No. 03-2753
No. 03-2754

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Michael McKevitt,

Plaintiff-Appellee

v.

Abdon Pallasch, et al.,

Defendants-Appellants

Appeal from the United States District Court
Northern District of Illinois, Eastern Division,
(No. 03 C 4218, Hon. Ronald A. Guzman, Presiding)

BRIEF OF AMICUS CURIAE ABC, INC., ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, BLOOMBERG L.P., CBS BROADCASTING INC., GANNETT COMPANY, INC., THE HEARST CORPORATION, THE MCCLATCHY COMPANY, THE McGRAW-HILL COMPANIES, NATIONAL BROADCASTING COMPANY, NYP HOLDINGS, INC., NEWSWEEK, INC., THE NEW YORK TIMES CO., SEATTLE TIMES COMPANY, TIME INC., TRIBUNE COMPANY, TURNER BROADCASTING SYSTEMS, INC. (CNN), THE WASHINGTON POST, REED ELSEVIER INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, THE NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL PUBLIC RADIO, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW, SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(b) and 7th Cir. Rule 26.1, Amici state as follows:

Davis Wright Tremaine LLP is the only law firm whose partners or associates are appearing or are anticipated to appear on amici's behalf in this matter. Amici did not appear in the district court.

ABC, Inc. is a wholly owned subsidiary of Disney Enterprises, Inc., which is a wholly owned subsidiary of the Walt Disney Company. The Walt Disney Company is a publicly traded corporation.

Advance Publications, Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

The American Society of Newspaper Editors (ASNE) is a nonprofit corporation. There is no parent corporation, nor does any publicly help company own 10 percent or more of ASNE's stock as there is no stock.

The Associated Press has no parent corporation, and no publicly held company owns more than 10 percent of its stock. The Associated Press is a mutual news corporation operating under the Not for Profit Business Corporation Law of the State of New York.

The Association of American Publishers, Inc. ("AAP") is a not-for-profit corporation and has no parent company. No publicly held company owns 10 percent or more of AAP's stock.

Bloomberg L.P. has no parent company. Merrill Lynch & Co., Inc. has an equity stake of 10 percent or more of Bloomberg L.P.

CBS Broadcasting Inc. ("CBS") is an indirect wholly owned subsidiary of Viacom Inc., a publicly traded company. Viacom Inc. also owns Blockbuster Inc., which is publicly traded. No public company other than Viacom Inc. owns an interest in CBS. CBS Broadcasting Inc. has ownership interests in MarketWatch.com, Inc. and Sportsline USA, Inc., which both are publicly traded companies.

Gannett Company, Inc. has no parent company, and no publicly held company owns 10 percent or more of Gannett Co., Inc. stock.

The Hearst Corporation does not have a parent corporation, and no publicly held company owns 10 percent or more of Hearst's stock.

The McClatchy Company has no parent corporation and no publicly held company owns 10 percent or more of McClatchy's stock.

The McGraw-Hill Companies has no parent company, and no publicly held company owns 10 percent or more of the McGraw-Hill Companies.

National Association of Broadcasters (NAB) is a nonprofit incorporated trade organization. NAB has no parent corporation, and no publicly held company owns 10 percent or more of NAB's stock.

National Broadcasting Company, Inc. is wholly owned by General Electric Company, a publicly held company. GE has no parent company and no publicly owned company owns 10 percent or more of its stock. NBC has no subsidiaries whose shares are publicly traded.

National Public Radio, Inc ("NPR")has no parent corporation, and no publicly held company owns 10 percent or more of NPR.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10 percent or more of its stock.

Newsweek, Inc. is a subsidiary of The Washington Post Company. Berkshire Hathaway, Inc., a publicly held company, has a 10 percent or greater ownership interest in The Washington Post Company. The Washington Post Company has no affiliates that are publicly owned.

NYP Holdings, Inc.'s parent company is The News Corporation Limited. No other publicly held company owns 10 percent or more of NYP Holdings, Inc. stock.

Radio-Television News Directors Association is a non-profit membership organization. It does not have a parent company, and no publicly held company holds 10 percent or more of its stock.

Reed Elsevier Inc. has two ultimate parent companies that are publicly traded: Reed Elsevier PLC, a UK company, and Reed Elsevier NV, a Dutch company. No other public company owns as much as 10 percent of Reed Elsevier Inc., directly or indirectly.

Reporters Committee for Freedom of the Press has no parent company and no publicly held company holds 10 percent or more of Reporters Committee for Freedom of the Press.

Seattle Times Company has no parent corporation and is not publicly traded. Knight Ridder Inc. is a publicly traded company that owns more than ten percent or more of its stock.

Silha Center for the Study of Media Ethics and the Law is an endowed center located at the University of Minnesota. It is non-profit and does not issue stock.

The Society of Professional Journalists is a non-for-profit corporation. No publicly held company owns 10 percent or more of its stock.

Time Inc. is indirectly wholly owned by AOL Time Warner Inc., a publicly owned company. It has no affiliates or subsidiaries that are publicly owned.

Tribune Company is a publicly traded company and has no parents, subsidiaries or affiliates that are publicly owned. No publicly held company owns 10 percent or more of its stock.

Turner Broadcasting System, Inc. is a subsidiary of AOL Time Warner, Inc., a publicly traded company. Other than AOL Time Warner, Inc., no other publicly held company owns 10 percent or more of Turner Broadcasting System, Inc.

The Washington Post Company has no parent companies and no publicly held affiliates. Berkshire Hathaway, Inc., a publicly held company, has a 10 percent or greater ownership interest in The Washington Post Company. The Washington Post Company has no affiliates that are publicly owned.

IDENTITY OF AMICI

Amici are many of this nation's leading news and publishing organizations and associations. (A description of the identity of each individual amicus is set forth in Addendum A hereto).

AUTHORITY TO FILE

Amici have concurrently moved for leave to file this amicus brief, pursuant to Fed. R. App. P. 29(a).

PRELIMINARY STATEMENT

Amici include a broad cross-section of the nation's newspaper, magazine, and book publishers, television and cable broadcasters, most with online publishing affiliates, as well as trade organizations of journalists and nonprofit organizations focused on freedom of the press. To each and every member of the Amici, the opinion in *McKevitt v. Pallasch*, Nos. 03-2753, 03-2754 (7th Cir.) (Decided July 3, 2003, Opinion August 8, 2003) (the "Opinion") announced a stunning break from long-standing precedent recognizing the federal qualified reporter's privilege. The Opinion is both far-reaching and radical in its rejection of this long-standing test. By failing to distinguish between subpoenas arising in civil cases as opposed to the criminal context in which this case arose, or between subpoenas seeking confidential information as opposed to the non-confidential materials at issue in this case, the Panel's broad assertion that "rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum is reasonable in the circumstances" (Slip Op. at 6) challenges the fundamental notion that

a qualified privilege against compelled disclosure of newsgathering exists under federal law.

Some form of the privilege has been recognized in the overwhelming majority of federal courts around the nation in the three decades since *Branzburg v. Hayes*, 408 U.S. 665 (1972). Those courts have acknowledged that the privilege is critical to shield the newsgathering process from repeated, unnecessary and overbroad interference. Yet, on far less than a full record and with no more than an emergency motion requesting a stay and expedited appeal from the order of the District Court, the Panel has issued a far-reaching Opinion that threatens to strip reporters and news organizations who publish material in this circuit of any First Amendment protection from overreaching subpoenas, requiring only that such subpoenas be "reasonable in the circumstances."

In so holding, the Opinion is:

- Contrary to long-standing precedent of three Circuit Courts of Appeal recognizing a qualified privilege that limits the circumstances under which a journalist could be compelled to disclose *non-confidential* newsgathering information in a *criminal* trial.[1]

- Contrary to the precedents of five Circuit Courts of Appeal recognizing a qualified privilege limiting the circumstances under which a journalist could be compelled to disclose *confidential* newsgathering material in a *criminal* trial.[2]

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1 *See U.S. v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *U.S. v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied* 464 U.S. 816 (1983); *U.S v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied* 454 U.S. 1056 (1981).

2 *U.S. v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000), *cert. denied*, 532 US. 924 (2001); *U.S. v. The LaRouche Campaign*, *supra*; *U.S. v. Burke*, *supra*; *U.S. v. Criden*, 633 F.2d 346 (3d Cir.

- Contrary to the precedents from the ten Circuit Courts of Appeal that have recognized a qualified privilege limiting the circumstances in which a journalist could be compelled to disclose *confidential* and, in some cases, *non-confidential* newsgathering material in *civil proceedings*.[3]

The Opinion commits this Circuit to a position which conflicts with decisions from ten out of the eleven Circuits that have recognized the existence of some form of the reporter's privilege. For this reason alone, the Opinion warrants serious reconsideration and modification by the full Bench. Amici request that the Opinion be modified to recognize the existence of a qualified reporter's privilege grounded in the First Amendment or, at a minimum, as a matter of federal common law. Alternatively, Amici respectfully urge that the Opinion be withdrawn as improvidently issued, leaving the opinion of the District Court unmodified. As a further alternative, Amici urge that the Opinion be modified in a way that limits its sweeping reach to the circumstances that this particular controversy presented to this Court.

1980), *cert. denied*, 449 U.S. 1113 (1981); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *U.S. v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied* 482 U.S. 917 and 483 U.S. 1021 (1987).

