



Comments of the Reporters Committee for Freedom of the Press
July 21, 2009

To: Wisconsin State Assembly Committee on Judiciary and Ethics
Re: Comments on proposed Assembly Bill 333 establishing a
privilege for reporters and whistleblowers

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General Interest of Signatory

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970, and frequently files *amicus curiae* briefs in significant media law cases.

The Reporters Committee serves as a First Amendment clearinghouse, monitoring and compiling information about significant legal and statutory developments affecting journalists and the public's right to know and produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, a bi-weekly newsletter, and a web log, which is updated several times daily.

The Reporters Committee also operates a hotline to assist journalists with legal problems as they arise in their work. Often, these legal defense requests come from journalists who have been ordered to appear in court or disclose confidential information. This contact with reporters, editors and media lawyers around the country drives home the importance that reporter's privilege and shield laws play in the everyday performance of journalism.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing the rights of reporters to protect their confidential sources and unpublished material. And it is through this dual role that the Reporters Committee can offer a unique prospective on the need for a reporter's privilege in Wisconsin. The Reporters Committee played an integral role by providing written and/or oral testimony to state legislatures in Texas, Utah and Maine, the most recent states to enact shield laws.

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Overview

The Reporters Committee takes this opportunity to urge Wisconsin to join the vast majority of states in adopting statutory protections for the confidentiality of sources and newsgathering materials of its reporters.

Wisconsin is one of only a handful of states that do not have a shield law to preserve the free flow of information. Thirty-seven states plus the District of Columbia have already enacted shield laws. The proposed Assembly Bill 333 is based on a principle of law that Wisconsin courts have already recognized – that in order to protect the free flow of information to the public, reporters have a privilege from having to reveal their sources and newsgathering information. See *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995). But the proposed legislation goes even further by providing an absolute privilege for confidential sources and information.

The law would provide much of the protection needed for journalists to carry out their essential role of informing the people of Wisconsin. The law contains an absolute prohibition on the subpoenaing of reporters for any confidential information. Further, it places the ability to subpoena a reporter for non-confidential material and sources solely with the court, giving judges the opportunity to evaluate the need for each subpoena with a clearly defined test complete with specific guideposts to steer their hands in determining the proper scope of protection. Most importantly, the rule protects the people of Wisconsin. By protecting the news media's ability to report the news, the legislature can ensure that important issues continue to enter the public discourse and preserve the proper functioning of the democracy.

The time has come for Wisconsin to join the vast majority of jurisdictions across the country in offering the basic protections necessary to protect the public's right to know. The proposed legislation is a positive step towards preserving the news media's contribution to society, and the Reporters Committee applauds the legislature for attempting to bring Wisconsin to the national forefront in protecting these rights. However, the law could go a bit further in the protections it is extending.

Thus, the Reporters Committee offers the following three recommendations:

- The definition of news person should be more inclusive;
- it should be made clear that the privilege, and the ability to waive the privilege, belongs to the reporter, and;
- an interlocutory appeal provision should be included so as to preserve the reporter's ability to fully protect his or her sources.

Comments

I. The absolute protection of confidential sources and information guarantees that whistleblowers will be able to speak out about matters of public importance.

The proposed bill does a great deal to ensure that the people of Wisconsin will have unfettered access to information that is of the utmost public concern. The ability of a news reporter to safeguard the identity of a whistleblower who speaks to them in confidence is vital to ensuring the free flow of information and protecting the public's right to know. By providing an absolute privilege for this type of confidential source information, the legislature can do a great service to the people of Wisconsin by joining nearby states in carefully protecting the vital relationship between a confidential source and a news reporter.

Wisconsin will not be alone in recognizing the need to protect this valuable relationship by offering absolute protection. Twelve of the thirty-seven states with shield laws, also offer an absolute protection of confidential sources and information. In Nebraska, news reporters cannot be required to disclose "the source of any published or unpublished, broadcast or non-broadcast information." Neb. Rev. Stat § 20-146 (1) (1973). And in Kentucky, news reporters can never be compelled to reveal "the source of any information procured or obtained by him." Ky. Rev. Stat. Ann. §421.100 (1952).

Despite its relatively infrequent application, a rule offering strict protection of the confidential source relationship has considerable dividends. Maintaining the relationship between journalists and confidential sources ensures that some of the most important news will continue to reach the public discourse rather than dry up at the source. Within just the last few years alone, confidential sources helped expose the mistreatment of veterans at the Walter Reed Army Medical Center, the Abu Ghraib prison scandal and steroid abuse in major league baseball.

Given the dangerous implications of undermining the confidentiality of sources, the Reporters Committee endorses an absolute privilege for confidential source information, ensuring that sources can continue to speak freely and openly to the press about matters that concern the public.

