovery, a presiding judge is obliged to consider the effect that compelled disclosure would have on the values protected by the First Amendment . . . .") (internal quotations omitted).

[68] *Id.* at 1344 (citing *Miller v. Transamerica Press, Inc.*, 621 F.2d 721 (5th Cir. 1980)).

[69] *Id.* at 1343.

[70] *Id.* at 1345–46.

made reasonable efforts to discover the confidential source's identity without defendants' disclosure.[71]

3. Courts Are Silent on the Issue

A number of states have not yet addressed how the reporter's privilege applies in cases against the media.[72] In these states, absent case law to the contrary, there is no reason to believe that the privilege would apply any differently in cases against the media than in other kinds of cases.

B. Federal Court Application of the Reporter's Privilege in Cases Against the Media

In most federal cases where a media defendant is being sued for defamation, federal courts sit in diversity and apply state law. In those cases, media defendants should determine which state's law will govern the case and then ascertain how that state applies the reporter's privilege in cases against the media. If a federal question provides the basis for federal court jurisdiction, however, then a state privilege law may not apply because state law does not supply "the rule of decision," as required by Rule 501 of the Federal Rules of Evidence.[73] Moreover, because the Federal Rules of Evidence apply in federal court, courts will strictly construe the state's privilege law to give proper effect to the federal evidentiary rules.[74]

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[71] *Id.* at 1346.

[72] *See, e.g.*, Alaska, Connecticut, North Carolina, North Dakota, Arizona, Iowa, Kansas, Maine, Nebraska, New Hampshire, South Carolina, West Virginia, and Wisconsin. While these states have not specifically applied the reporter's privilege in libel cases against media defendants, all of these states have recognized the existence of a constitutional, statutory, or common law reporters' privilege. Federal courts in many of these jurisdictions have recognized the existence of a reporter's privilege as well.

[73] *See, e.g.*, *McKevitt v. Pallasch,* 339 F.3d 530, 533 (7th Cir. 2003) (refusing to apply Illinois statutory Shield Law in federal question case because "state law privileges are not 'legally applicable' in federal-question cases").

[74] *See Desai v. Hersch*, 954 F.2d 1408, 1411 (7th Cir. 1992).

Federal courts also appear more likely to construe absolute privilege statutes narrowly to protect only those persons who are clearly defined within the terms of the statute,[75] and they may be more likely to find waiver of the privilege if the defendant uses what would otherwise be privileged information as a part of his defense.[76] As a general matter, acceptance of the reporter's privilege among federal circuit courts appears to be less widespread than it is among state courts, and some recent decisions disavow the privilege entirely.[77]

III. Piercing the Reporter's Privilege in Cases Against the Media

A. Test for Piercing the Privilege to Obtain the Identity of Confidential Sources

As discussed above, the reporter's privilege applied in most states and in federal court is a qualified privilege, often involving consideration of four generally recognized factors: (1) the relevance of the information sought to the requesting party's cause of action; (2) whether or not alternative sources have been exhausted in the attempt to obtain the requested information; (3) the importance of protecting confidentiality in the case; and (4) whether, in defamation cases, a plaintiff is able to make a prima facie showing that the alleged defamatory statements are false.[78] When these factors are satisfied, most jurisdictions will compel the media to disclose the identity of its confidential sources.

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[75] *See, e.g.*, *Price*, 416 F.3d at 1340–41 (construing the privilege narrowly so that magazine reporters did not fall within the terms of the privilege statute); *Compuware Corp. v. Moody's Investor Servs., Inc.*, 222 F.R.D. 124, 131–32 (E.D. Mich. 2004) (construing Michigan privilege law not to apply to the civil context).

[76] *See, e.g.*, *Newton v. NBC*, 109 F.R.D. 522, 531–532 (D. Nev. 1985) ("[D]efendants shall be deemed to have waived the [Shield] Law's protections should they choose to prove their defense through witnesses whose identities are protected from disclosure by [the law].") (quoting *Mazella v. Phila. Newspapers, Inc.*, 479 F. Supp. 523, 529 (E.D.N.Y. 1979)).

[77] *See, e.g.*, *McKevitt*, 339 F.3d at 533.

[78] *See, e.g.*, *Mitchell v. Superior Court of Marin County*, 37 Cal. 3d 268, 279–83 (1984) (finding that balance of factors weighed against disclosure of confidential sources and unpublished information in libel case against media defendants).

1. The Relevance of the Information Sought

The general rule is that the reporter's privilege will not be pierced unless the requested information goes "to the heart of the plaintiff's claim."[79] The D.C. Circuit emphasized the importance of this factor in *Zerilli v. Smith*, a Privacy Act case in which the plaintiffs sought the source of leaks to a non-party journalist:

> The civil litigant's need for the information he seeks is of central importance. If the information sought goes to 'the heart of the matter,' that is, if it is crucial to his case, then the argument in favor of compelled disclosure may be relatively strong. . . . On the other hand, if the information sought is only marginally relevant, disclosure may be very difficult to justify.[80]

Mere relevance, however, is not sufficient to pierce the reporter's privilege and compel discovery.[81] In *State ex rel. Classic III, Inc. v. Ely*, for example, the court rejected a libel plaintiff's argument that it could overcome the reporter's privilege merely by proving that the evidence sought was relevant or reasonably likely to lead to the discovery of admissible evidence: "If that were all that were required to be shown in order to require revelation of confidential sources, the privilege would be meaningless, for it would offer no greater protection than is offered by proper application of the discovery rules."[82] The *Ely* court, noting that the allegedly defamatory magazine article did not actually use or rely on information from the confidential sources whose identities were sought, found that "nothing said by any of these

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[79] *Id.* at 280 (quoting *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir. 1958)); *see also Price*, 416 F.3d at 1343 ("[The privilege] may be pierced if the party seeking the reporter's confidential source presents substantial evidence . . . that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case."); *United States v. Criden,* 633 F.2d 346, 359 (3d Cir. 1980) (stating that the party seeking to pierce the reporter's privilege "must persuade the court that the information sought is crucial to [its] claim"); *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979) ("The material sought must provide a source of crucial information going to the heart of the (claim)."); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) ("[c]ompulsory disclosure in the course of a 'fishing expedition' is ruled out in the First Amendment case."); *Commonwealth v. Bowden*, 838 A.2d 740, 755 (Pa. 2003) ("The party must persuade court that the information sought is crucial to [its] claim.").

[80] 656 F.2d 705, 713 (D.C. Cir. 1981) (internal citations omitted).

[81] *Mitchell*, 37 Cal. 3d at 280.

[82] 954 S.W.2d 650, 657 (Mo. Ct. App. 1997).

sources could be crucial to or go to the heart of the allegedly libelous article."[83] Accordingly, the court found that compelled disclosure was not warranted.[84]

In contrast, where a journalist's confidential informant is the source of allegedly defamatory statements or information alleged to invade a plaintiff's privacy, this factor is more likely to weigh in favor of compelled disclosure.[85] For example, in *Hatfill v. The New York Times Co.*, a plaintiff alleged that a series of columns published by the defendant newspaper reporting the allegation that plaintiff was implicated in lethal anthrax attacks was defamatory.[86] The plaintiff filed a motion to compel the reporter to reveal his confidential sources. The reporter refused due to his promise of confidentiality. The court found that the question of whether the reporter could claim a privilege could be determined by the three-part test from *La Rouche v. NBC, Inc.*[87] Under that test, the court considers: 1) the relevancy of the information sought, 2) whether the information could be obtained by alternate means and 3) the presence of a compelling interest in the information. The court held that the plaintiff was entitled to disclosure

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[83] *Id.* at 658.

[84] *Id.*

[85] *See, e.g.*, *Lee v. Dep't of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005) (disclosure proper where plaintiff in civil case sought identities of non-party journalists' sources to prove leaks of information were in violation of Privacy Act); *Price*, 416 F.3d at 1345–46 (necessity factor satisfied where libel plaintiff is public figure who must prove actual malice by proving either that journalist lied about having confidential source for defamatory statements or that confidential source was so unreliable that it was reckless to publish article relying on information she provided); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726–27 (5th Cir. 1980) (disclosure proper where plaintiff in libel case could not prove actual malice without learning identity of journalist's confidential source who made allegedly libelous statement); *Riley*, 612 F.2d at 718 (disclosure not proper where information sought regarding non-party journalist's source had only marginal relevance to plaintiff's civil rights case); *Carey v. Hume*, 492 F.2d 631, 636–37 (D.C. Cir. 1974) (disclosure proper where information sought regarding journalist's confidential source went to heart of plaintiff's libel case); *Baker v. F & F Investment*, 470 F.2d 778, 784 (2d Cir. 1972) (disclosure not proper where plaintiffs did not demonstrate that identity of non-party journalist's source was necessary, much less critical, to maintenance of civil rights action); *Garland v. Torre*, 259 F.2d 545, 550–51 (2d Cir. 1958) (disclosure proper where plaintiff sought identity of non-party journalist's confidential source who made allegedly defamatory statements); *Dowd v. Calabrese*, 577 F. Supp. 238, 243 (D.D.C. 1983) (disclosure not proper where plaintiffs in defamation case already had affidavits and documents showing falsity of allegedly defamatory statements and did not need identities of journalist's confidential sources to prove their case).

[86] 459 F. Supp. 2d 462 (E.D. Va. 2006).

[87] 780 F.2d 1134 (4th Cir. 1986).

after weighing the plaintiff's need for the information and ordered the newspaper to reveal its sources.[88] The court reasoned:

> In order for Plaintiff to meet its burden in the defamation case and offer evidence as to the reporter's state of mind, Plaintiff needs an opportunity to question the confidential source and determine if Mr. Kristof accurately reported the information in the sources he provided. . . . As Plaintiff needs to acquire a full understanding of Mr. Kristof's state of mind and verify the accuracy of the statements from the confidential sources, the information is central to this dispute and thus relevant under the *LaRouche* test.[89]

2. Exhaustion of Alternative Sources

In determining whether to pierce the reporter's privilege, courts place great significance on whether the requesting party "has exhausted every reasonable alternative source of information."[90] Compulsory disclosure of confidential sources is a "last resort, permissible only when the party seeking disclosure has no other practical means of obtaining the information."[91]

In *Shoen v. Shoen*, for example, the Ninth Circuit Court of Appeals held that disclosure of a book author's confidential source could not be compelled in a libel case where the plaintiffs served interrogatories but failed to depose "an obvious alternative source."[92] Similarly, in *Price*, the Eleventh Circuit held that disclosure of a magazine reporter's confidential source could not be compelled in a libel case where the plaintiff had not yet deposed four individuals identified by the reporter as having direct or indirect knowledge about the incident at issue—one of whom most likely was the confidential source.[93] Likewise, in *Riley v. City of Chester*, the Third Circuit noted that the plaintiff in a civil rights case had not questioned other readily available sources—

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[88] *Hatfill*, 459 F. Supp. 2d at 467.

[89] *Id.* at 467.

[90] *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981).

[91] *Mitchell v. Superior Court of Marin County*, 37 Cal. 3d 268, 282 (1984); *see also Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1974) ("The values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, not the beginning, of the inquiry.").

[92] 5 F.3d 1289, 1296–97 (9th Cir. 1993).

[93] 416 F.3d at 1346–48.

including "the most patently available other source" —to determine the identity of the source of a leak to a non-party journalist.[94]

On the other hand, the plaintiff need only engage in "reasonable" alternative methods of discovery and need not exhaust every possible source of information. For example, in *Lee v. Department of Justice*, the U.S. Court of Appeals for the District of Columbia held that disclosure of non-party journalists' confidential sources was appropriate.[95] In that case, the sources were alleged to be government employees who leaked information about the plaintiff in violation of the Privacy Act. The plaintiff already had deposed approximately 20 individuals. The court, noting that the exact number of depositions necessary for exhaustion must be determined on a case-by-case basis, held that the plaintiff was not required to depose every individual who could have conceivably leaked the information.[96]

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[94] 612 F.2d 708, 717 (3d Cir. 1979); *accord LaRouche*, 780 F.2d at 1139 (disclosure not proper where plaintiff in defamation case failed to depose public sources of allegedly defamatory statements and to exhaust all non-party depositions); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8–9 (2d Cir. 1982) (disclosure not proper where plaintiffs in antitrust litigation failed to explore alternative means of discovering whether defendant oil companies might have engaged in price-fixing by transmitting price data through non-party newsletter and its confidential sources); *Zerilli*, 656 F.2d at 715–16 (disclosure not proper where plaintiffs in Privacy Act case did not depose all individuals who were identified as having knowledge of documents that were leaked to non-party journalists); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 599 (1st Cir. 1980) (disclosure not proper where trial court did not fully weigh whether plaintiff in defamation case could or should have pursued other avenues of discovery); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438–39 (10th Cir. 1977) (disclosure not proper where trial court did not evaluate efforts of plaintiff in civil case to obtain information from someone other than non-party journalist); *Baker v. F&F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972) (disclosure not proper where plaintiffs in civil rights case did not exhaust other available sources of information as to identity of non-party journalist's confidential source); *Rogers v. Home Shopping Network, Inc.*, 73 F. Supp. 2d 1140, 1145–46 (C.D. Cal. 1999) (disclosure not proper where, although plaintiff in defamation case deposed all eyewitnesses to alleged incident, she did not pursue all other leads that resulted from deposition testimony, including deposing individuals who were reasonably likely to have knowledge of the alleged incident).