[3] *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Gonzales v. National Broadcasting Company, Inc.*, 194 F.3d 29 (2d Cir. 1999); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *LaRouche v. National Broadcasting Company*, 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Caporale, supra* (adopting rationale of *Miller v. Transamerican Press*, *supra* in 11th Circuit); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

INTERESTS OF AMICI

The Amici's interest in supporting Defendants-Appellants' request for reconsideration of this Opinion is profound. The press functions as the eyes and ears of the public. The press often possesses more information on more varied topics than any other private or public institution, except perhaps the government itself. Even where the press has no connection to a particular dispute or government investigation, journalists will interview individuals involved in the matter and collect relevant documents and materials. Examples from today's headlines abound. The press follows the activities of many businesses, organizations, public and private institutions, politicians, and individuals involved in controversies or disagreements. Civil and criminal lawsuits of one kind or another arise from many matters covered by the press. Not surprisingly, the litigants in these cases, both private and public, often serve subpoenas on the press to take advantage of journalists' investigations and further their own interests.

In those jurisdictions that recognize a reporter's privilege, the "special criteria" that are applied to subpoenas seeking newsgathering materials serve the important deterrent effect of dissuading litigants from seeking information from the press in the first instance, offering resort to the press only after all other alternatives have been exhausted. Yet, even with the deterrent effect of the qualified privilege, most news organizations among the Amici receive numerous subpoenas from litigants every year, some Amici receive several every week.[4] Amici are unanimous in their prediction that

[4] In an attempt to provide empirical evidence of the frequency with which news organizations are subpoenaed, The Reporters Committee for the Freedom of the Press,

the number of subpoenas to media entities issued under the aegis of federal courts in the Seventh Circuit will increase dramatically if the Opinion is allowed to stand.

The Panel's skepticism as to the impact of compelled disclosure of non-confidential materials is wholly unfounded. The need for the privilege stems not only from the drain of time, effort and money imposed on a press that is constantly subject to subpoenas from private parties. The privilege also safeguards "'free flow of information to the public.'" *von Bulow v. von Bulow*, 811 F.2d 136, 143 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987) (*quoting U.S. v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980)). The courts have recognized numerous adverse effects that would flow from "wholesale exposure of press files to litigant scrutiny," including a decrease in the number of potential sources willing to speak to the press, an increased number of requests for anonymity by those sources that do speak, increased incentives for news organizations to promptly discard potentially valuable non-published information in order to avoid "substantial costs in the event of future subpoenas," and the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or a private party. *See Gonzales*, 194 F.3d at 35 & n. 5 (collecting cases); *see also U.S. v. Bingham*, 765 F. Supp. 954, 958 (N.D. Ill. 1991) ("[t]o the extent that compelled

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one of the Amici, has collected data on such subpoenas for several years. The results of the latest survey (collecting data relating to 2001) was published in May of 2003 and can be found at the Reporters Committee website, www.rcfp.org., under "Agents of Discovery." The 319 news organizations that responded to the survey (237 newspapers and 82 television broadcasters), reported receiving, in addition to voluminous informal requests, a total of 823 subpoenas seeking newsgathering material. Three broadcasters received more than 40 subpoenas during the year.

disclosure . . . becomes commonplace," the media's belief that outtakes will be destroyed and editorial judgment chilled is "a legitimate concern.").[5]

Indeed, if reporters believe that their materials can be obtained freely, that risk is likely to influence the newsgathering process at the very outset, causing the journalist to limit the information they commit to writing or the documentation they collect. Such self-censorship will also infringe upon the editorial process and leave editors with less than a full record upon which to determine what ultimately should be published. Without the heightened protection for newsgathering materials afforded by a qualified privilege, news organizations, especially those with limited resources, will necessarily avoid coverage of subjects likely to be the subject of litigation. Moreover, the willingness of sources, especially those subject to law enforcement scrutiny, to provide newsworthy information to the press will be impaired if they believe their communications will be readily accessed by litigants.

In short, the credibility of a news organization as an impartial observer and its ability to gain access to otherwise unavailable information will inevitably be undermined if reporters become routine sources or witnesses for one side or the other in the adversarial process, leaving litigants "free to 'annex' the news media as 'an

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[5] Disclosure of a journalist's unpublished newsgathering material frequently exposes the journalist to inquiry -- often under oath -- as to why certain information was or was not included in a published article, broadcast or book -- an area which the Supreme Court has recognized is protected under the First Amendment. *See, e.g., Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974) ("the choice of material to go into a newspaper" or in a broadcast "constitute[s] the exercise of editorial control and judgment" which goes to the heart of the First Amendment protections.)

investigative arm of the government.'" *Branzburg*, 408 U.S. at 709 (Powell, J. concurring).

ARGUMENT

I. Because The Panel's Opinion Involves An Issue Of Exceptional Significance, Is Far-Reaching In Its Effects And Conflicts With The Jurisprudence Of Ten Other Circuit Courts Of Appeal, Rehearing En Banc Is Appropriate

The Panel's dramatic break with precedent developed by federal courts nationwide that have found the "proper balance" by imposing heightened requirements on subpoenas issued to the press calls for serious reconsideration and modification by the full Bench. *McKevitt* presents the classic case of "a question of exceptional importance" that is ripe for *en banc* review, under Fed. R. App. P. Rule 35(a)(2). *See Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*) *cert. denied*, 511 U.S. 1084 (1994) (granting rehearing *en banc*, to decide the question of whether Chicago's newsstand ordinance was constitutional); *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (*en banc*) (granting rehearing *en banc* to "consider the unclear, delicate, and important question" of the Constitutionality of random drug testing of horse racing participants) (Posner, J.); *see also* Local Circuit Rule 40 (e). Faced with a similar petition for rehearing -- a panel decision rejecting qualified privilege for non-confidential newsgathering material in a civil action -- the Second Circuit amended the decision to recognize the privilege. *See Gonzales*, 194 F.3d 29.[6]

Indeed, in *Branzburg*, the Supreme Court was unanimous in recognizing that "without some protection for seeking out the news, freedom of the press could be

eviscerated." 408 U.S. at 681. Accordingly, Justice Powell stressed that the claim of privilege "should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 710.

The qualified privilege, as it has evolved through *Branzburg*'s progeny, is an attempt to effect that "proper balance." *See* Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems*, at 14-11--14-15 (PLI 2003) (the author now serves as a judge of the Second Circuit). Those Circuits that have recognized some form of a qualified privilege generally require litigants to demonstrate that the information sought is material, critically necessary to the defense or prosecution of the action and not available from other sources. *Id.* The Opinion thus stands virtually alone among all the Circuits in refusing to acknowledge the existence of the privilege in some circumstances.[7]

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[6] Indeed, in the area of First Amendment jurisprudence, it is not unheard of for a court to reverse itself *sua sponte*. *E.g., Moldea v. The New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) (panel reversing its own decision *sua sponte* in defamation action).

[7] Even the Sixth Circuit, which "declined to join" the circuit courts that have recognized a federal reporter's privilege, *see In re Grand Jury Proceedings*, 810 F.2d 580, 585-86 (6th Cir. 1987), took pains to note that even if a privilege did apply in that case, disclosure of the reporter's materials would be appropriate because the prosecutor had made "a clear and convincing showing that [the reporter] has information that is clearly relevant to a specific violation of criminal law, that the information is not available from alternative sources, and that the state has a compelling and overriding interest in obtaining the information." *Id.* at 586. The Circuits are divided on the question of whether the need for the disclosure of possibly relevant evidence in a criminal trial should always trump the First Amendment protections of the newsgathering process. *Compare U.S. v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (Because the right to the production of all evidence at a criminal trial has Constitutional dimensions, "the public has much less of an interest in the outcome of civil litigation, in civil cases . . . the interests of the press may weigh far more heavily in favor of some sort of privilege"),

The district courts throughout the Seventh Circuit have also long recognized the importance of a qualified privilege and the interests it protects.[8] Indeed, there is a clear consensus at the district court level holding that information obtained by a journalist in the course of gathering news may be protected from disclosure by a qualified reporter's privilege. *See*, *e.g.*, *Neal v. Harvey*, 173 F.R.D. 231 (N.D. Ill. 1997) (recognizing reporter's privilege for unpublished information from both confidential and non-confidential sources); *Bingham*, *supra* (finding qualified newsgathering privilege is "grounded in constitutional policy" and applies to civil and criminal cases, but acknowledging the Seventh Circuit has "not yet addressed the question" of the privilege's existence).[9]

The Opinion's break with the weight of this precedent on an important First Amendment issue merits review by the full Court.

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with Cuthbertson, 630 F.2d at 147 ("The authors of the Bill of Rights did not undertake to assign priorities between the First Amendment and the Sixth Amendment. . . rather than affecting the existence of the qualified privilege, we think these rights [a defendant's Sixth Amendment and due process rights] must be considered in deciding whether . . . the privilege must yield" in the given circumstances) (citation omitted).

[8] As the Second Circuit noted in *Gonzales*, 194 F.3d at 34-35, the precedent of the district courts, "deserves mention, as it is in the district courts that most discovery litigation occurs, and appeals from discovery rulings are relatively infrequent." *See also U.S. v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995), *cert. denied*, 517 U.S. 1250 (1996) (affirming district court's decision to quash subpoena issued to reporter noting that the subpoena sought irrelevant information available from other sources.)

[9] Amici could find only limited authority from the district courts in the Seventh Circuit that explicitly declined to recognize the privilege, *see NLRB v. Evansville Courier Co.*, 937 F. Supp. 804, 809 (S.D.Ind. 1996) and that case is clearly distinguishable from that presented here in that the court viewed the requested material as business records, not a reporter's newsgathering material. *Cf. U.S. v. Jennings*, 1999 WL 438984 at *2 (N.D.Ill. June 21, 1999) (finding no privilege in the limited context of non-confidential information in a criminal case, while recognizing that *Branzburg* "support[s] some First Amendment protection of the press from harassment to disclose confidential sources.")

