

Part 2: Legal Resources For Working Journalists

INTRODUCTION

The material in this segment of the Handbook is designed to help working reporters and news executives avoid legal problems in the everyday practice of their profession; assist them in gaining access to public meetings and documents they are entitled to cover; and help them provide the public with full, accurate and reliable information about the justice system and legal issues in the news. It is divided into four Sections.

Section XII explains the state laws and legal procedures that directly affect and dissemination in Ohio, including the laws regarding:

- libel;
- invasion of privacy; and
- journalists' privilege/shield law.

Section XIII discusses and provides the actual text of:

- Ohio's state laws regarding media access to public meetings and public records; and
- the Supreme Court of Ohio's rules governing media access to state courts.

Section XIV lists telephone numbers and Web site URLs of key sources of factual information, background discussion and commentary on a wide range of legal topics.

Section XV is a glossary of frequently encountered legal terms.

IMPORTANT NOTE TO READERS: This material is intended to provide basic legal information of value to journalists. It **DOES NOT** provide an exhaustive, all-encompassing discussion of the laws or legal topics addressed. The legal information and text of state laws provided in the following pages was current as of August 2002, but laws change and legal interpretations are constantly evolving as a result of court decisions, legislative action and administrative rulemaking. In any real-world legal situation, readers are strongly advised to independently verify the currency and accuracy of information in this publication, and to seek competent legal counsel.

SECTION XII

LIBEL, PRIVACY & JOURNALISTS' PRIVILEGE

The material in this section of the Handbook, including statements of opinion and commentary on legal issues, was prepared by Professor Timothy D. Smith of Kent State University. Prof. Smith is an attorney and a former daily newspaper editor. Opinions expressed are his and do not necessarily reflect the policies or opinions of the Ohio State Bar Association.

Libel

Libel is defined as injury to reputation. Unfortunately, that definition leaves volumes unsaid.

In the law, libel is a *tort*. That means it is a type of injury where the remedy is a civil suit for damages. To win such a civil suit, the injured party, or *plaintiff*, must prove that the *defendant* published or broadcast damaging information and did so either negligently or deliberately, knowing it was false.

The terms *published*, *damaging*, *negligently* and *false* are among the “elements” of the tort of libel. The plaintiff must prove each one to win a suit.

Libel is a complex subject and there is a danger in attempting to reduce it to terms that make it appear otherwise. Despite that, there are basic rules that, if understood, will substantially reduce the risk of a libel suit.

The first rule is to avoid being sued. The next logical piece of advice would be to accomplish this by always printing the truth. Unfortunately, even though truth is always a defense to a libel suit, truth itself is an elusive subject. There's the truth believed by the reporter's sources and the truth believed by the plaintiff. Those “truths” may be at odds without either side being wrong. “Truth” in reporting is rarely as concrete as the direction of the sunrise.

To avoid being sued, in those cases where the truth doesn't rise in the east (and even when it does), be *fair*. Fairness, or lack of it, is not a formal element in a libel suit, but it often looms large in a jury's assessment of how the case should come out. One major study into why people sue for libel found that most plaintiffs were angry at being treated “unfairly.” While they disputed the charges contained in a story, they said they sued because they had been treated in a cavalier fashion. Long-time investigative reporter Bruce Locklin of the Bergen County, N.J., *Record* has written many stories that devastated the reputations of his subjects. Suits are rare, though, because he has always treated his subjects decently. He doesn't take cheap shots in the stories and he takes special care to see that the story is balanced. People and issues that are controversial and newsworthy are rarely one-dimensional. Giving both sides fair treatment means more than just saying the subject or a critical report “declined to comment.”

Being fair is no guarantee against suit, but it will reduce the risk and, equally important, enhance your chances if there is a trial. Jurors have a keen sense of fairness. They know a hatchet job when they see one. They know it even when the defendant's printed or broadcast accusations are accurate—but are displayed unfairly.

Elements of libel

There are two critical components that must be present for a story to be libelous. The story must be *false* and *defamatory*. A plaintiff must prove *both* elements to win a libel suit. Not all false statements are defamatory nor are all defamatory statements false.