[95] 413 F.3d 53, 55 (D.C. Cir. 2005).

[96] *Id.* at 61; *accord Star Editorial v. U.S. Dist. Court Cent. Dist. of Cal.*, 7 F.3d 856, 861 (9th Cir. 1993) (disclosure proper where plaintiff in defamation case interviewed all nonconfidential sources identified by media defendants and found that none had personal knowledge of events at issue); *Carey*, 492 F.2d at 638 (disclosure proper where information obtained by plaintiff in libel case was too vague to permit plaintiff to conduct discovery from other sources to determine identity of journalist's confidential informant); *Garland v. Torre*, 259 F.2d 545, 551 (2d Cir. 1958) (disclosure proper where, although it was possible that plaintiff in defamation case could have learned identity of non-party journalist's confidential source by further discovery proceedings directed at defendant who made allegedly defamatory statements, plaintiff's "reasonable efforts in that direction had met with singular lack of success"); *Hatfill v. New York Times, Co.*, 459 F. Supp. 2d 462, 467 (E.D. Va. 2006) (disclosure proper where

3. The Importance of Protecting Confidentiality

The next factor courts consider in determining whether to apply the reporter's privilege is the importance of protecting confidentiality in the case at hand.[97] Courts typically consider public policy concerns surrounding the compelled disclosure of confidential sources—namely, the importance of protecting confidential sources from exposure and retaliation in order to encourage the truthful revelation of wrongdoing. As the court explained in *Mitchell*:

> The investigation and revelation of hidden criminal or unethical conduct is one of the most important roles of the press in a free society – a role that may depend upon the ability of the press and the courts to protect sources who may justifiably fear exposure and possible retaliation. Thus when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information.[98]

The risk of harm to confidential sources may be sufficiently substantial to prevent disclosure if the sources might be exposed to retaliation—such as job loss—upon disclosure of their identities, or if the reporter's credibility with regular sources would be irreparably damaged by the disclosure.[99] In weighing the harm that may result from compelled disclosure, courts

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plaintiff in defamation case could not determine identities of journalist's confidential sources from alternate means because media defendant did not provide enough identifying information to determine which of hundreds of individuals might have information regarding source's identity).

[97] *See, e.g.*, *Mitchell*, 37 Cal. 3d at 283.

[98] *Id.* at 283; *see also Zerilli*, 656 F.2d at 711 ("[T]he press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant."); *Riley*, 612 F.2d at 718 ("Because of the importance to the public of the underlying rights protected by the federal common law news writer's privilege and because of the fundamental and necessary interdependence of the Court and the press. . . . trial courts should be cautious to avoid an unnecessary confrontation between the courts and the press.") (internal quotations and citations omitted); *Baker*, 470 F.2d at 782 ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . . The deterrent effect such disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.").

[99] *See, e.g.*, *Star Editorial*, 7 F.3d at 861 (noting that "concerns of retaliation or fear of exposure may justify refusing disclosure, even if the party has no other avenue to obtain the information," but only where information relates to matters of great public importance and risk of harm to source is substantial; finding disclosure proper where trial court restricted disclosure of confidential source information to counsel and only for purposes of the litigation);

consider the circumstances under which the reporter received the information or promised confidentiality. For example, in *Bruno & Stillman v. Globe Newspaper Co.*, a libel case against a newspaper publisher, the First Circuit noted that information may be presented to journalists unsolicited, with no request for or only a casual mention of confidentiality, or in the course of a carefully bargained-for undertaking.[100] Accordingly, the court found that "the court must assess the extent to which there is a need for confidentiality," because "[n]ot all information as to sources is equally deserving of confidentiality."[101]

Similarly, in *Classic III*, a libel case against a magazine publisher, the Missouri appellate court explained that "the court should evaluate whether the claimed need for confidentiality is real, or whether, for instance, the reporter simply automatically promised confidentiality as part of a blanket effort to stymie any future attempt at discovery."[102] In that case, the reporters made specific promises of confidentiality to their sources, who were individuals involved in the trucking industry that made up the magazine's readership. The court found that the journalists "credibly assert[ed] that if they were forced to reveal the names of truckers and others who contacted them in confidence, their credibility would be seriously harmed and their sources of information would be irreparably damaged."[103] Continuing, the court explained that:

> [W]here, as here, the evidence does not support a finding that the journalist is falsely claiming a promise of confidentiality to frustrate prosecution of a legitimate claim, and there are legitimate reasons why the journalist would reasonably want to protect his or her news sources, this factor favors recognition of a privilege.[104]

Zerilli, 656 F.2d at 712 ("Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.").

[100] 633 F.2d 583, 597 (1st Cir. 1980).

[101] *Id.*

[102] *State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 656 (Mo. Ct. App. 1997).

[103] *Id.* at 657.

[104] *Id.*

4. Prima Facie Showing of Falsity in Defamation Cases

The final factor some courts consider in determining whether to pierce the reporter's privilege in defamation cases is whether the plaintiff is able to make a prima facie showing that the alleged defamatory statements are false.[105] In *Mitchell*, the California Supreme Court noted that the requirement of a prima facie showing of falsity is related to the importance of protecting confidentiality:

> There is a great public interest in the truthful revelation of wrongdoing, and in protecting the "whistleblower" from retaliation; there is very little public interest in protecting the source of false accusations of wrongdoing. A showing of falsity is not a prerequisite to discovery, but it may be essential to tip the balance in favor of discovery.[106]

The court, while not requiring a prima facie showing of falsity in all cases, held that a court "may require the plaintiff to make a prima facie showing that the alleged defamatory statements are false before requiring disclosure."[107]

In *Cervantes*, in which a mayor sued a magazine for libel based on an article tying the mayor to organized crime, the Eighth Circuit held that a plaintiff must show "cognizable prejudice" from the denial of discovery regarding confidential sources.[108] In that case, the plaintiff offered only "self-serving affidavits" and evidence that "framed but a minimal assault

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[105] *See, e.g.*, *Mitchell*, 37 Cal. 3d at 283.

[106] *Id.*

[107] *Id*; *accord Bruno & Stillman*, 633 F.2d at 597 ("[T]he falsity of the [media's] charges . . . should be drawn into question and established as a jury issue before discovery is compelled."); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972) ("[T]o routinely grant motions seeking compulsory disclosure without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws."); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 181 (Ga. Ct. App. 2001) ("To properly perform [the] balancing test in a libel case, the trial court must require plaintiff to specifically identify each and every [allegedly libelous statement], determine whether the plaintiff can prove the statements were untrue, taking into account all other available evidentiary sources, including the plaintiff's own admissions, and determine whether the statements can be proven false through the use of other evidence, eliminating the plaintiff's necessity for the requested discovery.); *Classic III*, 954 S.W.2d at 659 ("If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names of informants.").

[108] *Cervantes*, 464 F.2d at 994.

on the truth of the matters contained in the four paragraphs [alleged to be defamatory]."[109] The court found:

> Aside from this evidence, [the plaintiff] has not produced a scintilla of proof supportive of a finding that either defendant in fact entertained serious doubts about the truth of a single sentence in the article. Neither has he come forward with competent evidence from which the District Court could reasonably discern the inherent improbability of the matters published.[110]

Thus, the court held that the plaintiff had not shown that disclosure of the defendants' confidential sources was warranted.[111] In certain cases, however, courts may find that a libel plaintiff's sworn testimony is sufficient to establish a prima facie showing that allegedly defamatory statements are false.[112]

Where a court requires a prima facie showing of falsity, the plaintiff must show that *material* portions of the articles or statements are false. Technical inaccuracies with respect to minor points are not sufficient to compel disclosure.[113] In *Rogers*, the court explained the prima facie requirement:

> Although the article appears to contain the above-mentioned inaccuracies, the presence of these inaccuracies does not necessarily amount to a prima facie showing of falsity. There is an element of materiality inherent in the *Mitchell* court's discussion of what constitutes a prima facie showing of falsity. Thus, in order to make a prima facie showing of falsity, Rogers must do more than point to inaccuracies in the article. Rogers must make a prima facie showing of material falsity—falsity that is sufficiently substantive so as to suggest that she has a viable claim for libel.[114]

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[109] *Id.*

[110] *Id.* at 994–95

[111] *Id.* at 992, 995.

[112] *See Price*, 416 F.3d at 1344–45 ("[T]he only evidence within plaintiff's control that could disprove the story [is] his own testimony. . . . That testimony is . . . substantial evidence that the allegations in the [defendant's] article are false and defamatory.").

[113] *See, e.g.*, *Rogers v. Home Shopping Network*, 73 F. Supp. 2d 1140, 1147–48 (C.D. Cal. 1999); *see also Wojcik v. Boston Herald, Inc.*, 803 N.E.2d 1261, 1267 n.17 (Mass. App. Ct. 2004) ("[D]isclosure ordinarily should not be required absent demonstration of an essential relationship between the identities of the sources and the plaintiffs' ability to establish an element of their defamation claim.").

[114] *Rogers*, 73 F. Supp. 2d at 1147–48.

Because, in *Rogers*, the alleged inaccuracies involved minor points such as the correct date of the incident, whether certain individuals were present, and whether the plaintiff threw food items or only make-up products during the incident, the court found that the plaintiff did not make a prima facie showing of material falsity.[115]

B. Unpublished Materials

In actions against the media, defendants often invoke the reporter's privilege to protect not only the identity of confidential sources, but also unpublished newsgathering materials related to those sources. Courts generally apply the same analysis to the two types of information. When a media defendant seeks to protect unpublished information that is not confidential and does not reveal the identity of a confidential source, however, the analysis typically changes. In such circumstances, unless otherwise specifically covered by a state statute, the privilege largely falls away in many jurisdictions, as courts are much more inclined to allow a libel plaintiff to gain access to such information.

1. Piercing the Privilege to Obtain Unpublished Information Related to Confidential Sources

Not surprisingly, most courts that have addressed the issue have determined that protecting unpublished information that could lead to the identity of a confidential source is tantamount to protecting the actual source. For example, in *Mitchell v. Superior Court of Marin County*, the California Supreme Court found that the qualified privilege not only protects the identity of a confidential source, but also protects information provided by a confidential source.[116] The court noted that while libel plaintiffs should be allowed to obtain discovery regarding the editorial process, "discovery which seeks disclosure of confidential sources, and

[115] *Id.*

[116] 37 Cal. 3d 268, 279 (1984).

information supplied by such sources, is not ordinary discovery."[117] Ultimately, the court concluded that "in a civil action, a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources."[118] Further, the court determined that the test to pierce the privilege is the same whether a party seeks the name of a confidential source or unpublished information supplied by such a source.[119]

Similarly, in *Blumenthal v. Drudge*,[120] a defamation action brought by a former presidential aide and his wife against Internet reporter Matt Drudge, the plaintiffs had not only requested the names of confidential sources, but they also had moved to compel responses to document requests regarding the sources. Treating the request as one and the same, the court found that in order to overcome the First Amendment qualified privilege, plaintiffs had to satisfy the common three part test.[121] The court determined that because the plaintiffs had "proffered nothing to satisfy their burden," the court would not allow the qualified privilege under the First Amendment to be pierced as to the identity of the source or the documents related to that source.[122]

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[117] *Id.*

[118] *Id.* (emphasis added); *accord In re DaimlerChrysler AG Securities Litig.*, 216 F.R.D. 395, 407 (E.D. Mich. 2003) (noting in a non-libel case that the Michigan Shield Law not only protects confidential sources, but also unpublished information and documentation even from named informants, explaining that "a known source can give confidential unpublished information to a journalist, in which case the information is protected from disclosure."); *News-Journal Corp. v. Carson*, 741 So. 2d 572, 575 (Fla. Dist. Ct. App. 1999) (concluding that documentary evidence is protected under the Florida Shield Law because "[i]t would make no sense to limit the scope of the privilege to only information which is not in some written or tangible form").

[119] *See Mitchell*, 37 Cal. 3d at 279. The court found that the plaintiff had failed to make the necessary showing to obtain the information. As such, the court issued a writ of prohibition keeping the lower court from requiring the defendants to "produce documents which reveal confidential sources or information furnished by such sources." *Id.* at 284.

[120] 186 F.R.D. 236 (D.D.C. 1999).

[121] *Id.* at 244.