II. The Panel Did Not Need To Reach The Constitutional Issue It Addressed And It Was Improvident To Do So Without Briefing Or Argument On The Issue

The only issue presented to the Court on the emergency application for the stay of the District Court's order was the limited question of whether a stay of the District Court's order was appropriate. In answering that question, the Panel reached much further than necessary. Resolution of that limited question did not require the Panel to reject precedent from the large majority of circuits recognizing a qualified privilege for confidential and, in some cases, non-confidential material in civil proceedings or for confidential material in criminal proceedings to decide the controversy before it. As this Court has noted, the Court need not determine questions that have divided other circuits when the answer is not necessary to resolve the dispute before it and questions of constitutional interpretation should not be reached unless unavoidable. *See In re Scarlata*, 979 F.2d 521 (7th Cir. 1993) (court need not take definitive stand on question split in other courts when answer not necessary to resolve controversy); *Kelly v. Illinois Bell Tel. Co.*, 325 F.2d 148, 151 (7th Cir. 1963) ("Questions of constitutionality are not to be decided unless such adjudication is unavoidable"). These maxims should apply even more strongly here where the appeal of the District Court's decision had neither been briefed nor argued. *See Gray-Bey v. U.S.*, 201 F.3d 866, 870 (7th Cir. 2000) (in extending period of time to grant or deny application for post-conviction relief, court found application "presents several legal issues which have yet to be resolved by this circuit. As these issues are important and recurring, we have concluded that the issues presented in this case should not be decided without the benefit of full briefing and adversarial presentation.") Amici respectfully identify several issues that could have

been raised on full briefing and that would have enabled a more thorough consideration of the issues the Panel addressed.

A. The Appeal is Not Moot

The Panel found that the appeal was moot and dismissed the appeal because, after the denial of the stay, the reporters complied with the subpoena and turned over their tape recordings. (Slip Op. at 2) In analogous circumstances, however, the Supreme Court has found that a controversy over the propriety of an IRS subpoena seeking production of audio-taped conversations of L. Ron Hubbard was not rendered moot by compliance with the subpoena. *See Church of Scientology of California v. U.S.*, 506 U.S. 9, 13, 14 (1992) (if the order directing production of the tapes in this case was "improperly issued, [this] Court could order that the . . . tapes be either returned or destroyed …[Even though it might be too late] to provide a fully satisfactory remedy [because the tapes had already been produced], . . . a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies [of the tapes], it may have in its possession.").

Even if the appeal were moot, this case would fall within the exception to the mootness doctrine that exists when a particular legal issue is capable of repetition, yet likely to evade review. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976). Under this exception, where, as here, the dispute is unlikely to last beyond the appellate process and the privilege issues raised by the dispute are likely to recur, the appeal should not be dismissed on mootness grounds. *E.g. In re Special April 1977 Grand Jury*, 581 F.2d 589, 591 (7th Cir. 1978) (because subpoena's deadline for compliance was too

short to allow full litigation and it was reasonable to expect additional subpoenas in given action, appeal should not be dismissed as moot).[10]

B. Both State Law and Federal Common Law Provide Support for a Qualified Privilege

In choosing to dismiss Illinois state law by concluding that "it has no application to this case" (Slip Op. at 5), the Panel focused on whether the state law privilege was "legally applicable." However, in analyzing the question that the Seventh Circuit addressed -- *i.e.*, whether to recognize a reporter's privilege -- federal courts are frequently guided by consideration of the privilege accorded to reporters under state law. *See D'Oench, Duhme & Co. v. Federal Insur. Co.*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring) ("A federal court sitting in a non-diversity case . . . may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect"). Indeed, when called upon to address the issue of whether the federal common law recognizes a qualified reporter's privilege, federal courts have often given state law highly persuasive or even controlling effect. *See*, *e.g.*, *von Bulow*, 811 F.2d at 144 ("in examining the boundaries of the journalist's privilege, we may consider also the applicable state law"); *U.S. v. Cuthbertson*, 630 F.2d 139, 146 n.1 (3d Cir. 1980) (finding an "independent and congruent" basis for recognition of the privilege in New Jersey and

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[10] *See also In re Associated Press*, 162 F.3d 503, 511-12 (7th Cir. 1998) (challenge to closure of Governor's videotaped deposition not moot, even after testimony occurred and videotape played in open court, as it was reasonable to expect press to seek access to other trial proceedings, and such proceedings are typically short); *Procter & Gamble Co. v. Bankers Trust Company*, 78 F.3d 219 (6th Cir. 1996) (challenge to temporary restraining order prohibiting publication involving certain court documents filed under seal not moot even though documents were subsequently released, because it was reasonable to expect magazine would continue to seek to report on proceedings and

Pennsylvania statutory law); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., Inc.*, 455 F. Supp. 1197, 1200 (N.D. Ill. 1978) (because there is no federal reporter's privilege statute, court may look to state law for guidance).

Not only do the policies of Illinois, Indiana and Wisconsin, each of which recognize some form of a reporter's privilege,[11] weigh in favor of recognizing the privilege in the Federal Courts of this Circuit, but state law across the nation regarding the reporter's privilege since *Branzburg* is quite instructive. Since *Branzburg*, fifteen jurisdictions have enacted statutes recognizing a reporter's privilege; in all, thirty-two jurisdictions recognize some level of reporter's privilege by statute or rule.[12] *See*

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temporary restraining orders, by their very nature, are of brief duration and unlikely to be fully litigated).

[11] 735 Ill. Comp. Stat. 5/8 901 (Illinois Reporter's Privilege Act); Ind. Code Ann. § 34-46-4-2 (Indiana Shield Law entitled "Journalist's Privilege Against Disclosure of Information Source"); *In re WHR-TV*, 693 N.E.2d 1,9 (Ind. 1998) (declining to recognize Constitutional privilege in limited context of non-confidential video outtakes in criminal proceeding, but holding state trial procedure rules mandate application of test to subpoenas on media that is functional equivalent of the privilege); *Zelenka v. State*, 83 Wis. 2d 601, 266 N.W.2d 279 (Wis. 1978) (Wisconsin Constitution provides for reporter's privilege).

[12] Alabama (Ala. Code § 12-21-142); Alaska (Alaska Stat. §§09.25.300-.390); Arizona (Ariz. Rev. Stat. §§ 12-2214, 12-2237); Arkansas (Ark. Code Ann. § 16-85-510); California (Cal. Evid. Code § 1070; Cal. Const. art. I, § 2(b)); Colorado (Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 to 106); Delaware (Del. Code Ann. tit. 10, §§ 4320-26); District of Columbia (D.C. Code Ann. §§ 16-4701 to 4704); Florida (Fla. Stat. § 90.5015); Georgia (Ga. Code Ann. § 24-9-30); Illinois (735 Ill. Comp. Stat. 5/8-901); Indiana (Ind. Code § 34-46-4-1); Kentucky (Ky. Rev. Stat. Ann. § 421.100); Louisiana (La. Rev. Stat. Ann. §§ 45:1451-1459); Maryland (Md. Code Ann., Cts. & Jud. Proc. § 9-112); Michigan (Mich. Comp. Laws §767.5a); Minnesota (Minn. Stat. § 595.021-.025); Montana (Mont. Code Ann. §§ 26-1-901 to 903); Nebraska (Neb. Rev. Stat. §§ 20-144 to 147); Nevada (Nev. Rev. Stat. § 49.275); New Jersey (N.J. Stat. Ann. §§ 2A:84A-21 to 2A:84A-21:8); New Mexico (N.M. R. Evid. 11-514); New York (N.Y Civ. Rights Law § 79-h); North Carolina (N.C. Gen. Stat. § 8-53.11); North Dakota (N.D. Cent. Code § 31-01-06.2); Ohio (Ohio Rev. Code Ann. §§ 2739.04 & 2739.12); Oklahoma (Okla. Stat. Ann. tit. 12, § 2506); Oregon (Or. Rev. Stat. §§ 44.510-.540); Pennsylvania (42 Pa. Cons. Stat. § 5942); Rhode Island

C. Thomas Dienes, et al., *Newsgathering and the Law* §15-1. Seven additional states have recognized some form of the privilege based on either state constitutions or state common law.[13] In addition, for the last thirty-three years, federal prosecutors have been required to follow the guidelines of the Attorney General which provide protections similar to the reporter's privilege. *See* 28 CFR 50.10.[14]

There is similar precedent for recognition of the reporter's privilege as a matter of federal common law. For example, in the course of recognizing a reporter's privilege, the Second Circuit in *Baker v. F. & F. Investment*, 470 F.2d 778, 781 (2d Cir. 1972), *cert. denied*, 411 U.S. 996 (1973), reasoned that "[a]bsent a federal statute to provide specific instructions, courts which must attempt to divine the contours of non-statutory federal law governing the compelled disclosure of confidential journalistic sources must rely on

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(R.I. Gen. Laws § 9-19.1); South Carolina (S.C. Code Ann. § 19-11-100); Tennessee (Tenn. Code Ann. § 24-1-208).

[13] Idaho (*In re Wright*, 108 Idaho 418 (1985)); Iowa (*Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978); Massachusetts (*In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991)); New Hampshire (*Opinion of the Justices*, 117 N.H. 386 (1977)); Washington (*Senear v. Daily Journal-American,* 97 Wash.2d 148 (1982)); West Virginia (*State ex rel. Hudok v. Henry*, 182 W.Va. 500 (W.Va. 1989)); Wisconsin (*Zelenka v. State*, 83 Wisc.2d 601, 266 N.W.2d 279 (Wis. 1978)).