II. The qualified privilege applying to non-confidential sources and information keeps news reporters from becoming the investigative arm of law enforcement and civil litigants.

Although subpoenas involving confidential sources ordinarily garner the boldest headlines and the most public attention, the vast majority of subpoenas served on reporters do not involve confidential sources. These subpoenas regularly seek reporters' notes, e-mail messages, recordings, phone records, computer files, drafts, outtakes and unpublished photographs and represent a significant intrusion into and burden on the editorial process.

In keeping in line with nearly all state shield laws, the Wisconsin bill would also protect non-confidential sources and newsgathering materials. The qualified privilege for information other than confidential allows a court to apply a commonly used balancing test that weighs the relevance, necessity and availability of the information against the news reporter's rights to protect the information. This test has already been recognized by Wisconsin courts in interpreting the Wisconsin state constitution. *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995).

By applying this practical test, it is ensured that a criminal prosecutor or defendant or a civil plaintiff will be able to compel a reporter to testify or give up information only in narrow situations. In order for the press to maintain its independence, it must not be seen as cooperating with either private litigants or the government. By demanding that the information sought goes to the heart of the matter and is unavailable from alternative sources, the rule prevents lazy prosecutors and civil litigants from abusing news reporters as shortcuts in the litigation process.

Recommendations

I. The definition of news person should be more inclusive

The legislature wisely defined “news person” to incorporate many types of journalists when drafting the proposed rule. The law specifically protects reporters who work for a variety of news organizations. Many Courts across the country have recognized that what “makes journalism journalism is not its format, but its content.” *Shoen v. Shoen*, 5 F. 3d 1289, 1293 (9th Cir. 1993).

The proposed law does, however, leave out a significant number of self-employed news gatherers. As written, it covers journalists only if they are reporting for an organization. Because the protection is tied to reporting for “an organization,” the law eliminates many freelancers, book authors, documentary filmmakers and Internet-based reporters who are not affiliated with an organization at the time of reporting. The law will only protect those journalists who are affiliated with a news organization at the time they begin to gather news.

In order to include self-employed journalists, the Reporters Committee urges the legislature to amend the language of section 885.14 to include a protection for reporters who are not affiliated with a news organization. Courts have recognized that the proper test to apply is whether the newsperson had the intent to gather and disseminate news to the public at the inception of the reporting process. *See von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987). In *von Bulow*, the Second Circuit ruled that the reporter's privilege was not available to a woman who claimed to be a book author because the woman did not have the intent to publish a book when she began interviewing people about Claus von Bulow, who was being investigated for the attempted murder of his wife Sunny. The court found that the ‘author’ could not avail herself of a privilege because she was close

friends with Claus and her intent was to vindicate him, not to disseminate independent news about the situation.

As *von Bulow* and subsequent cases have recognized, this test allows those reporters who are legitimately gathering news for the public to avail themselves of the protection. But it also draws a line and does not extend the privilege those who are not functioning as independent journalists. By adding a function-based test into the statutory language, the Wisconsin legislature could more effectively provide protection to many types of news gatherers.

II. It should be made clear that the privilege, and the ability to waive the privilege, belongs to the reporter

The law does not clearly define who controls the privilege, and thus has the right to waive it. It should be made clear in the language that the reporter has the right to waive the privilege, and not the source. By stipulating that it is the news person who can waive the privilege, the law will protect the public's right to learn the truth in those situations when sources are coerced into waiving their rights, and a judge then compels a reporter to testify.

III. An interlocutory appeal provision should be included so as to preserve the reporter's ability to fully protect his or her sources.

In order to ensure that the rights of news reporters, and by extension the rights of the public, are sufficiently protected, the Reporters Committee urges the legislature to include an interlocutory appeal provision in the statute. By adding the right to immediately appeal any decisions made by the court to subpoena a reporter to testify the legislature is helping to protect this very important right. The neighboring state of Minnesota includes a provision such as this. In the Minnesota shield law, it stipulates that "The order may be appealed directly to the Court of Appeals according to the Rules of Appellate Procedure." Minn. Stat. Ann. § 595.024 (1998). This interlocutory appeal helps to preserve the rights at stake, by allowing for an appeal while the underlying litigation is pending. Such a procedure eliminates the need to use a court's time litigating motions for a stay.

Conclusion

We thank you for the opportunity to provide comment on this important matter. The Reporters Committee strongly urges Wisconsin to join the majority of states in passing legislation to protect journalists from costly, damaging subpoenas that threaten the neutrality of the reporters and their ability to gather the news. The proposed bill, although not perfect, does a great deal in achieving that goal and lends uniformity, clarity, and predictability to balancing the competing constitutional and societal interests when journalists are hailed into court.

Respectfully submitted,

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