[122] *Id.*

In addition, many state statutes specifically protect unpublished information and require the same test to obtain such information. For example, the Iowa Shield Law protects "confidential sources, unpublished information, and reporter's notes."[123] Under all circumstances, the privilege is qualified and will yield only if a party "shows by a preponderance of the evidence: (1) there is a probability or likelihood the evidence is necessary; and (2) the evidence cannot be obtained from any less intrusive source."[124]

2. Unpublished, Non-Confidential Information Enjoys Limited Protection

While courts are inclined to extend protection to confidential sources as well as unpublished information related to those sources, the same protection is often more difficult to secure for nonconfidential, unpublished information. For example, although Pennsylvania's Shield Law appears to be absolute and broadly applicable to any kind of newsgathering information,[125] the Pennsylvania Supreme Court limited its applicability to confidential information in *Hatchard v. Westinghouse Broad. Co.*[126]

Hatchard involved two separate libel actions in which the plaintiffs sought unpublished documentary information from the television station defendant. The court explained that, "[i]f unpublished information which would not reveal confidential sources could be withheld by the media defendant, it would be virtually impossible for the plaintiff to arrive at those facts of which the defendant was aware at the time of publication other than the defamatory information

[123] *Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97, 103 (Iowa 2002).

[124] *Id.* at 103.

[125] 42 PA. CONS. STAT. § 5942(a) ("No person . . . employed by any . . . [newspaper, radio or television station or magazine] . . . for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.").

[126] 532 A.2d 346 (Pa. 1987).

actually disseminated to the public."[127] As a result, the court ultimately held that "unpublished documentary information gathered by a television station is discoverable by a plaintiff in a libel action to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information."[128] It seems clear that the protection for unpublished, nonconfidential material largely falls away in many other jurisdictions as well.[129]

Nevertheless, there are decisions applying the reporter's privilege to unpublished information that would not reveal a confidential source.[130] Courts that have recognized protection for unpublished materials typically invoke the policy of guarding the free flow of

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[127] *Id.* at 349.

[128] *Id.* at 351. Another Pennsylvania Supreme Court case, *Commonwealth v. Bowden*, further defined this exception. 838 A.2d 740 (Pa. 2003). In that case, which was not a defamation action, but rather a case involving reporters who refused to reveal information for a criminal case, the court held that "documents may be considered sources for Shield Law purposes, but only where production of such documents, even if redacted, could breach the confidentiality of the identity of a human source and thereby threaten the free flow of information from confidential informants to the media." *Id.* at 752.

[129] *See, e.g.*, *Williams v. ABC*, 96 F.R.D. 658, 665 (W.D. Ark. 1983) (holding that the Arkansas Shield Law did not "protect out-takes in a libel or privilege case, which would not in any respect reveal a source"); *Marketos v. Am. Employers Ins. Co.*, 460 N.W.2d 272, 273, 279–81 (Mich. Ct. App. 1990) (determining in non-libel action that the First Amendment qualified privilege, the Michigan Constitution, and the Michigan Shield Law, do not provide any protection for unpublished, nonconfidential material); *Outlet Commc'ns, Inc. v. State*, 588 A.2d 1050, 1052 (R.I. 1991) (finding in non-libel case that unpublished, nonconfidential materials are not protected by the Rhode Island Shield Law or Constitution, or the First Amendment qualified privilege).

[130] *See, e.g.*, *Ventura v. Cincinnati Enquirer*, 396 F.3d 784, 792–93 (6th Cir. 2005) (finding that Ohio Shield Law, OHIO REV. CODE. ANN. § 2739.12, provides journalists with absolute and unqualified privilege against disclosure of sources of any information obtained in course of employment, even if sources have proclaimed their identity); *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) ("[W]e hold that the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality. We add, however, that the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in non-disclosure."); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("We do not think that the privilege can be limited solely to protection of sources. The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial process. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege."). In *KSDO v. Superior Court*, the court applied the same qualified privilege available for the protection of confidential sources to unpublished, nonconfidential notes and materials. However, in that libel case the reporter had already revealed the name of his source. As a result, the court concluded that the plaintiffs had not shown that the information they sought from the reporter's notes was unavailable from any other source, as they could go directly to the source. As such, the court did not require the reporter to produce his notes. 136 Cal. App. 3d 375, 385–86 (Cal. Ct. App. 1982).

information as a basis for that protection. In one case involving a media subpoena, the First Circuit Court of Appeals succinctly noted that:

> There is some merit to these asserted First Amendment interests. We discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled. To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment.[131]

Similarly, another court faced with a subpoena served on a media entity noted, "As a backdrop to our discussion of the appropriate test for determining whether a civil litigant's interest in disclosure is sufficient to override a journalist's privilege, we recognize that routine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process."[132]

Moreover, a few states have strong Shield Laws that may be extended to unpublished, nonconfidential information even if it is at the heart of a defamation or privacy claim. The New Jersey Shield Law states that a person connected to the news media "has a privilege to refuse to disclose, in any legal . . . proceeding . . . (b) Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated."[133] As a result, in *Kinsella v. Welch*,[134] the plaintiff brought suit for invasion of privacy related to footage taken of him

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[131] *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (finding that press rights must yield in criminal case where Fifth Amendment right to fair trial is at stake).

[132] *Shoen v. Shoen*, 48 F.3d 412, 415–16 (9th Cir. 1995). Indeed, even the Supreme Court has implicitly recognized the importance of unpublished material in the hands of the press, noting that "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials-whether fair or unfair-constitute the exercise of editorial control and judgment." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

[133] N.J. STAT. ANN. 2A:84A-21(b).

[134] 827 A.2d 325 (N.J. Super. Ct. App. Div. 2003).

while receiving treatment in a hospital emergency room. The plaintiff sought production of the "outtakes" from the videotaping. Although there was no claim of confidentiality as to the material, the defendant invoked the Shield Law and refused to produce the tapes. The court concluded that the nonconfidential outtakes were "entitled to the complete and pervasive security against disclosure provided by the [New Jersey] Shield Law."[135]

Similarly, the Shield Law in the District of Columbia, while not nearly as strong as in New Jersey, provides very broad qualified protection to confidential and non-confidential sources and unpublished information that can be overcome only by meeting the same three-part test.[136] As a result of this statute, in *Prentice v. McPhilemy*, a libel action involving a book, the court acknowledged that the Shield Law in the District of Columbia has no exceptions for defamation cases and concluded that nonconfidential sources and documents were still protected from disclosure in that case because the plaintiff failed to meet the three-part test.[137]

In sum, it is clear that unpublished, nonconfidential materials generally will be more difficult to protect under a reporter's privilege than materials that relate to or identify a confidential source. Nevertheless, some jurisdictions have Shield Laws or court decisions that do afford such protection; thus, it is imperative that an attorney defending the media in a libel case determine what protection is available under the law applicable to that particular case. Moreover, even in cases in which the court determines that the privilege should be pierced to

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[135] *Id.* at 332 (internal citations and quotations omitted) (but noting that if defendant planned to use outtakes at trial, that footage must be produced before any such trial); *see also Maressa v. New Jersey Monthly*, 445 A.2d 376, 385 (N.J. 1982) (acknowledging that "[t]he Shield Law privilege may burden some libel plaintiffs who will not survive a summary judgment motion without discovery," but finding the "newsperson's privilege is absolute in libel cases").

[136] D.C. CODE § 16-4702. The statute provides protection against compelled disclosure of, "The source of any news or information . . . whether or not the source has been promised confidentiality…[and] Any news or information procured . . . that is not itself communicated in the news media. . . ." *Id.* In order to overcome the privilege under the DC Shield Law, a plaintiff must establish by clear and convincing evidence that (1) the "news or information is relevant to a significant legal issue . . . ," (2) the "news or information could not, with due diligence, be obtained by any alternative means," and (3) that there "is an overriding public interest in the disclosure." § 16-4703.

[137] 27 Med. L. Rep. 2377, 2380, 2383–84 (D.C. Super. Ct. May 5, 1999).

allow plaintiffs access to unpublished information, most courts limit their orders to compel only information that does not reveal confidential sources, and media counsel should be careful to request such a limitation. For example, in *Aequitron Medical, Inc. v. CBS*, a case involving claims for tortious interference with prospective business advantage and deceptive trade practices stemming from a news segment, the court determined that the plaintiff had satisfied the three-part test to overcome the qualified First Amendment privilege and required defendants to produce documents responsive to the plaintiff's discovery requests.[138] However, the court was careful to note that the defendants were "not required to produce any documents that would disclose confidential sources . . . ."[139]

C. Public Figure v. Private Figure Plaintiffs

Courts in most jurisdictions do not apply the reporter's privilege differently based merely on the status of the libel plaintiff as a public or private figure. Rather, the heightened proof requirements of actual malice for the public figure plaintiff merely factor into the balancing test for determining whether the privilege should be upheld. Cases from various jurisdictions illustrate conflicting views about how this balance should be struck. Generally, however, in the absence of a statute that confers an absolute privilege, it appears that courts are more willing to pierce the privilege when the plaintiff is required to satisfy the actual malice standard.

In *Star Editorial, Inc. v. United States District Court*, for example, the court held that compelled disclosure of the identity of confidential sources was proper where the information provided by those sources was the basis for an allegedly libelous article about comedian Rodney

[138] 1995 WL 406157, at *3 (S.D.N.Y. July 10, 1995).

[139] *Id.*

Dangerfield.[140] The court, noting that Dangerfield was a public figure who was required to prove actual malice, explained:

> In a public-figure libel case . . . proving actual malice may be difficult without knowing the identity of the informant. Proof of malice may be supported by establishing that the informant is unreliable, or that no informant even exists. Without knowing the identity of the informant, such proof is difficult to establish.[141]

Not all public figures succeed in piercing the reporter's privilege, however. In *Rogers*, the court held that, notwithstanding that the plaintiff, actress Mimi Rogers, was required to prove actual malice, the factors overall weighed against disclosure of a magazine publisher's confidential sources.[142] In that case, Rogers sued the National Enquirer for libel based on an article describing the actress's allegedly outrageous reaction to the cancellation of her promotional video series on the Home Shopping Network. While recognizing that the first factor often weighs in favor of disclosure in public-figure libel cases, the court held that this factor alone cannot be outcome determinative. If it were, the court noted, a plaintiff could simply join a reporter as a defendant in order to tip the balance of the factors in favor of compelled disclosure.[143] Thus, the *Rogers* court explained, while the fact that a particular action is a libel suit against a media defendant places the matter in the category of cases in which compelled disclosure may be appropriate, the actual result depends upon the balancing of all factors.[144]

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[140] 7 F.3d 856 (9th Cir. 1993).

[141] *Star Editorial*, 7 F.3d at 861; *accord Zerilli*, 656 F.2d at 714 ("Proof of actual malice will frequently depend on knowing the identity of the newspaper's informant, since a plaintiff will have to demonstrate that the informant was unreliable and that the journalist failed to take adequate steps to verify his story. Protecting the identity of the source would effectively prevent recovery in many [actual malice] libel cases.").

[142] 73 F. Supp. 2d 1140 (C.D. Cal. 1999).

[143] *Id.* at 1143.

[144] *Id.*

1. Conflicting Views of *Herbert v. Lando*

In determining whether the reporter's privilege should be pierced in cases involving the actual malice standard, one of the key differences between courts in various jurisdictions is the proper application of the U.S. Supreme Court's decision in *Herbert v. Lando*.[145] Justice White, writing for the majority, wrote that the First Amendment does not shield the media from having to divulge state-of-mind evidence relevant to actual malice in a public figure defamation case (*i.e.*, evidence that points to whether the reporter knew or had reason to know the statement was false when it was made).[146] Some jurisdictions take the view that the disclosure required in *Herbert* was limited specifically to state-of-mind evidence, while others interpret *Herbert* more broadly for the principle that a plaintiff may pierce the privilege to discover any evidence — including the identity of a confidential source — relevant to the actual malice inquiry.

For example, in *Gadsden County Times, Inc. v. Horne*, the Florida District Court of Appeal recognized that a qualified First Amendment-based privilege was applicable in a libel case and found that the trial court's reliance on *Herbert* to pierce the privilege was improper.[147] Although the public or private status of the *Gadsden County* plaintiff had not yet been decided (the court wrote that the identity of a confidential source would be relevant under either burden of proof),[148] the Florida Court of Appeal distinguished the two cases by focusing on the fact that the *Herbert* plaintiff attempted to discover mental impressions and editorial processes of the media defendant.[149] In contrast, the *Gadsden County* plaintiff sought the identity of the media

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[145] 441 U.S. 153 (1979).

[146] *Id.* at 159–69.