[14] The *Branzburg* court noted that the Attorney General guidelines (now codified at 28 C.F.R. § 50.10 with non-substantive modifications) require that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights" and direct all federal prosecutors to "weigh that limiting effect against the public interest to be served in the fair administration of justice." The guidelines also require that "all reasonable attempts . . . be made to obtain the information from non-press sources before there is any consideration of subpoenaing the press," *and* that the Attorney General, him or herself, expressly authorize the issuance of a subpoena on the media. *Branzburg*, 408 U.S. at 707 n.41. These guidelines thus provide for a balancing of interests very similar to that provided by the privilege recognized in the ten circuit courts that have recognized some form of privilege. It would be an anomalous result, indeed, if our federal courts were to permit prosecutors in foreign jurisdictions to obtain

both judicial precedent and well-informed judgment as to the proper federal public policy to be followed in each case." *See also In re Williams*, 766 F. Supp. 358, 368 (W.D. Pa. 1991), *aff'd*, 963 F.2d 567 (3d Cir. 1992) (*en banc*) (since Rule 501 of the Federal of Evidence was passed after the decision in *Branzburg*, the Rule provided "'a mandate to develop evidentiary privileges in accordance with common law principles.'") (citation omitted); *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987) ("Although we are not bound to follow New York law, neither should we ignore New York's policy of giving protection to professional journalists . . . "); *U.S. v. Cuthbertson*, 630 F.2d at 146-47) (recognizing "a federal common-law qualified privilege arising under Fed. R. Evid. 501" and extending application of that privilege to non-confidential material and the criminal context); *U.S. v. Lopez*, 14 Media L. Rptr. 2203, 2204 (N.D. Ill. 1987) (quashing subpoena on the basis of a reporter's privilege "grounded in federal common law," following the rationale outlined in *Cuthbertson*); *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 89 F.R.D. 489, 492 (C.D. Cal. 1981) ("following *Branzburg*, federal appellate and trial courts have recognized a qualified federal common law 'journalist's privilege.'")

Indeed, both this Circuit and the Supreme Court have recognized the interplay between the state law of privileges and the federal common law of privilege. When faced with the question of whether to recognize a privilege for psychotherapist-patient communications, this Circuit recognized the privilege under Fed.R.Evid. 501, as a matter of federal common law. *See Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996). In doing so, this Circuit found it "particularly significant" that Illinois

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more information from American journalists than is available to federal prosecutors in the United States.

had a statute that "expressly recognizes a psychotherapist/patient privilege." *Id.*, 51 F.3d at 1357. The Supreme Court affirmed that decision, finding recognition of that privilege "appropriate" in light of "the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." *Id.*, 518 U.S. at 12. Indeed, the Supreme Court recognized that "[d]enial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.*, 518 U.S. at 13. In light of this precedent, the fact that the Opinion frustrates the purpose of the legislative and judicial determinations of the thirty-nine states that have recognized some form of a reporter's privilege indicates that it warrants serious reconsideration.

C. Purported Waiver of the Privilege By the Source Should Not Eviscerate the Privilege

The Opinion asserts that "it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure" where the source of the information is not confidential and actually "wants the information [to be] disclosed." (Slip Op. at 6).[15] The Panel thus dismisses out of hand the widely-

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[15] The Panel emphasizes its inference: "Rupert *wants* the information disclosed," when in fact, as the following colloquy shows, he was merely facing traditional pressure to retroactively waive the confidentiality commitment he previously had obtained in writing. On the extremely limited record before the Panel, the proposition that Rupert "wants" the material disclosed appears to be based on the following excerpt from the cross examination of Rupert:

> Q. So you shared these [emails] with the journalists and you gave them an account; is that correct?
>
> A. I gave them, as I said before, an appraisal of my life and this particular case.

recognized policy considerations supporting the application of the privilege in the context of nonconfidential sources and information. In addition, the Panel's view is directly contrary to the decisions by federal courts in this Circuit and elsewhere holding that the reporter's privilege belongs to the reporter, not the source, and cannot be waived by the source.

Unlike other evidentiary privileges such as the attorney-client or physician-patient privilege, which are premised on the need to preserve confidentiality, "the issue of confidentiality is not the exclusive rationale behind the reporter's privilege." *Damiano v. Sony Music Entertainment Inc.*, 168 F.R.D. 485, 499 (D.N.J. 1996). Rather, as numerous courts have recognized, the essential rationale for the reporter's privilege is the need to protect the public interest in the "free flow of information." *Cuthbertson*, 630 F.2d at 147; *see also Shoen*, 5 F.3d at 1292 ("the privilege is a recognition [of] society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public"); *Damiano*, 168 F.R.D. at 499 ("the qualified

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Q. I take it you have no objection to us having a view of those matters which you related to your journalist friends?

A. Absolutely not.

Q. And so that can be communicated to any American Court which is hearing the application at this time?

A. Yes it can.

(*See* Second Supp. Mem. In Support of App. For Order Requiring Production of Documents and Things. (Tab G to Defendants – Appellants Emergency Motion)) If prosecutors may so easily induce binding retroactive waivers of commitments of confidentiality, the protection accorded by the qualified privilege would be eviscerated.

privilege is designed to protect the overarching public policy of *access* to information, and not confidentiality for a particular party") (emphasis in original).

Since the reporter's privilege is designed to primarily protect the interests of the press and the public, rather than the source, federal courts have expressly held that that the privilege belongs to the reporter or publisher alone, and may not be waived by the source. *E.g.*, *Cuthbertson*, 630 F.2d at 147 (newsgathering privilege "belongs to [the news organization]" and not the source); *Los Angeles Memorial Coliseum Com'n*, 89 F.R.D. at 494 ("the journalist's privilege belongs to the journalist alone and cannot be waived by persons other than the journalist"); *Lipps v. State*, 254 Ind. 141, 258 N.E. 2d 622 (1970) (Indiana shield law, since revised in unrelated aspect, creates "a right personal to the reporter only [that] cannot be invoked by the person who communicated with the reporter"). Indeed, courts in this Circuit and elsewhere have refused to enforce subpoenas aimed at the press *even where the source was the very party seeking disclosure. E.g.*, *U.S. v. Lopez*, 14 Media L. Rptr. 2203 (quashing subpoena served on nonparty NBC by criminal defendant seeking video outtakes from interview given by defendant to a television reporter); *Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984) (quashing subpoena issued by defendant to non-party journalist for tapes and notes of interview with defendant, holding that defendant/interviewee had no right to waive reporter's privilege).

The rule that the privilege belongs to the reporter and not the source prevents litigants and the government from doing an "end run" around the privilege and thereby hampering the "free flow of information" to the public. If the privilege could be breached any time a source is placed under pressure by an adversary, such as the cross-

examination at trial here, and asked to waive the privilege -- a "request" that carries with it the obvious if unstated implication that failure to agree to a waiver will lead to adverse inferences or consequences -- the journalist's promise of confidentiality to the source would be illusory. This Court should not endorse such a seriously flawed position. The privilege is designed to provide "some [measure of] protection for seeking out the news," *Branzburg*, 408 U.S. at 681 -- a protection that belongs to the journalist, not the source.

D. The Ordinary Safeguards Applicable to Subpoenas Do Not Afford Sufficient Protection of the Newsgathering Process

The Opinion suggests that the standard protections that apply to criminal, civil or agency subpoenas will suffice to protect the press from overbroad or burdensome discovery requests. *See* Slip Op. at 6, *citing* R. Crim. P. 17(c); *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 993 (7th Cir. 2002) (subpoena issued under Fed. R. Civ. P. 45); *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 700 (7th Cir. 2002) (investigatory subpoena from EEOC).[16] Without a qualified privilege, there is little to prevent a private litigant from utilizing the newsgathering efforts of journalists for their private purposes. Since journalists typically gather information about controversies, disputes, disasters, crimes and other matters of special interest that often give rise to litigation, they are far more likely than any third party to be subject to a constant torrent of subpoenas.

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[16] The Panel, again without any briefing on the issue, adopted the unprecedented and radical view that newsgathering may be protected only to prevent the misappropriation of intellectual property ("when unauthorized copying of the facts gathered is likely to deter the plaintiff, or others similarly situated, from gathering and disseminating those facts"). (Slip Op. at 7.) No other Circuit has limited newsgathering protection to property interests.

The protection against burdensome subpoenas afforded by Rules 26 and 45 is unlikely to provide much protection to newsgathering materials. Indeed, the newsgathering function distinguishes the journalist as "the possessor of the documents or other evidence," from all other third parties with relevant information. (Slip Op. at 6). The widget manufacturer is unlikely to have information "relevant" to the wide range of disputes, litigation, or investigations covered by the press every day. Each of the Amici, or their members, on the other hand, is likely to have collected information "relevant" to myriad disputes, despite having no direct stake in the outcome of those cases. With the anticipated increase in subpoenas once litigants know the qualified privilege has been called into question, at least in this Circuit, the aggregate effect will be extraordinarily burdensome. (*See* note 4, *infra*)

If left to stand, the Opinion will encourage intrusion into newsroom and editorial files maintained by Amici, not just when necessary to prove a critical issue in a defamation case against the news organization and not just when necessary to prove a critical issue in a litigation to which the news organization is not a party, but whenever any party to any litigation thinks there is some information in the reporter's file that "appears reasonably calculated to lead to the discovery of admissible evidence" Fed. R. Civ. P. 26(b)(1), so long as the subpoena is considered "reasonable under the circumstances." This poses a "lurking and subtle threat to journalists" when "unused information even if non-confidential" is "routine[ly] and casually, if not cavalierly compelled." *LaRouche Campaign*, 841 F.2d at 1182.

III. If Not Reversed Or Withdrawn, The Opinion Should Be Limited To The Facts As Found By The District Court

Amici urge the Court in the strongest possible terms to reconsider this Opinion. If, however, reconsideration is rejected, Amici respectfully urge the full Bench to issue a supplemental opinion that expressly limits the holding to the facts as found by the District Court.[17] Those facts were:

1. The order of the District Court did not require disclosure of the identity of confidential sources.

2. There were no alternative sources for the materials sought.

3. The reporters made audiotapes of interviews with a subject of a proposed book pursuant to the terms of a collaboration agreement in which the source maintained a financial interest in the material ultimately published.

4. The subject of the interviews was the key prosecution witness at defendant's criminal trial on terrorism-related charges.