[147] 426 So. 2d 1234, 1240–41 & n.7 (Fla. Dist. Ct. App. 1983); *see also Philip Morris Cos., Inc. v. ABC*, No. LX-816-3, 1994 WL 1031488, at *5 (Va. Cir. Ct. Dec. 30, 1994), *rev'd on other grounds by Philip Morris Cos., Inc. v. ABC*, No. LX-816-3, 1994 WL 1031488, at *15.

[148] *Gadsden County*, 426 So. 2d at 1242.

[149] *Id.* at 1241 n.7.

defendant's source — that is, *Herbert* did not require disclosure of confidential sources, as the *Gadsden County* plaintiff argued.[150]

On the other hand, in *Downing v. Monitor Publishing Co.*, the New Hampshire Supreme Court held that the media defendant was required to disclose the identity of a source in a public figure libel case or suffer a presumption that the reporter had no source for the allegedly defamatory article.[151] The overarching goal seemed to be one of fairness to both sides regarding evidentiary issues. The *Downing* court determined that there is no absolute privilege that permits a media defendant to refuse to reveal sources when those sources are essential to a libel plaintiff's case.[152] Thus, unlike the *Gadsden County* court, the *Downing* court found that the special burdens of public figure plaintiffs seeking to meet the actual malice standard made a difference in application of the reporter's privilege.

2. Public Figure Libel Plaintiffs

(a) Public Figure Cases Piercing the Privilege

News-Journal Corp. v. Carson, a libel action brought by a judicial candidate, typifies the cases holding that the reporter's privilege should be pierced when the plaintiff is required to prove actual malice.[153] The court in *Carson* held that the plaintiff satisfied the balancing test for piercing the privilege afforded by Florida's Shield Law. In addressing the relevance prong of the test, the court held that the information was relevant and material to the issues at hand because the public figure plaintiff was required to show actual malice by clear and convincing evidence

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[150] *Id.*

[151] 415 A.2d 683 (N.H. 1980).

[152] *Id.* at 685–86 ("It is untenable to impose the heavy *New York Times* burden of proof upon a plaintiff and at the same time prevent him from obtaining the evidence necessary to meet that burden."); *accord Capuano v. Outlet Co.*, 579 A.2d 469, 476 (R.I. 1990).

[153] 741 So.2d 572 (Fla. Dist. Ct. App. 1999).

in order to make out a claim, a "heavy burden."[154] Additionally, in determining compelling need, the court explained that "upholding the privilege [would have] the effect of making proof of actual malice impossible because establishing what the publisher knew or did not know at the time of the publication depends on the kind and quality of the information and identity of the sources at hand when the publication was made."[155]

Some state Shield Laws explicitly authorize a court to consider the impact of the actual malice standard on the reporter's privilege. In *Weinburger v. Maplewood Review*, the Supreme Court of Minnesota applied the Minnesota state Shield Law exception that requires disclosure of a source's identity when the person seeking the information can show that the identity will lead to relevant evidence on the issue of actual malice.[156] The case involved a public figure who sought to discover the identities of unnamed sources relied upon in an article about the plaintiff's employment and behavior as head football coach of a local school. The *Weinburger* court held that knowledge of the identity of the confidential source would, in fact, have a tendency to prove or disprove actual malice and therefore ordered disclosure.[157]

At least one federal court has held that even the First Amendment constitutional reporter's privilege must give way when a plaintiff is required to prove actual malice. In *Miller v. Transamerica*, the Fifth Circuit recognized the constitutional privilege that protects a media defendant from having to disclose confidential sources, but held that the privilege must yield in some cases.[158] While stating that the First Amendment interests in protecting confidential

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[154] *Id.* at 575.

[155] *Id.* at 576. The court also found that the interest in non-disclosure is less compelling when the media is the defendant in the case. *Id.*

[156] *Weinburger v. Maplewood Review*, 668 N.W.2d 667, 672–73 (Minn. 2003).

[157] *Id.* at 674.

[158] 621 F.2d 721, 725 (5th Cir. 1980).

sources in public figure libel cases are stronger than in (1) protecting mental impressions (*i.e.*, *Herbert*) and (2) protecting sources in grand jury proceedings (*i.e.*, *Branzburg*), and while observing that the privilege is particularly strong when the plaintiff is a public figure, the court still applied the balancing test in such a way as to favor disclosure.[159] The result appears to be based primarily on the fact that the informant used was the only source for the challenged statements and, therefore, the only way for the plaintiff to show the defendant acted with actual malice. Accordingly, the court found that the identity of the source was essential to the plaintiff's case.[160]

(b) Public Figure Cases Upholding the Privilege

In jurisdictions with absolute or near-absolute privileges, the reporter's privilege is often upheld even in cases brought by public figures. Notably, New Jersey has recognized an absolute privilege, pursuant to state statute, prohibiting forced disclosure of confidential sources in a libel action. In *Maressa v. New Jersey Monthly*, the New Jersey Supreme Court considered the contours of the statutory reporter's privilege, noting its constitutional foundation and support.[161] Tracing the history of New Jersey's Shield Law, the court found that the legislature had intended to protect confidential sources to the maximum extent allowed by the state and federal constitutions. Because the privilege was absolute, the court refused to order disclosure of confidential sources, even in a public official libel action where the plaintiff carried the burden of proving actual malice.[162]

More recently, the Superior Court of Pennsylvania reversed a lower court's order of disclosure of confidential sources in a libel case brought by various public figure plaintiffs for

[159] *Id.* at 725–26.

[160] *Id.* at 726–27.

[161] 445 A.2d 376, 380–81 (N.J. 1982).

[162] *Id.* at 385.

allegedly defamatory articles concerning grand jury testimony leaked in violation of criminal laws.[163] The trial court had effectively created a "crime-fraud exception" to the state Shield Law, allowing the identity of the confidential sources to be discovered in the plaintiffs' libel action. Although Pennsylvania common law had previously recognized a limited exception to the state Shield Law (*i.e.*, information disclosure that does not reveal the source),[164] the mere fact that a crime may have occurred as a result of the grand jury leak was not sufficient to permit a new exception that would allow the privilege to be pierced.[165]

3. Private Figure Libel Plaintiffs

There are fewer cases addressing the issue of a reporter's privilege in the context of libel claims brought by private figure plaintiffs. This may be due to the fact that the First Amendment does not require states to impose the actual malice standard of fault for private figure libel plaintiffs; indeed, most states have opted for simple negligence in private figure cases.[166] And, in some jurisdictions, statutes only permit disclosure of confidential sources when actual malice is an issue.[167] Thus, a private figure plaintiff may not be able to establish a "compelling need" for privileged information due to the lower standard of proof. Nevertheless, out of an apparent concern for fairness, some courts have ordered disclosure in private figure cases but have limited the disclosure to information that is "necessary" to the plaintiff's case. Others refuse to order disclosure but at the same time prohibit the media from relying on undisclosed sources in defending the libel claims.

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[163] *Castellani v. Scranton Times, L.P.*, 916 A.2d 648 (Pa. Super. Ct. 2007).

[164] *See Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346 (Pa. 1987).

[165] *Castellani*, 916 A.2d at 654–55.

[166] *See, e.g.*, *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 94 & n.10 (D.C. 1980) (Ferren, J., dissenting) (listing cases in which courts have adopted a negligence standard for the media in private-figure libel cases).

[167] *See, e.g.*, MINN. STAT. § 595.025 (2006).

In *McNeilus v. Corporate Report, Inc.*, the District Court of Minnesota denied a motion to compel discovery of confidential news sources in a private figure libel action based primarily on its reading of the state Shield Law.[168] The Minnesota statute precluded use of the privilege in cases where the identity of a source would lead to evidence relevant to the issue of actual malice. Because the plaintiff was a private figure, that exception did not apply. The court noted, however, that *reliance* on the state Shield Law or a constitutional or common law privilege must be absolute: "'[W]e are convinced that the legislature did not intend to allow the use of the news shield law as a sword in libel suits. We see no reason why a news media defendant should be able to rely on the privilege until the day of trial, then renounce the privilege and use previously undisclosed information as a defense against the plaintiff's evidence of negligence, reckless disregard of truth, or actual malice."[169]

D. Summary

Because jurisdictions vary widely in their approaches to the reporter's privilege, it is difficult to draw any general conclusions about when the reporter's privilege can be successfully invoked in any particular civil case against the media. "When called upon to weigh the fundamental values arguing both for and against compelled disclosure, the overwhelming majority of courts have concluded that the question of a reporter's privilege in civil cases must be decided on a case-by-case basis, with the trial court examining and balancing the asserted interests in light of the facts of the case before it."[170] As a result, many courts in libel cases have denied motions to compel the production of information and sources protected by the reporter's

[168] No. CO-91-120, 1993 WL 542394, at *1 (Minn. Dist. Ct. Sept. 16, 1993).

[169] *Id.* at *4. (quoting *Las Vegas Sun v. Eighth Judicial Dist. Court*, 761 P.2d 849, 853 (Nev. 1988)); *accord Dalitz v. Penthouse Int'l, Ltd.*, 214 Cal. Rptr. 254, 168 Cal. App.3d 468, 477 (Cal. Ct. App. 1985) (involving public figure plaintiffs).

[170] *Mitchell v. Superior Court of Marin County*, 37 Cal. 3d 268, 276 (1984) (emphasis added).

privilege, but many courts have gone the other way and decided to pierce the privilege to require the disclosure of such information. While it is helpful to understand the range of approaches used throughout the country, lawyers defending media clients must consult the law in the relevant jurisdiction to determine how the reporter's privilege will be applied, if at all, on the particular facts of each case.

IV. Potential Consequences for Withholding "Privileged" Information

A reporter's refusal to disclose confidential information or unpublished materials may result in significant legal consequences, particularly when the media is a defendant in the case. For example, while several states' Shield Laws provide that a reporter or publisher may not be held in contempt for refusing to disclose confidential sources or unpublished information, these laws do not grant complete immunity from all legal consequences.[171] In other words, these Shield Laws still allow a court to impose sanctions other than contempt if a media member refuses to disclose privileged information.[172] Moreover, while criminal sanctions are rare in the civil context, jail time remains a possibility in at least some jurisdictions.

A. Civil Penalties

Potential civil penalties for refusing to reveal sources or other unpublished information include: (1) precluding the defendant who refused to disclose its source or information from submitting evidence of the existence of the source or the undisclosed information; (2) a presumption that the media defendant refusing to disclose information acted with actual malice or with a lack of sourcing or a shift in the burden of proof on the issue of actual malice or negligence; and (3) so-called "death penalty sanctions," such as entry of a directed verdict,

[171] *See, e.g.*, CAL. EVID. CODE § 1070; N.Y. CIV. RIGHTS LAW § 79-h.

[172] *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 464 N.E.2d 967, 970–71 (N.Y. 1984), *cert. denied*, 469 U.S. 1158 (1985); *Sands v. News Am. Publ'g Inc.*, 560 N.Y.S.2d 416, 420–421 (App. Div. 1990).

default judgment or summary judgment against a defendant who refuses to comply with an order to disclose such information.

1. The Preclusion of Evidence as a Penalty

Some courts have held that Shield Laws precluding contempt sanctions reflect an intent that the penalties imposed for failure to obey an order to disclose confidential sources or information should be strictly limited to protect the legitimate interests of the party seeking disclosure.[173] There is disagreement among the courts, however, as to the extent of the sanction or remedy necessary to accomplish that goal.

There seems to be a consensus that a media defendant refusing to disclose confidential sources or information supporting the veracity of a statement or the absence of actual malice should be precluded from submitting: (1) evidence of the reporter's reliance on a confidential source; and (2) evidence of information obtained from the source or information the defendant refuses to disclose.[174]

In *Newton v. NBC, Inc.*, for example, the court prevented a defendant who had invoked the protection of Nevada's Shield Law from using evidence from a confidential source to prove a defense.[175] If the defendant had chosen to offer such evidence, then the plaintiff would have been offered an opportunity to conduct further discovery.[176] The court in *Newton* expressly adopted the reasoning set forth in *Mazzella v. Philadelphia Newspapers, Inc.*:[177]

> Since the function of all trials is to establish the truth, and since our decision in this case is predicated upon the assumption that Pennsylvania's shield law was enacted primarily to protect confidential communications, defendants shall be

[173] *See, e.g., Oak Beach Inn Corp.*, 464 N.E.2d at 972.

[174] *See, e.g.*, *Oak Beach Inn Corp.*, 464 N.E.2d at 971; *Sands*, 560 N.Y.S.2d at 416; *Greenberg v. CBS, Inc.*, 419 N.Y.S. 2d 988, 997 (App. Div. 1979); *Sprague v. Walter*, 543 A.2d 1078, 1086 (Pa. 1988).

[175] 109 F.R.D. 522 (D. Nev. 1985).

[176] *Id.* at 532.

[177] 479 F. Supp. 523 (E.D.N.Y. 1979)

> deemed to have waived the law's protections should they choose to prove their defense through witnesses whose identities are protected from disclosure by this order. Thus the court would be obliged to grant a continuance during trial sufficient to permit plaintiffs to take discovery of any such witness and conduct any further investigation should that be required.[178]

Likewise, in *Sands v. News America Publishing, Inc.*, the New York Supreme Court precluded the media defendant from introducing information from confidential sources into evidence unless the defendant provided the plaintiff with the information in question.[179] The court reasoned that if "defendants intend to rely on undisclosed statements made by plaintiff to confidential sources in their defense, which [they] have not made available to plaintiff prior to trial, the trial court shall . . . impose a suitable sanction."[180] Though the governing Shield Law—Section 79-h of the New York Civil Rights Law—provides an absolute bar against holding a journalist who refuses to disclose a source in contempt, the court held that the law did not provide absolute immunity from all legal consequences for non-disclosure.[181]

2. Presumption of Actual Malice or Lack of Sources

In cases where no reporter's privilege is available and a court orders the media defendant to disclose confidential sources or materials, several courts have held there should be a presumption that the defendant acted without sourcing or with actual malice.[182]

In *Downing v. Monitor Publishing Co. Inc.*, the Supreme Court of New Hampshire held that where a defendant in a libel action brought by a plaintiff who is required to prove actual malice refuses to disclose sources after a court order, there will be a presumption that the

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[178] *Newton*, 109 F.R.D. at 532 (quoting *Mazzella*, 479 F. Supp. at 529 n.3).

[179] 560 N.Y.S.2d 416, 421 (App. Div. 1990).

[180] *Id.* at 424.

[181] *Id.* at 420–21.

[182] *See, e.g.*, *Tavoulareas v. Piro*, 93 F.R.D. 11, 17 (D.D.C. 1981); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 886–87 (D. Haw. 1981); *Downing v. Monitor Publ'g Co. Inc.*, 415 A.2d 683, 686 (N.H. 1980).

defendant had no source.[183] The presumption can only be removed, the court held, when the requested sources have been disclosed at "a reasonable time before trial."[184]

In that case, a newspaper published an article about a sheriff that was the basis of his libel action. The story questioned the truth of the sheriff's account of how he was shot and reported the results of a lie detector test he took. The sheriff filed a libel suit against the newspaper and sought disclosure of the source of the information. When the newspaper refused to comply, the trial court ordered disclosure. On appeal, the order was affirmed. The court reasoned that due to the sheriff's public figure status, he was required to prove actual malice by the newspaper. As such, he was entitled to know the source of the information so he could establish the falsity of the articles. If the newspaper declined to comply with the order, the inference was to be made that no source existed. The court reasoned that the Supreme Court has never suggested "that there is any first amendment restriction on the sources from which a plaintiff can obtain the evidence necessary to prove the essential elements of his libel case."[185] The court explained:

> One way to show reckless publication is to show "that there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Another is to show that there was in fact no informant and that the publication was therefore baseless. *If a defendant is unable or unwilling to name its informant, it may be inferred that there was none.* If there was in fact an informant, a plaintiff would be unable to show that there "were obvious reasons to doubt" his veracity if he is unable to determine who the informant was.[186]

At least one case suggests, however, that it would be inappropriate to impose a presumption of actual malice or lack of sourcing where a Shield Law applies. In *Sprague v. Walter*, the court held that a media defendant's refusal to disclose confidential sources did not

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[183] 415 A.2d 683.

[184] *Id.* at 686.

[185] *Id.* at 685 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

[186] *Id.* at 685 (emphasis added).

justify relieving the plaintiff of the burden of proving actual malice, and if the Shield Law is invoked by the defendant to avoid disclosing a source, the jury should be instructed that no inference, either favorable or adverse, may be drawn from the fact that the defendant invoked the privilege.[187]

3. "Death Penalty" Sanction

There is disagreement among the courts on whether so-called "death penalty" sanctions are ever appropriate for a reporter's refusal to disclose a confidential source, but it is a possibility that media defendants should always consider carefully when invoking a reporter's privilege. Two cases that reach opposite results illustrate the difficulty of drawing any general conclusions about the availability of "death penalty" sanctions in cases against the media.

In *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, plaintiffs sued a newspaper for libel, arguing that an anonymous letter to the editor contained false statements which the defendants had published maliciously.[188] The trial court granted the plaintiffs' motion to compel defendants to disclose the letter authors' names and contact information and to produce a copy of the letter. When the newspaper continued to refuse to disclose information, the court issued an order striking defendants' answer and permitting the plaintiffs to move for summary judgment unless the defendants complied with the court's order of disclosure.[189]

The Appellate Division reversed the trial court, and the New York Court of Appeals affirmed, holding that there was no need for the trial court to subject defendants to a default or summary judgment on the libel complaint by striking their answer. The remedy of contempt was

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[187] 543 A.2d 1078, 1086 (Pa. 1988); *see also Maressa v. New Jersey Monthly*, 445 A.2d 376, 388 (N.J. 1982) (where a media defendant validly asserted the New Jersey Shield Law, it would be error for the trial court to infer, or to instruct the jury to infer, that there was no corroborating source or information or that the defendant acted with actual malice).

[188] 464 N.E.2d 967 (N.Y. 1984).

[189] *Id.* at 969.

barred under New York's Shield Law,[190] and the court held that other statutory remedies were inapplicable because disclosure of the letter writer's identity had no bearing on the action against defendant. In addition, they held that the intent of the New York Shield Law would have been undermined if the remedies statute, which enumerates the penalties for failure to comply with an order to disclose, was not strictly read to protect the defendant. The court ultimately found that the appropriate sanction was to bar the defendants from introducing evidence of reliance on their confidential source to prove the absence of actual malice.[191]

Ayash v. Dana-Farber Cancer Institute reaches the opposite result from *Oak Beach.* In *Ayash*, the court held that a media defendant refusing to disclose the identities of sources pertinent to the plaintiff's case could have a default judgment entered against it.[192] In *Ayash*, a physician brought an action against a hospital, newspaper, and reporter (among others) for defamation claims over a series of *Boston Globe* articles concerning deaths at the hospital which employed the plaintiff. The physician accused the newspaper and its reporter of publishing inaccurate articles about deaths resulting from chemotherapy overdoses.

The plaintiff requested the identities of the sources, and the court ordered the *Globe* defendants to disclose them. After the defendants refused to disclose information that would lead to the sources' identity, the court held the Globe defendants in civil contempt. The Massachusetts Appeals Court allowed the plaintiff's renewed motion to compel source disclosure, but when the media defendants continued to refuse to reveal their sources, the judge issued a default judgment against the *Globe* defendants and the appellate courts upheld it.[193]

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[190] N.Y. CIV. RIGHTS LAW § 79-h.

[191] *Oak Beach*, 464 N.E.2d at 971–72.

[192] 822 N.E.2d 667, 695 (Mass. 2005).

[193] *Id.* at 694–95.

The existence of a Shield Law in *Oak Beach* might explain why the court reached a different result than the court in *Ayash*, which involved only a qualified common law reporter's privilege. While it is difficult to formulate any general rule in this area, it is certainly true that default judgments or other "death penalty" sanctions are rare when a reporter refuses to reveal confidential sources and likely will be applied only after other penalties are unsuccessful in compelling disclosure. Of course, even if a default or summary judgment is entered against the media defendant on the issue of liability, the plaintiff still must prove damages.[194]

B. The Penalty of Criminal Contempt for Non-Disclosure

In *Garland v. Torre*, the Second Circuit affirmed a district court's judgment holding a columnist in criminal contempt for refusing to reveal her source for allegedly defamatory statements about the plaintiff, actress Judy Garland.[195] On appeal, the defendant made several arguments as to why it was error to require her to disclose her sources. She argued that the First Amendment would protect her from compelled source disclosure, and that the public interest in the free flow of news should protect the confidentiality of her source through "at least a qualified privilege."[196]

The court rejected the columnist's argument, stating that the First Amendment's freedoms are limited by the compelling interest of the court in the administration of justice. The court stated that a privilege from disclosure is an uncommon exception to a general duty to testify. According to the court in *Garland*, federal and state precedent favor freedom from

[194] *See Ayash*, 822 N.E.2d at 697–99 (affirming the jury's damage award); *see also Dalitz v. Penthouse Int'l, Ltd.*, 214 Cal. Rptr. 254, 258 (Cal. Ct. App. 1985) (noting that the imposition of a default judgment in a defamation action would "leav[e] only the issue of damages").

[195] 259 F.2d 545 (2d Cir. 1958).

[196] *Id.* at 547–48.

disclosure only in instances where a privilege is created by a statute, and no statute applied on the facts of this case.[197]

Although there are no reported cases imposing jail time on a media defendant in a defamation case for failing to disclose confidential information, there is some indication that courts are willing to use this drastic measure in the civil context generally. *Ashcraft v. Conoco*, for example, concerns a North Carolina reporter jailed after refusing to reveal confidential sources he used to report a torts settlement amount sealed by the United States District Court for the Eastern District of North Carolina.[198]

After the settlement amount was disclosed, the plaintiff moved that the district court hold the defendant, his fellow reporter, and his newspaper—the Wilmington, North Carolina *Morning Star*—in civil contempt. During the hearing on the contempt motions, the defendant refused to disclose the sources who had provided him with information about the settlement. The plaintiff then renewed its motion to compel disclosure, arguing that a compelling need was present based on the district court's interest in identifying the sources. The defendant was found in civil contempt for failure to disclose his sources and was turned over to the U.S. Marshal until he decided to comply with the court's order.

On appeal, the U.S. Court of Appeals for the Fourth Circuit held that in this instance, a compelling interest sufficient to override the reporter's First Amendment-based privilege not to disclose his sources had not been demonstrated.[199] Specifically, the court found that the order sealing the settlement was invalid. The court suggested, however, that if the seal had been valid, enforcement of the settlement confidentiality order might have provided a compelling interest

[197] *Id.* at 549–51.

[198] 218 F.3d 282, 285–86 (4th Cir. 2000).

[199] *Id.* at 288.

sufficient to override the reporter's constitutional protection.[200] This opinion suggests the potential of jail time even in a civil case for a media defendant who invokes a First Amendment privilege to shield its sources from disclosure, at least in a case involving what the court deems to be a compelling public interest.

V. Strategic Considerations For Media Defendants

A. Protecting Sources and Unpublished Materials While Defending a Case Against the Media

1. Choosing Between Penalty and Disclosure

(a) Confidential Source Materials

Most if not all media defendants will choose to protect the source even if it has harmful consequences to their ability to defend against a libel lawsuit. In such situations, the question is not whether to assert the privilege but rather what consequences the assertion will have. As explained above, in some jurisdictions, the consequences are mild, if not non-existent.[201] Elsewhere, the sanction for refusal to disclose a confidential source may be so great that liability is virtually assured. That liability must be weighed against the potential of deterring future confidential sources from coming forward, and against the possibility that an angry "burned" source could color her testimony to the disadvantage of the reporter and media company. Thus, the primary decision often becomes whether to ask the source to release the journalist from the promise of confidentiality, as discussed below.

Of relatively little concern is the possibility that the source could sue the reporter or news organization for violating the promise of confidentiality. Voluntary disclosure outside the

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[200] *Id.*

[201] *See, e.g.*, *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988) (the refusal to identify a confidential source carries no inference for or against the media). In many jurisdictions, however, the privilege only protects against contempt sanctions, leaving the trial court free to levy other types of sanctions that can have a material impact on the case. *See supra* Part IV.

context of litigation might expose the media to suits under *Cohen v. Cowles Media Co.*[202] However, disclosure under compulsion in litigation likely would not be actionable, either because of immunity for statements made in judicial proceedings[203] or because the need to comply with a court order discharges the duty under contract or promissory estoppel.[204] Good practice would suggest refusing to disclose confidential sources at least until a court has ordered disclosure, and providing notice to the source of any motion to compel disclosure so that the source has the opportunity to obtain independent counsel to oppose the motion to compel.

(b) Non-Confidential Source Materials

Unpublished, non-confidential source materials are different. Their disclosure would not breach a promise made to others. At the same time, disclosure of unpublished materials might chill newsgathering efforts. For example, while a person providing information to a reporter might not care about confidentiality at the time, she may care if the disclosure of her identity by a reporter in a libel lawsuit makes it possible that she will be subpoenaed to testify in the case.

The law of the relevant jurisdiction might provide no protection to non-confidential source information, thus requiring disclosure if the materials are relevant and not unreasonably

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[202] 501 U.S. 663 (1991) (holding that the First Amendment does not prohibit a source from recovering damages for publishers' breach of confidentiality agreement).

[203] *Cf. Mahoney & Hagberg v. Newgard*, 712 N.W.2d 215, 220 (Minn. Ct. App. 2006) ("The claims of breach of confidences, invasion of privacy, and civil conspiracy …all arise out of the communications contained in appellant's affidavit and are the sort of claims to which judicial immunity should apply."), *aff'd but narrowed to claims sounding in defamation*, 729 N.W.2d 302, 309 (Minn. 2007).