5. The subpoena did not seek oral testimony or notes from the journalist. (*See* footnote 5, *infra*).

6. The information was sought by a defendant in a criminal proceeding pending in a foreign nation pursuant to 28 U.S.C. §1782.

7. There was no practicable opportunity for in-camera review of the tapes.

As the Panel's ruling now stands, it could well sweep within its grasp, not just audiotapes made of the subject of a book pursuant to a collaboration agreement, but all

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[17] *E.g.*, *Miller v. Transamerican Press, Inc.*, 628 F.2d 932 (5th Cir. 1980) (in qualified privilege case, rehearing *en banc* was denied but supplemental opinion issued clarifying holding); *see also Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (in denying petition for rehearing *en banc*, supplemental opinion in false light claim issued to, among other things, correct prior ruling's omission of an independent review of jury's finding of actual malice) (Posner, J.); *In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1244 (7th Cir. 1981) (in denying petition for rehearing *en banc*, supplemental

non-confidential, unpublished newsgathering material, be it a broadcasters' outtakes, photographs, reporter's notes of interviews, documents obtained from other sources or drafts – in short, the reporter's entire work product. It suggests that compelled disclosure of confidential sources and confidential information is appropriate where a subpoena is "reasonable in the circumstances." It threatens to permit this intrusion into the newsgathering process, not just for prosecutors or criminal defendants, but for civil litigants as well in litigation where the news organization is not even a party.

CONCLUSION

Before committing this Circuit to the course staked out by the Panel, Amici respectfully urge reconsideration by the full Bench, recognition of a reporter's privilege grounded in federal law or, alternatively, withdrawal of the Opinion, or at minimum, issuance of a supplemental Opinion that expressly limits the Opinion to the facts as found by the District Court. Amici recognize that there occasions when reporters, like all citizens, must provide evidence. As nearly all the District Courts in this Circuit have

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opinion issued clarifying that prior ruling did not exempt all third party documents subpoenaed by grand jury from further use).

recognized, such obligations come with a cost to First Amendment protections for newsgathering and should not be imposed without great care.

Dated: August 28, 2003

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: ______________________________
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ADDENDUM A

STATEMENTS OF INTEREST

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations (including WLS-TV in Chicago) that gather and report news to the public. ABC produces, among other programs, the news programs WORLD NEWS TONIGHT WITH PETER JENNINGS, 20/20, and NIGHTLINE.

Advance Publications, Inc. is a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States. Advance Publications, Inc. also owns The Condé Nast Publications Inc., which publishes 17 magazines with nationwide circulation, including *Vanity Fair* and *Vogue* magazines, and also owns Fairchild Publications, Inc., Parade Publications and The Golf Digest Companies. Advance Publications also owns many Internet sites that are related to its print publications. Advance Publications also has interests in cable systems serving over 2 million subscribers.

The American Society of Newspaper Editors (ASNE) is a professional organization of more than 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Associated Press, founded in 1848, is world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

The Association of American Publishers, Inc. ("AAP") is a national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of 1600 reporters in eighty-seven bureaus around the world, including a full-time bureau in Chicago, Illinois. Bloomberg News publishes more than 4000 news stories each day, electronically delivering business, financial and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional System, a proprietary desktop system. Bloomberg News also operates as a wire service, distributing business news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite television news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100

book titles a year; Bloomberg Magazines, which publishes twelve different magazines each month; and Bloomberg.Com, which is read by the investing public more than 300 million times each month.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as 60 MINUTES and 48 HOURS. CBS owns and operates broadcast television stations nationwide, including WBBM-TV in Chicago, Illinois, and, through an affiliated company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

Gannett Company, Inc. is an international news and information company that publishes one hundred daily newspapers in the United States with a combined daily paid circulation of 7.7 million, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than one hundred web sites in the United States and a national news service. Gannett's twenty-two television stations cover 17.7 percent of the United States. Gannett publishes ten daily newspapers in Wisconsin, five daily newspapers in Indiana, and one daily newspaper in Illinois.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The news-papers have a combined average circulation of 1.4 million daily and 1.8 million on Sunday.

The McGraw-Hill Companies, founded in 1888, is a global information services provider meeting worldwide needs in the financial services, education and business information markets through leading brands such as Standard & Poor's, BusinessWeek and McGraw-Hill Education. The Corporation has more than 320 offices in 34 countries.

National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade organization that serves and represents radio and television stations. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning commercial activities and the activities of government.

National Broadcasting Company, Inc. is a diversified media company that produces and distributes news, entertainment and sports programs. NBC, directly or through subsidiaries, owns and operates a television broadcast network, cable networks and television stations, including WMAQ-TV located in Chicago, Illinois.

National Public Radio, Inc. (NPR) is a non-profit organization incorporated in the District of Columbia. It is a membership organization composed of more than 680 public radio stations located throughout the United States and serves a growing broadcast audience of over 19 million Americans weekly. NPR gathers and reports the news through its award winning programs, including *Morning Edition*, *All Things Considered*, and *Talk of the Nation*. It also distributes its broadcast programming on-line, adding additional news features, and distributes its broadcasts worldwide through satellite and cable distribution, and to U.S. military installations via the American Forces Network.

The New York Times Company publishes *The New York Times,* a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The New York Times Company owns and operates television station WQAD-TV in Moline, Illinois.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally.

NYP Holdings, Inc. is the publisher of the New York Post newspaper (the "Post"). The Post is the country's oldest, continuously publishes newspaper, founded by Alexander Hamilton in 1801.

Radio-Television News Directors Association (RTNDA) is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than thirty countries.

Reed Elsevier Inc. is a prominent publisher of information products and services for the business, professional and academic communities, including scientific journals, legal, educational, medical and business information, reference books and textbooks, and business magazines, including Reed Business Information in Oak Brook, Illinois.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and re-search in First Amendment litigation since 1970.

Seattle Times Company publishes four newspapers in the State of Washington: *The Seattle Times*, Washington's most widely circulated daily newspaper; the *Yakima Herald-Republic*; the *Walla Walla Union Bulletin*; and *The Issaquah Press*. It also publishes four newspapers in Maine: the *Portland Press Herald/Maine Sunday Telegram*, Maine's largest daily newspaper; the *Kennebec Journal*; the central Maine *Morning Sentinel*; and the *Coastal Journal.*

Silha Center for the Study of Media Ethics and the Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. It produces a quarterly Silha Bulletin which covers legal and ethical issues affecting the mass media through the United States and the world.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly.*

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers, including the Chicago Tribune; publishes Chicago Magazine; owns and operates 22 major market television stations, including WGN in Chicago and WXIN and WTTV in Indianapolis; and operates a network of local and national news and information web sites throughout the United States.

Turner Broadcasting System, Inc. an AOL Time Warner Company, operates Cable News Network, one of the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet web sites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than 1 billion people in more than 212 countries and territories.

The Washington Post Company publishes of the newspaper *The Washington Post,* a daily newspaper with a nationwide daily circulation of over 778,000 and a Sunday circulation of over 1.05 million.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

This Brief of Amici Curiae listed in Addendum A was produced on a computer using the Microsoft Word 2000 word processing program. Amici's counsel has used that program's word count function to verify that the number of words in the brief, including (a) headings, (b) footnotes, and (c) quotations but excluding the (a) cover, (b) disclosure statement, (c) table of contents, (d) table of authorities, (e) Addendum A, and (f) this certification, is no more than 6,840 words, under the limit of 7,000 words allowed by Fed. R. App. P. 29(d).

August 28, 2003

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Victor A. Kovner

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES OF AMERICA, Plaintiff,
v.
Odell JENNINGS et al., Defendants.

No. 97 CR 765.

June 21, 1999.

MEMORANDUM OPINION AND ORDER

PLUNKETT, J.

***1** Before the Court is Shane DuBow's motion to quash *subpoena duces tecum* issued by the defendants. For the reasons provided in this Memorandum Opinion and Order, the Court denies DuBow's motion.

Background

On August 4, 1997, Shane DuBow ("DuBow") had the misfortune of visiting North Community Bank at precisely the time when Johnell Elem, Odell Jennings, and Clarence Anderson robbed it. DuBow, a freelance writer, began investigating the crime and interviewed Anderson prior to Elem and Jennings' trial.

On May 14, 1998, a jury found defendants Johnell Elem and Odell Jennings ("defendants") guilty of several counts of bank robbery by force or violence and use of firearms. Co-defendant Clarence Anderson, who had entered a guilty plea, testified as a government witness at trial. Neither Elem nor Jennings has yet been sentenced.

In the January 1999 issue of Gentlemen's Quarterly Magazine ("GQ"), DuBow shared the details of his experience as a crime victim and his interview with Anderson in an article entitled "Everybody Down!". Shane DuBow, *Everybody Down!*, GENTLEMAN'S Q., Jan. 1999, at 122. It is undisputed that neither the government nor Anderson's trial attorney was aware of DuBow's news gathering efforts or his interviews with Anderson before the article appeared in GQ.

At a status hearing on March 16, 1999, defendants moved for leave to take the deposition of Shane DuBow, which the Court granted for the limited purpose of determining whether the interview impacted Anderson's trial testimony. On April 28, 1999, defendants issued a *subpoena duces tecum* requiring DuBow to bring to the deposition all notes of interviews with Clarence Anderson. They seek to depose DuBow on matters which were not published in the GQ article for the purpose of filing a motion for new trial. DuBow now moves to quash the *subpoena duces tecum* [FN1] and argues that his materials are protected by the reporter's privilege under (1) the Illinois Reporter's Privilege Act and (2) the First Amendment of the Constitution.

FN1. Federal Rule of Criminal Procedure 17(c) provides that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

Discussion

DuBow first argues that the Illinois Reporter's Privilege Act governs whether the Court may grant DuBow's motion to quash subpoena in a federal criminal case. The Court disagrees. Federal Rule of Evidence 501 provides in part that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Further, the Supreme Court has stated that Rule 501 "requires the application of federal privilege law in criminal cases brought in federal court." *United States v. Gillock,* 445 U.S. 360, 368 (1980); *see United States v. Wimberly,* 60 F.3d 281, 284 (7th Cir.1995) (rejecting defendant's argument that Illinois Confidentiality Act applied with regard to privilege in federal criminal case). Therefore, the Illinois Reporter's Privilege Act provides no guidance as to whether the Court should grant or deny DuBow's motion to quash.

***2** Next, DuBow argues that the nonconfidential information he obtained during his interview with Clarence Anderson is protected by qualified

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privilege under the First Amendment of the Constitution. Whether reporters enjoy a qualified privilege with regard to nonconfidential information in a criminal case is an open issue in this circuit. The Court finds the Supreme Court's seminal decision in *Branzburg v. Hayes,* 408 U.S. 665 (1972), and the Fifth Circuit's recent decision in *United States v. Smith,* 135 F.3d 963 (5th Cir.1998) , instructive and holds that the information defendants seek is not subject to a qualified privilege.

In *Branzburg,* the Supreme Court declined to grant news reporters qualified immunity from grand jury questions concerning confidential sources in the absence of bad faith. *Branzburg,* 408 U.S. at 690. The majority recognized that news gathering should be afforded "some protection," but stated that the speculative nature of the chilling effect on news gathering did not take precedence over the government's interest in pursuing and prosecuting criminals. *Id.* at 695. The Court stated that the Constitution would not allow grand juries to purposefully harass news reporters, but the possibility of harassment in the case was minimized by the supervision of judges over the grand jury investigations. *Id.* at 707-08.

Although the majority, including Justices White, Burger, Blackmun, Powell, and Rehnquist, refused to grant qualified immunity to reporters, nine of the ten circuits that have interpreted *Branzburg* have stated that it supports such a privilege. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583, 595-96 (1st Cir.1980); *United States v. Burke,* 700 F.2d 70, 77 (2d Cir.1983); *United States v. Cuthburtson,* 630 F.2d 139, 147 (3d Cir.1980); *United States v. Steelhammer,* 539 F.2d 373, 375 (4th Cir.1976); *Miller v. Transamerican Press, Inc.,* 621 F.2d 721, 725 (5th Cir.1980); *Cervantes v. Time, Inc.,* 464 F.2d 986, 992-93 (8th Cir.1972); *Shoen v. Shoen,* 5 F.3d 1289, 1292 (9th Cir.1993); *Silkwood v. Kerr-McGee,* 563 F.2d 433, 436-37 (10th Cir.1977); *Zerilli v. Smith,* 656 F.2d 705, 714 (D.C.Cir.1981). *But see In re Grand Jury Proceedings,* 810 F.2d 580, 584-85 (6th Cir.1987) (stating that *Branzburg* does not support a qualified immunity for reporters). *Cf. McArdle v. Hunter,* 7 Med. L. Rptr. 2294, 2296 (E.D.Mich.1981); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., Inc.,* 455 F.Supp. 1197, 1202 (N.D.Ill.1978). "The basis for this reading is that five justices in *Branzburg* recognized that the Constitution may at times protect the confidentiality of a journalists' sources." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 972 (2d ed.1988). Of the dissenters, Justice Douglas would have granted an absolute privilege, and Justices Brennan, Marshall, and Stewart would have acknowledged a qualified privilege. In his concurrence, Justice Powell stated that a case-by-case analysis should be employed to balance the First Amendment implications against the interest in prosecuting crimes. Due to the language in the majority opinion discussed above and the positions of the five justices who chose not to join the majority opinion, the Court reads *Branzburg* to support some First Amendment protection of the press from harassment to disclose confidential sources.

***3** However, our reading of *Branzburg* does not necessarily require that we grant DuBow's motion to quash. For *Branzburg* only spoke to the disclosure of confidential sources and, in this case, Anderson not only agreed to be interviewed on the record, but he actually desired some small amount of fame. It seems difficult to argue that although the *Branzburg* Court did not afford journalists a qualified privilege from disclosing confidential sources, it somehow supports a qualified privilege from disclosing nonconfidential ones.

The First and Third Circuits, however, have stated that a qualified privilege protects a journalist's nonconfidential material from compelled discovery in a criminal case such as this one. In *United States v. La Rouche Campaign,* the First Circuit acknowledged four First Amendment concerns that outweighed the government's need for NBC reporters' nonconfidential film out-takes: (1) the threat of intrusion into the news gathering and editorial process; (2) the conversion of a journalist into an investigative arm of the judiciary and research tool of the government; (3) the disincentive to save non-broadcast material; and (4) the burden on journalists in responding to subpoenas. 841 F.2d 1176, 1182 (1st Cir.1988). In *United States v. Cuthbertson,* the Third Circuit held that a defendant could not compel discovery of CBS reporters' notes and film out-takes, regardless of their nonconfidential nature, because "compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes .... [and] may substantially undercut the public policy favoring the

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free flow of information that is the foundation for the privilege." 630 F.2d 139, 147 (3d Cir.1980). The *Cuthbertson* court noted, however, that "the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case." *Id.*

Unlike the *LaRouche* and *Cuthbertson* courts, the Court finds no support in *Branzburg* for the proposition that journalists should be protected from such speculative threats of intrusion into the news gathering and editorial process. Five justices in the *Branzburg* decision, after addressing similar policy concerns, agreed that there was "no reason to hold that ... reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations." *Branzburg,* 408 U.S. at 702. The fact that *Branzburg* involved grand jury questioning does not differentiate *Branzburg* from the instant case because the government and defendants' interest in ensuring that the defendants were provided a fair trial is just as compelling as the government's interest in pursuing criminals through the initial grand jury process.

The Fifth Circuit, in *United States v. Smith,* recently rejected the notion that a qualified privilege protects a journalist's nonconfidential information in criminal cases. 135 F.3d 963, 972 (5th Cir.1998). The *Smith* court stated that, in cases where there is a divulged source, concerns of a chilling effect are speculative at best because on-the-record sources always expect their nonconfidential statements to be disseminated to the public. *Id.* at 970. Further, although responding to subpoenas may create some burden on journalists, the court noted the press is not differently situated from any other business that may find itself possessing evidence relevant to a criminal trial. *Id.* Lastly, the court found "no empirical basis for assertions that the media will avoid important stories or destroy its archives in response to rare requests for criminal discovery." *Id.* at 971.

***4** The Court agrees with the Fifth Circuit's position and finds *Smith'* s reasoning equally applicable here. First, in a criminal case in which the journalist's source is divulged and the material is nonconfidential, the potential for a chilling effect is generally low and is nonexistent in cases like this one where the source has a personal reason for speaking on the record. It is undisputed that Anderson was personally motivated to go on the record to try to clear the name of his brother, Bubba, whom Anderson had convinced to become involved in the heists. Anderson's personal motivation would not evaporate in the absence of a qualified privilege. Second, the burden of time and resources on journalists in responding to subpoenas in criminal trials will be far from overwhelming and no different than the burden on other citizens or business persons who testify in criminal trials. Third, because such situations will be rare, it is doubtful that the press will feel an incentive to change its methods of pursuing news items or storing information.

Moreover, five justices in the *Branzburg* decision agreed that the First Amendment protects journalists from "grand jury investigations if instituted or conducted other than in good faith" or if the "[o]fficial harassment of the press [is] undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources...." *Branzburg,* 408 U.S. at 707. There is not even a hint of bad faith or harassment in this case that would warrant First Amendment protection of DuBow and his interview materials. Nor is this a fishing expedition that uses a broad sweeping subpoena to cull a vast array of irrelevant information. Defendants have subpoenaed DuBow with his interview materials to determine whether his pre-trial interview impacted Anderson's testimony at trial, [FN2] which is relevant to defendants' right to a fair trial. If there is evidence of influence, then such evidence may constitute a basis for a new trial. Thus, taking into consideration all of the interests involved, the Court holds that, in a criminal case, the First Amendment does not protect journalists from disclosure of nonconfidential, relevant information that is sought in good faith.

FN2. Especially disconcerting is the alleged discrepancy between the article's account and Anderson's testimony of who played a leadership role in one of the heists.

Conclusion

For the forgoing reasons, the Court denies DuBow's motion to quash the subpoena.

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1999 WL 438984, 1999 WL 438984 (N.D.Ill.)

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Action for fraud, conspiracy, breach of contract, and unjust enrichment. From decision of the New York Supreme Court, New York County, dismissing the complaint, plaintiff appeals.

Affirmed.

Mac Truong, New York, N.Y., plaintiff-appellant pro se.

Peter D. Raymond, of Hall Dickler Kent Friedman & Wood, New York, for defendants-respondents.

Full Text of Opinion

Before Milonas, J.P., and Rubin, Tom, Andrias, and Colabella, JJ.

Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered June 5, 1996, dismissing the complaint, unanimously affirmed, with costs.