[204] *See*, *e.g.*, *United Tech. Commc's Co. v. Washington County Bd.*, 624 F. Supp. 185, 190 (D. Minn. 1985) (applying Minnesota law) ("It is a general principle of the law of contracts that one is not liable in an action for breach where that breach was the result of a court order."); *Village of Minnesota v. Fairbanks, Morse & Co.*, 31 N.W.2d 920, 925 (Minn. 1948) (judicial order or other act of government making performance impossible discharges contractual duty); J. Borger, Ventura v. Cincinnati Enquirer: *Context from the Past and Questions for the Future*, LDRC LIBELLETTER, Nov. 1999, at 45, 51 ("A court should not sanction a journalist for revealing information that the court itself, or another court or government official, has compelled her to disclose."); J. Goodale, *et al.*, *Reporter's Privilege Overview*, 1 COMMUNICATIONS LAW 27, 81 n.178 (1999) ("[A] journalist who is forced to reveal a source by the courts should not be held liable to the source for the disclosure. RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981) (duty to perform discharged when performance made impracticable by need to comply with government order").

burdensome. But where there are legal protections afforded unpublished materials, media defendants must assess the benefits of disclosing unpublished materials against the drawbacks. That balance usually comes out in favor of disclosure.

The easiest case involves non-published materials relating to the publication at issue. Not only is the relevant law unlikely to protect such materials from disclosure, but the media defendants will almost always want to produce such materials to substantiate the truth of the publication and document the diligent efforts of the reporter. Media counsel should, however, take precautions to ensure that the production of such non-confidential source materials is not deemed a waiver of the privilege for other materials, whether confidential or non-confidential source materials.[205] One way to do that is to include a "non-waiver" provision in a protective order governing the case.

A more difficult question arises for unpublished materials *unrelated* to the publication at issue. A libel plaintiff suing over a particular publication may have been the subject of other stories by the media defendant. Should the media defendant turn over unpublished materials relating to those other stories? If the subject matter of the reports that are not at issue relates to the publication at issue, the media defendant will likely want to (and have to) produce the materials.

But libel plaintiffs often seek unpublished materials that are arguably irrelevant to the story at issue or its subject matter. For example, in a libel lawsuit brought by a politician, the plaintiff may seek documentation regarding the reporter's coverage of other politicians to show

[205] Reporters might waive the privilege if they voluntarily testify or offer to produce the source of their information. *See, e.g.*, *Sible v. Lee Enters.*, 729 P.2d 1271, 1274 (Mont. 1986) (finding that a reporter's notes would be discoverable if he testifies at trial or by way of deposition); *Sprague*, 543 A.2d at 1083 n.3 (indicating that the privilege "does not carry with it a concomitant inference either as to the reliability of the information conveyed or the media's responsibility in relying upon it" but also holding that a defendant can "introduc[e] extrinsic evidence to establish the validity of the information" without abandoning the privilege).

bias. In that situation, the media defendant may choose to assert the privilege (to the extent there is one for unpublished materials) and simultaneously object based on lack of relevance.

Underlying these decisions is an assessment of whether producing the unpublished materials will help or harm the media defendant's defense. For example, where the defendant has previously published other stories about the libel plaintiff that were written by reporters other than the one who wrote the publication at issue, it is possible that the plaintiff would attempt to exploit any inconsistencies and contradictions in the information gathered by the two reporters to show negligence or even actual malice. In such situations, the media defendant may wish to assert the privilege vigorously.

In other situations, the prior (or subsequent) reporting may support what was said in the publication at issue or otherwise help the defense of the case. Prior reporting may provide additional substantiation for the publication, may underscore the fairness of the publication at issue and/or may show that the libel plaintiff's reputation was already damaged.

This could be seen as a cynical calculation that drives the invocation of the privilege, one that politicians debating shield laws might decry and use against expanding the privilege's protections. Media defendants should consider whether they are willing to pick and choose the invocation of the privilege solely on the basis of expediency, not principle.

2. Anticipating and Preparing for the Choice

The need to choose between bad alternatives can be diminished by thinking and planning carefully in advance concerning when reporters may use confidential sources as well as about reporters' document retention policies. In the aftermath of the recent reporter's privilege battles in the courts, most media companies have likely already revisited their confidential source policies (if they have not, they should do so) and placed greater restrictions on the use of confidential sources. But such efforts may have been more concerned with third party subpoenas

served on reporters (where the media cannot benefit from providing materials to the government or litigant) than on discovery requests propounded on a media defendant (where confidential sources or unpublished materials may be important evidence supporting a defense). These different scenarios present different concerns.

(a) Restrictions on Use of Confidential Sources

Reporters need to think carefully about whether to grant confidentiality to a source and whether to use information given by a confidential source. Important questions include: How important is the story? What are the chances that the source is wrong? How likely is a lawsuit? What is the likelihood that a confidential source will insist on confidentiality in litigation arising months and years later? Because the use of a confidential source presents significant risks in a subsequent libel case, reporters and their editors must scrutinize the decision to rely on confidential sources.

By placing more restrictive parameters on when a reporter can use a confidential source, the media would likely reduce the number of stories based on confidential sources, and that would mean fewer lawsuits against media companies where disclosure issues can arise. Such restrictions also mean that when a reporter does author an article relying on a confidential source, that reliance will rest on more firm footing. If a reporter can use confidential sources only to obtain newsworthy facts, not opinions, that are unobtainable elsewhere and if the source's reliability is firmly established and the rationale for confidentiality is solid and explained correctly in the story at issue, then the use of that confidential source will present fewer problems in subsequent litigation.

(b) Clarifying the Promise

Prudent confidential source policies will also be clear about what reporters can and cannot promise, whether the source has any continued expectation of confidentiality, and whether it would be appropriate to ask the source to release the reporter from the promise.

Media companies must provide guidelines and training on what sorts of promises a reporter can extend to sources. Reporters should never make an iron-clad guarantee that the source's identity will never be disclosed. In today's environment, such promises cannot be made, even in jurisdictions possessing a seemingly absolute privilege for confidential sources. If a reporter's editors and the media company have other expectations for reporters' dealings with their sources, those expectations must be regularly communicated to the reporter.

Reporters must make sure that it is clear what they are promising. Are they promising not to disclose the source's name in the story? Are they promising never to disclose the source's identity in subsequent litigation? Are they promising to keep the source confidential even if it means going to jail or losing a libel lawsuit? Does the promise extend to the information provided by the source, not just the source's identity? Too often, the promise is fuzzy on these important distinctions. Journalists should "promise process, not result."[206] If the reporter ensures that the promises are clear at the outset, subsequent problems often can be avoided.

Of course, obtaining clarity is easier said than done. Sources may be scared off if a reporter approaches an interview too formally or injects legal disclaimers. And even if the promise was clear at the time, the question of disclosure of the source's identity may arise months if not years later. The source may have a different memory of the "promise" or the source may have greater or lesser concerns about remaining confidential. For these reasons, it

[206] B. Wall & J. Borger, *Broken Promises in the Aftermath of* Cohen, 13 COMMUNICATIONS LAWYER No. 1, at 17 (Spring 1995).

may be a good idea to contact the source when litigation arises, either to confirm the contours of the promise or to seek a release from the promise.

(c) Whether to Put Policies into Writing

Putting a confidential source policy in writing presents additional risks in the context of libel litigation. Written policies for reporters are often used against the media because reporters do not always follow policies. And because the decision to use confidential sources is so fact-sensitive, written policies may not give much guidance and may promote an overly rigid analytical process. Media counsel need to consider whether a written policy will induce sufficient compliance to offset the risks of non-compliance.

(d) What Documents to Keep

Document retention policies play an important role. Some policies advise reporters not to keep confidential source materials for fear such materials will be subpoenaed in some criminal investigation. But discarding such materials can have an adverse impact in lawsuits against the media. The fact that a reporter purged confidential source materials can be used against him by a clever plaintiff's lawyer arguing to the jury either that the documents never existed and there never was a confidential source, or that the documents really did not support what the reporter published. Indeed, if the plaintiff persuades the court that destruction of the reporter's notes amounted to spoliation of evidence, the court may be willing to give an adverse inference instruction to the jury that the destroyed materials would have been harmful to the defense. Having reporter's notes that reflect information provided by a confidential source (whose name is redacted) goes a long way to persuade a jury that the reported information was, in fact, obtained from a real person who demanded confidentiality.

B. Whether to Make an Effort to Get Confidential Sources to Reveal Themselves

1. Factors to Consider

Reporters generally dislike going back to their sources to get a release from a promise of confidentiality. They worry about the impact of such a request on their relationships with their sources. Other factors may weigh in favor of making such a request. Where appropriate, the journalists and media lawyers should discuss the following legal and practical factors when deciding whether to seek a release of confidentiality:

- Whether the Defense of the Case Would be Harmed if the Source Does Not Reveal Herself:

Media counsel must balance the harm caused by the failure to identify the source with the potential benefits or harm caused by the identification of the source and subsequent testimony. The threshold issue requires determination of the sanctions that a court might impose for refusing to identify a confidential source. The less severe the sanctions, the less need to ask the confidential source to reveal her identity. Counsel also should consider whether the plaintiff would attack nondisclosure in front of the jury, and how jurors might react to such an attack.

At the next level, media counsel must consider whether the source's disclosure and likely testimony would, in fact, help the case. The reporter might have relied on a source who was not in a position to know the information, who may have been biased or not credible, or whose reliability has been called into question. Any of these facts would undercut the reporter's justifiable reliance on the source, even if the reporter was unaware of those factors at the time of publication. Media counsel may fear that the source's manner or appearance might mean that the source would testify poorly at deposition or trial, particularly if the source is unhappy about revealing herself.

Indeed, it may not be clear whether the source would confirm what was reported in the story at issue. The reporter may have gotten it wrong, the source may misremember what she told the reporter, or the source may lie about what she told the reporter (perhaps still fearing repercussions if her identity is disclosed).

The only way to know the answers to many of these threshold issues is to contact the source.

- Risk of Waiver: There is a risk that the disclosure of some confidential source information and/or unpublished information might constitute a waiver of privilege with respect to all such information.[207] Media counsel must consult the laws of their jurisdiction to ensure that waiver does not occur.

- Whether the Source Would Be Harmed by Revealing Herself: If the original reasons for the source's desire to remain confidential remain as valid as ever and it is clear that the source would suffer real consequences if her identity were to be disclosed, one should hesitate asking the source to reveal herself for fear of obtaining a coerced consent to disclosure.

- Whether the Source's Consent Is the Result of Duress: There are a variety of ways that a source's release of a reporter's promise of confidentiality would not be fully consensual. If there is reason to believe that this is the case, then the reporter should hesitate to put the source in this difficult position. Because this assessment is highly dependent on the facts of the matter and the sophistication and experience of the source, it is difficult to articulate general rules.

[207] *See, e.g.*, *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 375 n.1 (Ky. 1985) (statutory privilege against disclosure of the source was waived by publication); *Las Vegas Sun, Inc. v. Eighth Judicial District Court*, 761 P.2d 849, 852–53 (Nev. 1988) (holding that disclosure of source is a waiver of the privilege).

■ Whether the Source Lied: If the source lied, then the reporter may believe that the promise of confidentiality is not binding.[208] After all, the deal was for the reporter to obtain accurate information in exchange for confidentiality. Whether a source lied or simply got it wrong is typically very difficult to determine, and reporters generally do not like to give up a source even if the source gave bad information. If a reporter, in retrospect, believes that the source lied, it may be advisable to tell the source that the reporter no longer considers the promise binding. In such situations, media counsel may recommend seeking an early settlement of the case, because a lying source could be more harmful than helpful to the defense of a libel lawsuit, particularly if the lie could have been uncovered prior to publication.

■ Whether the Source has Waived Confidentiality: A source may waive confidentiality in a variety of ways. For example, the source could disclose the same information publicly, thus making it clear that the source no longer cared about remaining anonymous. In such a situation, the reporter could disregard the promise or, in an abundance of caution, confirm directly with the source that the source no longer intends to bind the reporter to the prior promise. The public disclosure could be an "alternative source" of the information sufficient to keep the privilege itself intact, even if the original disclosure prior to publication was as a confidential source.

■ The Nature of the Source's Relationship with the Reporter:

Media counsel often consider the scope of the reporter's past relationships with the source and whether the reporter hopes to use the source for future reporting. A close relationship could ease the approach to the source with a request for consent to disclose his or her identity.

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[208] *Cf. Steele v. Isikoff*, 130 F. Supp. 2d 23, 32 (D.D.C. 2000) ("Even if the courts of the District of Columbia (or Virginia) were to determine that a reporter-source confidentiality agreement gives rise to a contractual relationship, Isikoff would have been relieved of his duty to abide by his promise under the alleged first contract because of Steele's pre-existing intent to lie.").