[1] The IAS court properly granted summary judgment dismissing this action for fraud, conspiracy, breach of contract and unjust enrichment brought by an unsuccessful contest participant against the contest's sponsors, a magazine, an advertiser in the magazine, and a celebrity. The fraud cause of action was not supported by any evidence of the requisite elements (*see, Abrahami v UPC Constr. Co.*, 224 AD2d 231, 232-233); plaintiff's response to defendants' denial of any wrongful intent, especially his assertions of reliance and scienter, were conclusory. Since the underlying fraud claim is not viable, and there is no substantive tort of conspiracy (*id.*), the cause of action for conspiracy to commit fraud is deficient. We would also note in this regard the absence of any proof of an agreement to engage in a common scheme or plan to deprive plaintiff of his property (*see, MBF Clearing Corp. v Shine*, 212 AD2d 478, 479; *Goldstein v. Siegel*, 19 AD2d 489, 493). Plaintiff's claim that the contest judges did not really make the decision selecting the winner, in violation of the published rules of the contest and thereby of the contract created when plaintiff submitted his entry (*see, Ritz v News Syndicate Co.*, 16 Misc 2d 1013), is speculative and premised upon a mischaracterization of the desposition testimony submitted by defendants. There is no evidence of bad faith (*see, Milich v Schenley Indus.*, 42 NY2d 952) and, in light of the extensive disclosure obtained by plaintiff, no likelihood that further disclosure will shed light on this or any other issue. In any event, although the corporate defendants provided the names and addresses of their former employees, plaintiff failed to avail himself of the opportunity to subpoena them. The rules plaintiff relies on for his breach of contract claim preclude his claim for unjust enrichment or quasi-contract (*see, Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367, *appeal withdrawn* 89 NY2d 1031); in any event, plaintiff failed to submit any evidence in response to defendants' showing that his contest entries remained in a storage box in defendant magazine's possession and were never seen or used by anyone, including defendant advertiser. Plaintiff's assertion that defendant advertiser aired a television commercial misappropriating an idea contained in one of his contest entries is without factual basis. We have considered plaintiff's other contentions and and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

REITZ v. GORDON

U.S. District Court
Northern District of Illinois

JULIE REITZ v. MYLES GORDON, YELLOW CAB COMPANY, and HERMAN PADILLA, No. 97 C 6514, December 9, 1997

NEWSGATHERING

1. **Forced disclosure of information — Disclosure of unpublished information — In civil actions (§60.1003)**

Forced disclosure of information — Statutory privilege ("shield" laws) (§60.25)

Non-party newspaper need not disclose unpublished photographs to parties to civil action, since parties failed to demonstrate sufficient need for photographs pursuant to Illinois Reporters' Privilege Act, 735 ILCS Section 5-8/901, and since parties have not demonstrated that all non-privileged sources of information have been exhausted.

Motion by non-party newspaper seeking to quash subpoena. Granted.

Phillip Harnett Corboy Jr., of Corboy & Demetrio, Chicago, Ill., for plaintiff.

David M. Smith, of Schoen & Smith, Chicago, for defendant Myles Gordon.

Young B. Kim, assistant U.S. attorney, Chicago, for defendant Samuel Woods.

James Klenk and Natalie J. Spears, of Sonnenschein Nath & Rosenthal, Chicago, for non-party The Chicago Tribune.

Full Text of Opinion

Holderman, J.:

In analyzing this motion, the court has considered the subpoena as though it had been issued pursuant to Fed.R.Civ.P. 45. Although non-party Tribune has argued that the free-speech clause of the Illinois Constitution is "broader and more far-reaching" than the First Amendment to the United States Constitution, after reviewing the pertinent case law, the court considers the scope of the Illinois Reporter's Privilege Act ("Act"), 735 ILCS §5-8/901 *et seq.* to be synonymous with the news-gathering privilege recognized by federal courts arising from the First Amendment to the United States Constitution.

In balancing the purpose of the privilege (i.e., the public interest in protecting the media from undue intrusions and burdens upon its news gathering and news reporting functions) with the rights of litigants in a particular case, federal courts under the First Amendment, *e.g., Gulliver's Periodicals, Ltd. v Chas. Levy Circulating Co.,* 455 F.Supp. 1197, 1202-03 (N.D.Ill. 1978) and Illinois Courts under the Act, *e.g., Villeda v Prairie Material Sales,* 17 Med. L. Rptr. 2289, 2292-94 (Cir. Ct. Cook County 1990), have considered factors such as the information's relevance to the case and whether the information's disclosure in the case is essential or crucial to public interests involved in the case, as well as the availability of information from other sources that would not impinge the privilege.

There is no question that any visual memorializations of an event, whether photographs, movies or videotapes, made as part of a news gathering function by personnel working for a media organization that are not published or otherwise voluntarily disclosed come within the ambit of the Act and the news-gathering privilege. *See e.g., United States v Bingham,* 765 F.Supp. 954 [18 Med.L.Rptr. 2386] (N.D.Ill. 1991); *Illinois v Fort,* 15 Med. L. Rptr. 2251, 2252-53 (Cir. Ct. Cook County 1988); *see also, O'Neill v Oakgrove Construction,* 71 N.Y.2d 521, 523 N.E.2d 277 [15 Med.L.Rptr. 1219] (1988).

The parties to this litigation have not tipped the First Amendment's balance sufficiently in their favor to justify this court ordering the disclosure of the photographs they seek.

[1] Although the photographs may enlighten all concerned, the parties have not shown sufficient need in this litigation for the photos sought from the Tribune by the subpoena to justify the intrusion on the First Amendment that court-ordered disclosure would bring. Moreover, even though the government's photographs taken at the scene are now missing, the parties have not established that the government photos are so irretrievably lost that the court can and should find that all non-privilege sources of the information have been exhausted.

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·uarterback. The logic
tiff to support this in-
ecause Bengston was
have known the true
›neous account, there-
:en a deliberate false-
·cumstances presented,
his inference does not
ıd convincing evidence
that defendants knew
se or entertained doubt

Falsity and actual malice are distinct concepts. It is one thing to publish a false statement and quite another to do so knowingly or recklessly (*see, Bose Corp. v Consumers Union,* 466 US 485, 511, *supra*). It may be possible, as the United States Supreme Court has suggested, that proof of falsity will support an inference of actual malice "where the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves" (*Time Inc. v. Pape,* 401 US 279, 285 [1 Med.L.Rptr. 1627]). The Appellate Division held that this case presented such an instance. We disagree. The inference depends for its validity on the premise that the eyewitness could not have perceived and understood anything but the truth. Thus, in reporting something else, the observer must have departed from the truth by design. The underlying premise is valid, however, only if the events were unambiguous and the setting was such that the observer could not have misperceived those events. Such conditions, however, cannot simply be assumed; as the proponent of the inference and the bearer of the burden of proof of actual malice, the plaintiff must demonstrate that they exist. No such showing was made here.

The evidence was that Bengston observed the events some 30 feet from where they took place. The exchanges he reported between plaintiff and the quarterback occurred after plaintiff's visiting team had delivered the ball into the hands of the home team, an event likely to excite the home crowd. It is probable, then — at least plaintiff did not show otherwise — that Bengston's opportunity to hear the exchanges was less than ideal.

It is significant that the only witnesses who claimed to know what plaintiff actually said were plaintiff himself, the quarterback to whom he had spoken and the quarterback's father. The other witnesses simply testified that they did not hear plaintiff use profane language. Plaintiff and the quarterback were obviously in a better position than Bengston to know what was said. The quarterback's father sat about the same distance away as Bengston. All of this evidence supports the finding that Bengston's report was inaccurate, but it does not lead to the conclusion that Bengston knew that it was false. There was no evidence to negate the possibility that Bengston simply misunderstood plaintiff. There was not, for example, testimony that plaintiff's words were clearly audible to anyone in Bengston's location.

Furthermore, the similarity between Bengston's account ("get your head out of your &!(!!(&") and plaintiff's account ("get your head up") suggests that the falsity was more the product of misperception than fabrication. In sum, we conclude that plaintiff failed to establish that the situation was sufficiently unambiguous to support the inference that the false statement was published with actual malice.

The absence of clear and convincing evidence of actual malice is fatal to plaintiff's complaint. The question whether the award of punitive damages was properly stricken is, therefore, academic. Thus, we have no occasion to consider whether plaintiff's proof of common-law malice was sufficient to sustain such an award or whether punitive damages are ever recoverable in libel actions involving matters of public concern (*see, Dun & Bradstreet v Greenmoss Bldrs.,* 472 US 749, 761; *supra; Gertz v Robert Welch,* 418 U.S. 323, 349; *supra; see, generally,* Committee Report, *Punitive Damages in Libel Actions,* 42 Record of Assn of Bar of City of NY 20 [1987]).

Accordingly, plaintiff's cross appeal should be dismissed as academic and the Appellate Division order, insofar as appealed from, should be reversed and the complaint dismissed.

Simons, Kaye, Alexander, Titone, Hancock, and Bellacosa, JJ., concur.

U.S. v. LOPEZ

U.S. District Court
Northern District of Illinois

UNITED STATES OF AMERICA v. OSCAR LOPEZ, et al., No. 86 CR 513, November 20, 1987

NEWSGATHERING

Forced disclosure of information—Disclosure of unpublished information (§60.10)

Forced disclosure of information—Common-law privilege (§60.20)

Television reporter has qualified privilege against disclosure of videotape "out-

takes" of interview with criminal defendant, since such privilege is not limited to confidential sources and since privilege applies in criminal as well as civil cases, and thus defendant's failure to overcome such privilege by demonstrating that outtakes provide information not available from alternative sources, and by demonstrating specifically how outtakes are "highly material" to defense, warrants quashing of subpoena.

Action by broadcasting company to quash subpoena served on it by defendant in criminal action. On company's motion to quash.

Granted.

A. Daniel Feldman, Samuel Fifer, and Kenneth E. Kraus, of Isham, Lincoln & Beale, Chicago, Ill., for movant.

Full Text of Opinion

Hart, J.:

Presently before the court is the motion of NBC to quash the subpoena served on it by defendant Garcia seeking the videotape out-takes from an interview given by Garcia to a WMAQ-TV reporter on August 19, 1986. NBC contends that enforcement of the subpoena would violate the federal common law and First Amendment privileges against compelled disclosure of a reporter's work product. Garcia argues that the reporter's qualified privilege has never been explicitly recognized in the Seventh Circuit, that the privilege protects only confidential sources, and that the privilege should not apply in criminal cases. For the reasons stated below, this court rejects Garcia's arguments and grants the motion to quash.

DISCUSSION

In *Branzburg v. Hayes*, 408 U.S. 665 [1 Med.L.Rptr. 2617] (1972), the Supreme Court, while refusing to create an absolute constitutional privilege for journalists, nevertheless recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Since *Branzburg*, federal courts have with near uniformity recognized a qualified privilege for the protection of reporters' notes and other source materials. *See, e.g., LaRouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134 [12 Med.L.Rptr. 1585] (4th Cir.), *cert. denied*, 107 S.Ct. 79 (1986); *United States v. Burke*, 700 F.2d 70 (3d Cir. 1983); *Zerilli v. Smith*, 656 F.2d 705 [7 Med.L.Rptr. 1121] (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 [6 Med.L.Rptr. 1598] (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (19 __); *Baker v. F. & F. Investments*, 470 F.2d 778 [1 Med.L.Rptr. 2551] (2d Cir. 1978); *Farr v. Pitchess*, 522 F.2d 464 [1 Med.L.Rptr. 2557] (9th Cir. 1975). *But see In re Grand Jury Proceedings*, 810 F.2d 580 [13 Med.L.Rptr. 2049] (6th Cir. 1987) (rejecting reporter's qualified privilege in the context of grand jury proceedings).

Although the Seventh Circuit has not yet addressed the question of a reporter's qualified privilege, this court has previously recognized the privilege, and has stated that, at least in civil cases, it extends to all underlying, unpublished material gathered in preparation for a news story or broadcast *regardless of whether the source of the material is confidential. Gulliver's Periodicals, Ltd. v. Chas. Levy Cir. Co.*, 455 F.Supp. 1197 [4 Med.L.Rptr. 1342] (N.D. Ill. 1978). Thus, Garcia's contention that the reporter's qualified privilege, if recognizable at all, protects only confidential sources, is without merit. *See also Burke, supra*; *United States v. Blanton*, 534 F.Supp. 295 [8 Med.L.Rptr. 1106] (D. Fla. 1982); *Altemose Const. Co. v. Building & Const. Trades Council*, 443 F.Supp. 489 [2 Med.L.Rptr. 1879] (D. Pa. 1977); *Loadholtz v. Fields*, 389 F.Supp. 1299 (D. Fla. 1975).

Garcia's next argument, that a reporter's qualified privilege does not apply in criminal cases, is also without merit. Since it is grounded in federal common law, the privilege applies to federal criminal cases through Fed. R. Evid. 501. It is true that *Gulliver's Periodicals*, the only case of this court to discuss the privilege, was a civil case, but those courts which have addressed this issue have not differentiated between civil and criminal proceedings for purposes of applying the privilege. *See, e.g., United States v. Criden*, 633 F.2d 346 [6 Med.L.Rptr. 1993] (3d Cir.), *cert. denied*, 449 U.S. 1113 (1981); *Blanton, supra.* In fact, as the court noted in *Burke, supra*, the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases, since reporters are to be encouraged to investigate and expose evidence of criminal wrongdoing. *Id.* at 77. Garcia cites *In re Grand Jury Proceedings, supra*, where the

Sixth Circuit declined to recognize the privilege in a case where the video out-takes at issue were the only means of determining the identify of a person who murdered a police officer, but the need for the out-takes in that case, because of the unique facts, was particularly compelling, and the case involved grand jury proceedings — not a trial.

In *United States v. Cuthbertson*, 630 F.2d 139 [6 Med.L.Rptr. 1545] (3d Cir.1980), as in this case, the court was confronted with an assertion of a reporter's qualified privilege by a television station in a criminal proceeding involving some nonconfidential sources. The court stated:

> A defendant's . . . due process rights certainly are not irrelevant when a journalist's privilege is asserted. But rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant's need for the information.

Id. at 147. *Cuthbertson* involved an attempt by criminal defendants to obtain some reporter's notes concerning out-takes that were used in a television program regarding their allegedly fraudulent business activities. The court stated that

> the district court should not be required to make the delicate balance of interests required by the privilege unless the defendant first shows that he is unable to acquire the information from another source that does not enjoy the protection of the privilege.

Id. at 148.

In *Cuthbertson,* the out-takes involved verbatim and substantially verbatim statements held by the television station of witnesses that the government intended to call at trial, which the court found "[b]y their very nature, . . . [were] not obtainable from any other source. *Id.* at 148. In this case, by contrast, the out-takes Garcia seeks are parts of her own interview, which also was attended by Ms. Susler, stand-by counsel for co-defendant Oscar Lopez. Since Garcia was personally present at the interview, she (or Ms. Susler), presumably has some general knowledge of what those out-takes contain. Because two witnesses were present at the interview (including Garcia herself), Garcia has not satisfied her burden of showing that the information she seeks is not available from a non-journalistic source as required under the caselaw. *See* *Zerilli, supra*; *Criden, supra*; *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Blanton, supra; United States v. Hubbard*, 493 F.Supp. 202 [5 Med.L.Rptr. 1719] (D.D.C. 1979).

In another criminal case, *United States ex rel. Vuitton et Fils, S.A. v. Karen Bags, Inc.*, 600 F.Supp. 667 (S.D.N.Y. 1985), certain convicted defendants sought access to the out-takes of a television interview of the prosecutor's chief witness against them, arguing that the out-takes would provide the evidence needed to support a motion for a new trial. In holding that the that the reporter's qualified privilege applied to the out-takes, the court stated that "[u]nless the moving party can demonstrate in a specific manner that the subpoenaed documents are 'highly material,' and not merely cumulative, the reporter's privilege will be upheld." *Id.* at 670. The court in *Vuitton* found that the defendants had failed to demonstrate a "practical need" for the information sought, since they had plenty of opportunity to conduct their own investigation and any further facts that might possibly be gleaned from the out-takes were likely to be merely cumulative. *Id.* at 671. The court characterized defendants' motion as one "at most based on a hypothesis or 'hunch,' lacking a logical basis." *Id.* In this case, similarly, Garcia has not satisfied her burden of making a *specific showing* of how the out-takes she seeks are "highly material" to her case. In fact, Garcia concedes in her memorandum that she *does not know* if the out-takes of the interview will permit her to put it into the context in which it was made. Garcia argues that in a criminal case, the burden cannot be on the defendant to explain what is missing. In this case, however, Garcia, who is herself the subject of the interview, has failed to make even a preliminary showing as to the nature of the statements contained in the out-takes and why those statements are necessary to air in order to make the interview complete, accurate and fair. Requiring her to make such a showing does not violate the Fifth Amendment, because Garcia may still refrain from testifying as to other matters, and the scope of any necessary cross-examination would be limited to this specific issue.

Because Garcia has not exhausted alternative sources and has not specifically shown how the out-takes she seeks are material to her defense, she has not overcome the reporter's qualified privilege which protects the out-takes.

IT IS THEREFORE ORDERED that the motion of NBC to quash the subpoena of defendant Dora Garcia seeking video out-takes is granted.

PAINTING INDUSTRY OF HAWAII v. ALM

Hawaii Supreme Court

PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND v. ROBERT A. ALM, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS; and THE STATE OF HAWAII, No. 12094, December 3, 1987

NEWSGATHERING

Access to records—Administrative (§38.14)

Statutory right of access—State open records acts (§44.17)

Settlement agreement between state commerce department and licensed contractor, which resolved contractor's alleged violations of wage and hour laws and which includes name of corporation's manager and states that manager holds contractor's license and agrees to comply with labor laws in future is not personal record exempt from disclosure under Hawaii public records act, H.R.S. 92-51.

Action seeking disclosure of government agency's settlement agreement. The Hawaii Circuit Court, First Circuit, ordered disclosure after an *in camera* examination and subsequently, on reconsideration, vacated the order and precluded disclosure. On plaintiff's appeal.

Reversed.

Michael A. Lilly, for plaintiff.

Nathan J. Sult, of the Department of Commerce & Consumer Affairs, and Grant Tanimoto, deputy attorney general, for defendants.

Full Text of Opinion

Before Lum, C.J., and Nakamura, Padgett, Hayashi, and Wakatsuki, JJ.

Lum, C.J.:

The issue in this appeal is whether a settlement agreement between the Department of Commerce and Consumer Affairs (DCCA) and a corporate public works contractor regarding license law violations by the contractor must be disclosed to the public. The answer to this issue turns on whether the settlement agreement is a personal record under Hawaii Revised Statutes (HRS) §§92-50 and 92E-1. The Circuit Court of the First Circuit ruled the agreement to be a personal record, and precluded disclosure. We reverse.

I.

On October 17, 1985, a complaint was filed with the Regulated Industries Complaint Office (RICO) of the DCCA alleging violations of the wage and hour laws by Metropolitan Maintenance (Metropolitan), a licensed contractor. RICO investigated the complaint and subsequently entered into a settlement of the alleged violations with Metropolitan and Donald Tagawa, Metropolitan's responsible managing employee.

The Plaintiff, Painting Industry of Hawaii Market Recovery Fund, requested disclosure of the settlement agreement by the DCCA pursuant to HRS §92-51. The DCCA refused on the ground that the settlement was not a public record. Plaintiff then filed the instant suit to compel public disclosure of the agreement.

On January 5, 1987, the Circuit Court of the First Circuit ordered disclosure of the settlement after examination *in camera*. The document was sealed to permit the DCCA an opportunity to appeal. On reconsideration, the court on March 6, 1987, vacated the order and precluded disclosure of the settlement on the ground that it was a personal record under HRS §92E-1.

II.

A public record is defined under HRS §92-50 as:

> [A]ny written or printed report, book or paper, map or plan of the State or of a county and their respective subdivisions and boards, which is the property thereof, and in or on which an entry has been made or is required to be made by

CERTIFICATE OF SERVICE

I hereby certify that two copies and one CD-ROM containing a soft copy of the foregoing Brief of Amici Curiae In Support of Defendants-Appellants' Petition for ReHearing *En Banc* were served this 28th day of August, 2003 by Federal Express on:

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