■ Risk of Conflict between Reporter and Publisher: The reporter and publisher may have different views on whether to honor a promise of confidentiality given to a source or whether to obey a court order requiring disclosure of a confidential source's identity. If that happens, and if media counsel is representing both the reporter and the publisher/broadcaster, the reporter may be required to obtain separate counsel.[209]

2. How to Do It

If the decision is to try to persuade the confidential source to reveal himself or release the reporter from the promise of confidentiality, it is important that the reporter and media counsel work together and strategize how best to approach the source. The following are issues to consider and resolve when deciding how to approach the source.

■ Whether the Reporter or Media Counsel should approach the Source: The initial issue is whether the reporter will approach the source or leave it to media counsel. Media lawyers have expressed different preferences, while agreeing that the decision largely turns on the facts of each case.

The benefit of the reporter making the overture is that the reporter has the relationship with the source, is more likely to persuade the source to consent to disclosure, and is in a better position to assess how to proceed. Having the reporter do it, however, can create additional confidential source issues, and it runs the risk that the release of confidentiality is not clearly established and documented.

Many media counsel recommend that the reporter, not the media lawyer, contact the source. If the reporter approaches the source, the media counsel needs to map out what the

[209] For an analysis of these ethical issues, *see* Bruce E. H. Johnson, *Conflicts Issues in Confidential Source Cases: New Dangers from the Model Rules?*, MLRC Bulletin, 2005 Issue No. 4 Part B ISSN 0737-8130 at 43 (Jan. 2006).

reporter should and should not say. If media counsel contacts the source, media counsel may want to recommend to the source that she obtain a lawyer.

- How Much to Say to the Source: Whatever the reporter or reporter's lawyer says to the source could come out in defamation litigation, or it could be evidence in a promissory estoppel lawsuit brought by the source. If it is uncertain whether there was any promise, the person contacting the source should sound out the source's perspective on that point and should not suggest that there in fact was a promise simply to reinforce a claim of confidentiality.

- Whether to Get the Agreement in Writing: If there is a risk of a dispute arising later, it may be prudent to obtain a written, signed release of confidentiality by the source. Some media counsel advise against written releases where information is subpoenaed in a criminal investigation. A short letter from media counsel to the source confirming that disclosure may be made to the opposing party in the litigation may be better than asking the source to sign a formal release.

C. Discovery Considerations

If a decision is made to maintain confidentiality of a source in a lawsuit against the media, the process of properly handling discovery issues involving confidential sources should start at the very beginning of the lawsuit. When the suit first comes in, counsel should meet with the reporter and editor or producer to discuss the story in detail, focusing on the factual issues that are the basis for the libel claim. What claim is being made? What statements are alleged to be false? What were the sources for the allegedly false statements? Was a confidential source actually the source for any allegedly false statements? How confident are we that the statements at issue are, in fact, true or substantially true? What other ways are there to prove the truth of the statement that do not require involving the confidential source?

During the meeting, counsel should probe the reporter on the relationship with the confidential source. What was the nature of the promise of confidentiality? Confirm the reporter's understanding of the scope of the promise of confidentiality. Is the promise of confidentiality reflected in any documents, emails, or notes? Identify and segregate any materials that reflect information from the confidential source and any documents regarding the nature of the promise of confidentiality.

Is this source one that will require protection to the bitter end? Will this source ultimately agree to be revealed if all other efforts to protect confidentiality have failed? Are there any issues of the source's physical safety, legal complications, or retaliation if he is identified? Discuss with the editor and reporter the potential legal liability for breaking a promise to keep a source's identity confidential. This is the time to find out if there is an actual or potential conflict between the paper and the reporter. Has the reporter been named individually as a defendant? Did the reporter have authority to grant a promise of confidentiality? Was it granted consistent with editorial policy? If the media outlet says the source needs to be revealed to defend the suit, will the reporter agree?

Consider the scope of knowledge of the confidential source. Does anyone in the news office other than the reporter know the source's identity? Consider carefully before expanding the circle of knowledge of the confidential source. Consider whether there is any need even for counsel to know the identity of the source – there usually is not. The fewer people who know the source's identity, the fewer targets for contempt citations and the fewer chances for inadvertent disclosure. If there are documents that reveal the name or identity of the source, have the reporter make copies of the documents and redact the identifying information before producing the documents to counsel.

After determining what statements are at issue, whether there is a real problem with the truth of the challenged statements, and what alternative sources may exist, it is time to focus on the plaintiff. Use the session with the reporter and editor to think about what documents the reporter would have wanted to have and what testimony the reporter would want to obtain before doing the story, if he had had the power of compelled discovery that the civil case now provides. This is a time – with the reporter and editor's input – to prepare creative, focused discovery requests and to serve them early on the plaintiff. The reporter might even consider going back to the confidential source to get a list of documents that would back up the source's statements (a good source will probably know where to look for the secrets) and for the names of other people who might be deposed to back up the sources claimed. Proving the truth of the statements at issue early is the best way to stave off demands for a source's identity.

One should consider doing an early deposition of a third party who can corroborate what the confidential source had to say (assuming that the challenged statement is true or substantially true). A good way to show that a plaintiff has not exhausted alternative sources of information before seeking to compel the identity of a confidential source is to show that non-confidential sources have the information already. The same principle can apply if there are other elements that the plaintiff cannot meet, or other defenses that can be proven, without making the source's identity or credibility relevant: the statements are opinion or not provably false statements of fact, the statements are absolutely privileged, the statements are barred by limitations, etc. Attacking the plaintiff's proof of fault – actual malice, gross irresponsibility or negligence – are far more likely to make the source's identity and credibility relevant.

All of this effort is helpful so that when the defendant is before a court on a motion to compel the source's identity, it can be argued that there is no need for the confidential source

because it is irrelevant in light of the truth or substantial truth of the statement, the availability of disclosed sources for the same information, or other complete defenses to the libel suit.[210] While the goal of full discovery in civil litigation is laudable, courts often recognize – either formally or informally – that when dealing with confidential sources whose existence breathes more life into the First Amendment free press promise, at least some consideration should be given to protecting those sources, especially when the need for information is not compelling. Even in jurisdictions where the privilege is not recognized or is weak in civil cases, many judges are sensitive to unnecessarily revealing the identity of confidential sources. This may be particularly true if the lawsuit involves local media and the judge is elected.

[210] *See, e.g.*, *Price v. Time, Inc.*, 416 F.3d 1327, 1346–48 (11th Cir. 2005) (holding that disclosure of a reporter's confidential source could not be compelled in a libel case where the plaintiff had not yet deposed four individuals identified by the reporter as having direct or indirect knowledge about the incident at issue—one of whom most likely was the confidential source); *Shoen v. Shoen*, 5 F.3d 1289, 1296–97 (9th Cir. 1993) (holding that disclosure of a confidential source could not be compelled in a libel case where the plaintiffs failed to depose "an obvious alternative source"); *La Rouche v. NBC, Inc.*, 780 F.2d 1134 (4th Cir. 1986) (disclosure not proper where plaintiff in defamation case failed to depose public sources of allegedly defamatory statements and to exhaust all non-party depositions); *Mitchell v. Superior Court of Marin County*, 37 Cal. 3d 268, 282 (1984) (holding that compulsory disclosure of confidential sources is a "last resort, permissible only when the party seeking disclosure has no other practical means of obtaining the information"); *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981) (finding that reporters should not be compelled to disclose their sources or reveal confidential information until after the plaintiff has proven that he or she "has exhausted every reasonable alternative source of information"); *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) ("[T]he falsity of the [media's] charges . . . should be drawn into question and established as a jury issue before discovery is compelled."); *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979) (refusing to compel disclosure of a confidential source of a leak to a non-party journalist where the plaintiff had not questioned other readily available sources—including "the most patently available other source" —to determine the identity of the source); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972) ("[T]o routinely grant motions seeking compulsory disclosure without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws."); *Mitchell v. Superior Court of Marin County*, 37 Cal. 3d 268, 283 (1984) (holding that that a court "may require the plaintiff to make a prima facie showing that the alleged defamatory statements are false before requiring disclosure"); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 181 (Ga. Ct. App. 2001) ("To properly perform [the] balancing test in a libel case, the trial court must require plaintiff to specifically identify each and every [allegedly libelous statements], determine whether the plaintiff can prove the statements were untrue, taking into account all other available evidentiary sources, including the plaintiff's own admissions, and determine whether the statements can be proven false through the use of other evidence, eliminating the plaintiff's necessity for the requested discovery.); *see also Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1974) ("The values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, not the beginning, of the inquiry.").

If it turns out that after the suit is filed your reporter has one of those "uh-oh" moments and there is a problem with the story's factual accuracy, there may be no choice but to focus on the fault element. This is not mutually exclusive, of course; a defendant can argue substantial truth as well as no knowledge of falsity and no lack of care. Is the plaintiff a public official or public figure? If so, it is obviously easier to defend if your reporter had good reason to think – even without the confidential source – that the challenged statement was true. Did the reporter have alternative bases for the belief other than the confidential source? If so, the defendant can argue that there is no need to reveal the identity of a confidential source that merely confirmed what the reporter already believed to be true, based on non-confidential sources. If the standard is negligence, the bar for showing sufficient alternative sources will be higher, but the same principle applies.

The hardest situation is when the statement is either false or arguably false, and the confidential source was the only source for that statement. Of course, this should not happen or happen only rarely. In such a case, the reporter's subjective belief in the truth of the source's statements is most vulnerable to being subject to discovery. How credible was the source? What was the basis of the source's information? Did the source have a bias against the plaintiff? It will likely be difficult to avoid disclosure under these circumstances, but consider whether there is proof that there were other sources of the incorrect information and whether the false information was in general circulation from otherwise reliable sources. If documents have the incorrect information, is there any need to compel the disclosure of a confidential source? Do the plaintiff's own documents and sources reflect the same false information?

Another avenue to consider is whether the libel appears to be merely a ruse to smoke out the source. The filing of a vague libel suit with an immediate effort to discover the identity of a

source is strong evidence that there is an ulterior motive. A plaintiff who resists identifying the allegedly false statements that are at issue or insists vaguely that the publication was libelous "as a whole" may simply be trying to "out" a source. If this can be shown, it might help with the court in opposing a motion to compel.

When it appears likely that a fight over disclosing a confidential source cannot be avoided, and of course depending on the court and the local practice, there is good reason to be forthcoming with all of the responsive information and documents that a plaintiff is entitled to get in discovery other than the identity of the confidential source. Sharing all of the non-confidential information and documents establishes a willingness to cooperate in discovery. The attitude with the other side and with the court (except in the case where the libel case is an effort to find and punish the source) should be cordial and professional but insistent that the source is not going to be revealed without a court order entered after the plaintiff has met a rigorous showing needed to overcome the First Amendment, common law, or statutory protections. Protecting a confidential source's identity can be a tough call for a judge accustomed to overseeing very broad civil discovery, so make it easy for the court to like what it is seeing from you in every other aspect of the discovery process when it is evaluating how to handle this sticky situation.

When responding to discovery, it is important to avoid disclosing the confidential source's identity directly or indirectly. Here the lawyer's obligation to provide accurate and complete discovery responses can conflict with the need to protect the confidential source's identity.

First, consider a direct request in discovery to identify all sources of a story. The defendant can easily identify the non-confidential sources and "a confidential source." But what

if the possible universe of sources is limited, and by identifying all non-confidential sources, the confidential source can thereby be identified by deduction? In such a case, it may be necessary to move forward quickly with defenses that can dispose of the case on the face of the pleadings or the face of the report, without using information obtained from any sources at all.

Next, consider a defendant's obligation to identify generally all persons with knowledge of relevant facts. Again, if the universe of possible sources is limited, a listing that discloses all persons with relevant knowledge except the confidential source may effectively reveal the source's identity. If defense counsel does not know the actual identity of the confidential source (and, as noted, there are good reasons to not learn the identity of a confidential source) a comprehensive listing of persons with knowledge of relevant facts may well include the confidential source, unknowingly. This would not, of course, reveal the fact that the person was the confidential source. It may, in fact, be less likely to reveal the identity of the source than a listing of persons that includes an obvious omission. Being particularly thorough in identifying persons with knowledge of relevant facts should help to take the focus off any particular name. The best course to take will depend on the specific facts of the case and how likely it is that discovery responses will permit the plaintiff to deduce the identity of the confidential source.

Document production can pose the same issues. If there are any documents that reveal the identity of the confidential source, and counsel has elected not to learn the source's identity, the reporter should be directed to make copies of materials and redact the identifying information on copies provided to counsel. The reporter must, of course, keep the original documents safe and not alter them in any way. Before producing any documents from the confidential source, or any notes of information obtained from the source, the reporter should be directed to review those documents carefully to determine whether the plaintiff or an enterprising lawyer or

investigator could determine the identity of the source from the content or nature of the documents. If the content or nature of the documents is such that they cannot be turned over without revealing the source, counsel again will have to object to their disclosure and quickly pursue means of disposing of the case on grounds that do not put the documents and identity of the source at issue.

Finally, be wary of compromises designed to allow partial or limited disclosures of the source's identity, such as attorney's eyes only designations. It is hard to see how such designations, with their exceptions and with the necessity of relying on opposing counsel's integrity and care in handling information, could adequately protect the First Amendment principles involved.

D. Choice of Law Considerations

As previously discussed, the scope of the applicable reporter's privilege varies from jurisdiction to jurisdiction, and given the multi-state reach of the media, it is likely that any case involving the press will implicate the laws of several jurisdictions. Thus, in evaluating a given situation, it is imperative that media counsel consider the threshold question of what law governs whether and to what extent a journalist may invoke the reporter's privilege. Is it the law of the forum state? The plaintiff's domicile? The place of the alleged wrong? The law of the state in which the requested documents are located or where the reporter's deposition takes place? Unfortunately, there is no simple answer to this question. States employ a range of varying choice of law schemes, each of which may produce a different outcome. As a result, media counsel must remain cognizant of the multitude of choice of law issues that may arise in any given case.

Choice of law issues surrounding the application of the reporter's privilege primarily arise out of two situations: (1) federal diversity cases and (2) when discovery of a source is

sought in one jurisdiction with respect to litigation pending in a second jurisdiction. Each of these scenarios presents both vertical and horizontal choice of law issues. The vertical question—whether federal or state law concerning privilege applies—is relatively easy to answer. Under Federal Rule of Evidence 501, federal courts exercising federal question jurisdiction must apply the federal law of privilege,[211] while those sitting in diversity must apply the state law of privilege. Actions pending in state court generally call for the application of state law regarding privilege; however, pursuant to the Supremacy Clause, state courts must, at a minimum, consider applicable constitutional privileges (*i.e.*, the First Amendment privilege) if there is no applicable state constitutional, statutory, or common law privilege.

The horizontal question—which state's law of privilege applies—is the more difficult question. In federal diversity cases, media counsel must first determine what choice of law rules will apply. Under *Klaxon Co. v. Stentor Electric Manufacturing*,[212] a federal court sitting in diversity looks to the choice of law provisions of the state in which it sits to determine which state's privilege law applies.[213]

Second, media counsel must consider what type of choice of law scheme the forum state employs—the traditional rule or a more modern "interest based" approach. Under the traditional rule, the law of the place of wrong (*lex loci*) governs all substantive matters, while the law of the forum (*lex fori*) governs all procedural or remedial matters. Although mechanical, this approach may still lead to uncertain results, depending on whether the forum state views the privilege issue

[211] This may be the extent of the choice of law analysis in federal question cases. A federal court exercising federal question jurisdiction will apply the privilege rule of the circuit in which it sits, as horizontal choice of law among federal circuits is generally discouraged. *See In re Raemakers*, 33 F. Supp. 2d 312, 315 (S.D.N.Y. 1999) ("Choice of law analysis is generally inappropriate in federal question cases where the choice involves the law of two or more circuits. 'Federal courts comprise a single system applying a single body of law, and no litigant has a right to have one interpretation of one federal court rather than that of another determine his case.'") (quoting *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993)).

[212] 313 U.S. 487 (1941).

[213] *See, e.g.*, *Hatfill v. New York Times*, 459 F. Supp. 2d 462, 465 (E.D. Va. 2006).

as a substantive or procedural matter. The majority view appears to be that as a rule of evidence, privilege is a procedural matter to be governed by the laws of the forum.[214] However, at least one court has treated the reporter's privilege as a substantive matter to be governed by the laws of the *lex loci*.[215] Although the basis for the distinction remains unclear, it appears that whether the reporter's privilege is considered procedural or substantive turns, in part, on whether the law of the forum state supports the reporter's privilege as a common law evidentiary matter or as a statutory right.[216]

The substantive/procedural distinction is irrelevant in states employing a more modern choice of law analysis. These states eschew the perfunctory approach adopted by traditional states in favor of a choice of law scheme that balances the competing policy interests of the relevant jurisdictions. While the paramount concern is which state has the most significant interest in applying its law to a given situation, the methodologies used to reach this result vary from state to state. As a result, general conclusions are difficult to draw. The following cases, each addressing New York's privilege law, serve to illustrate the various factors considered in applying an interest-based choice of law approach.

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[214] *See id.* (stating that "the reporter's privilege, a common law privilege under Virginia law, is a question of evidence" that is "governed by procedural or *lex fori* rules"); *Williams v. ABC*, 96 F.R.D. 658, 662 (W.D. Ark. 1983) (turning to the forum's privilege law because the "law of the [forum], in accordance with the general rule, is that the competency and admissibility of evidence are to be determined by the law of the forum state"); *see also Ghana Supply Comm'n v. New England Power Co.*, 83 F.R.D. 586, 589 (D. Mass. 1979) (explaining that Massachusetts "characteriz[es] questions of privilege as procedural").

[215] *See Laxalt v. McClatchy*, 116 F.R.D. 438, 449 (D. Nev. 1987).

[216] *Compare Hatfill*, 459 F. Supp. 2d at 465 (explaining that the reporter's privilege is a common law privilege under Virginia law and, as such, is a question of evidence that "is governed by procedural or *lex fori* rules") *with Laxalt*, 116 F.R.D. at 449 (treating the reporter's privilege as a substantive matter when the law of the forum state, Nevada, had a statutorily based reporter's privilege); *see also Cepeda v. Cohane*, 233 F. Supp. 2d 465, 467 (S.D.N.Y. 1964) ("[T]he rule of privilege and the recognition thereof reflected a legislatively determined state policy, and as such it was more than a rule of evidence or a question of procedure but should rather be classified as substantive or quasi-substantive.")

In *Compuware Corp. v. Moody's Investors Services, Inc.*,[217] a customer sued a credit rating service in the Eastern District of Michigan, alleging defamation and breach of contract concerning a debt rating the defendant had issued. Sitting in diversity, the court looked to Michigan choice of law rules to determine whether to apply the Michigan or New York law of privilege. The Michigan choice of law rules governing tort actions directed courts to apply Michigan law unless the interest of a foreign state in having its law applied outweighed the interest of Michigan. The court concluded that New York "has a very strong interest" because it is "the center of the financial publishing industry," and "the materials in question were given by two New York companies to defendant Moody's, also a New York company."[218] Continuing, the court explained:

> Moreover, in order for the reporter's privilege law to have the desired effect of allowing newsgatherers to seek information without fear of court-ordered production of those documents (and hence, the effect of making sources more willing to speak to the press), all courts must respect that privilege. A single court choosing to order disclosure of documents that would otherwise be privileged could greatly diminish the effectiveness of the protection, given that many New York publishers have a wide national circulation and would be subject to the jurisdiction of courts in a variety of states.[219]

Weighed against New York's interest, Michigan's interest was "only very slight," as its "only connection to the documents in question is Plaintiff's discovery requests."[220] Accordingly, the court ruled that New York's shield law would govern and ordered further proceedings to decide the source issue.[221]

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[217] 222 F.R.D. 124 (E.D. Mich. 2004).

[218] *Id.* at 132.

[219] *Id.*

[220] *Id.*

[221] *Id.*

Similarly, in *Stephens v. American Home Assurance Co.*,[222] the Southern District of New York applied the law of a foreign jurisdiction, New Jersey, to protect a journalist's nonconfidential source material.[223] In *Stephens*, A.M. Best Company, a non-party publisher of reports and ratings on insurance companies, moved to quash a subpoena served on it by American Home Assurance Co. in a case arising out of the liquidation of a reinsurance company declared insolvent by a Kentucky state court.[224] Citing Rule 501, the court turned to New York's choice of law rules to determine whether it should apply New York or New Jersey law concerning the reporter's privilege. Under New York's interest-based choice of law analysis, "privilege rules are considered conduct-relating" requiring application "of the law of the 'locus' of the conduct at issue."[225] Best, the subpoenaed party, maintained its headquarters and publishing facilities in New Jersey, and the matters American Home sought to discover stemmed from conduct based in New Jersey. Accordingly, in order to protect New Jersey's interest in "affecting the conduct of those who act within its jurisdiction" and "protecting the activities of its domiciliary news publishers," the court applied the New Jersey shield law and refused to order disclosure of the nonconfidential material.[226]

In cases where discovery is sought in one jurisdiction in connection with litigation that is pending in another jurisdiction, media counsel must also consider whether the forum's choice of law scheme includes special rules relating to depositions and discovery. Typically in this

[222] No. 91 Civ. 2898, 1995 WL 230333 (S.D.N.Y. Apr. 17, 1995).

[223] *Id.*

[224] *Id.* at *7

[225] *Id.*

[226] *Id.*

situation, the forum in which discovery is sought will apply its own law of privilege;[227] however, after construing the forum state's choice of law rules, some courts have applied the privilege law of the trial state.[228] For instance, in *Cepeda v. Cohane*, the court recognized that New York courts would apply the New York law of privilege to a deposition taken in New York in connection with an out-of-state lawsuit, even though the law of the trial state may not recognize the privilege or may construe it more narrowly. However, in further analyzing New York case law, the court found a "strong indication that if the situation were reversed, to wit, a strong public policy in the trial state recognizing the privilege and non-recognition in New York, the deposition state, a New York court would . . . apply the law of the place of trial and uphold the asserted privilege if it was valid under the law of the sister state."[229] New York, at the time of the discovery proceedings, had no law recognizing a reporter's privilege, whereas California did. Accordingly, the court applied California privilege law to determine whether or not the journalist could invoke the privilege.[230]

As discussed above, there is no clear cut rule for determining which state's law governs whether and to what extent a journalist may invoke the reporter's privilege to protect confidential and nonconfidential source material. Accordingly, media counsel must carefully consider the unique facts of each case and the laws of the relevant states when analyzing the conflicts of law issue.

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[227] *See Shaklee v. Gunnell*, 110 F.R.D. 190, 192 (N.D. Cal. 1986) (stating, without analysis or explanation, that "[i]n a foreign deposition proceeding the privilege of the state in which the deposition is taken applies"); *Nat'l Med. Care, Inc. v. Home Med. of Am., Inc.*, No. 103030/02 2002 WL 1461769, at *4 (N.Y. Sup. Ct. May 20, 2002) ("Where a deposition is to be taken in New York in connection with an out-of-state lawsuit, New York's law recognizing a privilege and defining its scope will be applied, even though the trial state . . . may not recognize the privilege, or may interpret it more narrowly.").

[228] *Cepeda v. Cohane*, 233 F. Supp. 465, 470–71 (S.D.N.Y. 1964).

[229] *Id.* at 470.

[230] *Id.* at 471. Ultimately, the court determined that California's privilege law did not apply to magazines and ordered the journalist to disclose his sources. *Id.*

CONCLUSION

Courts and legislatures in the United States afford inconsistent and confusing protection to journalists and the information they gather in the course of investigating and reporting the news. State and federal courts have recognized constitutional or common-law privileges for reporters and some state legislatures have enacted statutes to shield reporters from the reach of courts and other official bodies, but the types of protection vary considerably as to who can invoke the protection, what information is protected, and exceptions to the protection.

In the context of civil lawsuits, individual journalists and their media employers often find it difficult to protect confidential sources and newsgathering materials while defending themselves in those suits. Media defendants can face an array of consequences for withholding privileged information, including, among others, "death penalty sanctions" such as entry of a directed verdict, default judgment or summary judgment against a defendant who refuses to comply with an order to disclose such information. Media defendants and their counsel should think strategically about the issues they will confront in civil cases involving confidential sources or materials.

Additional Reference Materials

In addition to the citations throughout this paper, other valuable reference materials include:

- *Compendium: The Reporter's Privilege: A Detailed Guide to Fighting Subpoenas in All States and Federal Circuits,* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2007), http://www.rcfp.org/privilege/index.php;
- *Shields and Subpoenas,* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS. Current as of June 12, 2007, http://www.rcfp.org/shields_and_subpoenas.html;
- Maherin Gangat, *Reporter's Privilege Issues: Continuing Attacks in 2006,* MEDIA LAW RESOURCE CENTER BULLETIN (Dec. 2006);
- Theodore J. Boutrous, Jr., Thomas H. Dupree, Jr., and Michael Dore, *The Four Myths Surrounding the Common Law Reporter's Privilege*, MEDIA LAW RESOURCE CENTER BULLETIN (Dec. 2006);
- To track the status of bills that would create a federal Shield Law, H.R. 2102 and S.1267, see http://thomas.loc.gov/home/c110query.html; and
- MEDIA LAW RESOURCE CENTER'S website – online resources regarding the reporter's privilege: http://www.medialaw.org