For example, to report that a man has blond hair when his hair is really black is clearly false. But the false report is not defamatory. It causes no damage to the man's reputation. To be defamatory, a story must hold a person up to public ridicule, loathing or scorn. The accusation must be of the sort that would cause others to avoid the subject's company because he or she is perceived to be of suspect character or, in some sense, unclean or dishonest. Application of this definition changes over time as our culture changes. Forty years ago, to write falsely that someone had cancer was probably defamatory as well and clearly damaging to a reputation. The disease was not well understood and viewed with fear and shame. Today, having cancer carries no more stigma than having bronchitis. However, a person labeled as having AIDS would be in a much different situation. The disease is little understood and often associated with lifestyles that are themselves the subject of public scorn. To report that a person has AIDS would be defamatory and damaging to a reputation today. **Note:** Whether an accusation is defamatory has nothing to do with whether it is false. The two are totally separate concepts. To write that someone has AIDS would likely be held to be defamatory. If false, it could also be libelous.

The law puts the burden of proof on the plaintiff. The person suing must prove that the accusation is false. While that often involves many kinds of evidence, it can be as simple as the plaintiff taking the stand and saying under oath that the accusation is false. The law puts no such burden on the defendant, who is presumed "innocent," in a manner of speaking, of the charges made in the libel suit. However, that presumption probably would not mean much once the plaintiff denies the charge.

Beyond these two basic elements, there are others that the plaintiff must prove. Failure on any point will result in a verdict for the defendant.

Publication

This is a technical element in libel. It means the damaging information was communicated in writing to a third party—someone other than the person who is the subject. It can be as simple as dictating a damaging letter to a secretary, who types the letter and sends it to the subject. The secretary is the "third" party. (The author is the "first" party and the subject is the "second" party.) Typically, publication is proved by showing that the damaging information appeared in a published or broadcast news story.

Identification

The person complaining of damage must be identifiable in the story. This does not mean that the person must be named. A description that is specific enough to narrow the possible identities to just a few people is enough. For example, a story that states, "Korean merchants in the neighborhood have been accused of gouging the residents with inflated prices," would be enough identification if there were only three such Korean merchants. Any one or all three could claim that the story was aimed at them. (FYI - accusing someone in business of an unfair or improper business practice is damaging.) Using an incorrect address may be sufficient identification, since the occupant of that address may be "identified" and his or her reputation damaged by an apparent connection to wrongdoing.

Fault

It is important to understand that there are two very different standards of fault in libel cases, depending on the status of the person claiming to have been libeled.

- **Private person**

The law of Ohio requires that a private person—someone who is not a public official or public figure as defined by the law—must prove that a false and damaging statement was made with a level of fault known as *negligence*. Negligence is defined as lack of reasonable care or the care that a reasonably prudent person would use in conducting his or her affairs, including writing a news story. The standard in Ohio is whether a reasonably prudent “person” would have made the mistake that is alleged in the story, *not* a reasonably prudent “reporter.” The import of the difference is that the jury is told to judge the reporter’s conduct by its own standards of care, not those of other “prudent” reporters. The problem is that jurors typically view these situations in hindsight. Libel trials usually involve a debate as to the “truth” of a harmful statement. Jurors are more likely to think that they would not have published the statement unless its truth was absolutely certain, even though that might not be a reasonable practice for a prudent reporter. The bottom line is that, if the plaintiff is able to cast some doubt on the truth of a harmful statement, showing it was published with negligence is not difficult.

- **Public officials/public figures**

Public officials and public figures in Ohio must meet a fault standard set by the U.S. Supreme Court. The nation’s high court, in a series of cases in the 60s and 70s, ruled that people voluntarily in the public eye must prove a level of fault called *actual malice*. The phrase itself is a poor choice of words because it does not involve the usual meaning of malice. *Actual malice* is defined as “knowledge of falsity or reckless disregard for the truth.” The definition appears to be straightforward, but in practice, it is more complex. Few, if any, reporters would ever deliberately publish information that they knew was false. Pure fabrication is rare in mainstream journalism. (The supermarket tabloids are another matter.) Usually, libel cases involving public figures or officials revolve around whether the reporter exhibited “reckless disregard for the truth.” The U.S. Supreme Court and the Supreme Court of Ohio have ruled in many cases where the issue was whether the evidence presented by the plaintiff could be considered as proof of “reckless disregard.” The examples are too numerous to list here. Further, they are often tied to the specific facts of the cases. In general, however, there are guidelines:

- The evidence must focus on the reporter’s attitude toward the truth and not toward the plaintiff. Evidence that the reporter, or others at the newspaper or broadcast outlet, did not like the plaintiff is not considered evidence that any of these people would recklessly disregard the truth.
- Mere failure to check all possible sources is not, by itself, evidence of reckless disregard for the truth, but that rule is contingent on the sources used. The more credible those sources are, the less need there is to check all other possible sources. If the sources used are such that a prudent reporter might, or should, have doubts about their authenticity, more checking is in order. While a reporter with an ax to grind is not considered evidence of actual malice, using a source with a known ax to grind would be.
- Evidence of serious doubt on the part of the publisher of the story—and that includes all the major players involved in the story including the reporter, editor(s) and executives who decide how it will be used—will be viewed as evidence of reckless disregard, unless those doubts have been clearly resolved.

Notes

One thing should be apparent in this section on actual malice: the evidence comes chiefly from the defendant. Typically, the plaintiff, through the discovery process, questions the defendants and collects any physical evidence the defendant might have that would relate to the story. Physical evidence can include notes, tapes, documents, drafts of the story, letters and anything else a creative plaintiff's lawyer can think to ask for.

The law obligates a defendant to turn over all such material. Disposing of such material once a suit has started, or even after it seems likely that a suit will be filed, is extremely dangerous. It could be viewed as an attempt to obstruct justice. At best, if such a move is discovered, it could be presented to the jury as evidence of a cover-up.

However, there is no rule requiring that such material be saved. Libel defense lawyers differ on just what practice to follow concerning notes, documents, etc. As a media lawyer and former newspaper editor, I prefer a simple rule: Do not keep what you do not need. Public records and similar documents that support a story are valuable and worth saving. Notes and transcripts of interviews may be worth saving if they are clear and do not contradict any information in the story. The plaintiff's lawyer(s) will pounce upon contradictions, seeking to discredit the reporter for not following what was written in the notes or for using all of the material in the notes. This latter point can be especially telling if the reporter had favorable material in the notes and didn't use it, regardless of the reason.

One school of thought holds that if a reporter has no notes to support a challenged story, it makes the reporter look careless. Indeed, a plaintiff's lawyer can inflict some pain if the reporter has no notes to refer to when testifying about published or broadcast material. The competing school of thought is that the damage is limited because the lawyer will not be allowed to dwell for long on the issue of why the reporter routinely disposes of notes after a story is completed. It is difficult to attack testimony that goes:

"I know what the plaintiff and others said because that's what I put in the story. Everything significant that everyone said is in the story."

If there are notes, the plaintiff's lawyer can spend considerable time going over every line, every phrase, every doodle or extraneous mark, extracting an explanation from the reporter. If the notes are old—as they certainly will be because the time between the filing and the trying of a libel suit is usually measured in years—the reporter may have a very hard time remembering everything written there. Another alternative is to type the notes, preserving only the significant details and purging extraneous matter.

Regardless of approach, experience dictates that the reporter be consistent in the handling of notes, documents, tape recordings, etc. It looks bad if the reporter has file cabinets full of notebooks for every story written in the last 10 years, *except* for the story that is the subject of the libel suit.

Defenses

• Truth

Truth is always a defense to libel. As noted above, it is a defense that is open to considerable interpretation. A reporter's firm conviction that what he or she just wrote or broadcast *is* the truth will not be as comforting to the company libel lawyer as sworn statements or other forms of tangible evidence that will not erode over time. That goes for sources, too. They move away. They forget. They even get fearful of being embroiled in a court case. **Important:** The news media is responsible for the truth of what it publishes, except in the circumstances outlined

below. That means a reporter must be certain of the truth of statements made by others and cannot use the defense that a story *accurately recounts* what was said by someone else. The defense of “truth” refers to the substance of damaging statements, not merely the accuracy of the report.

- **Privilege**

This defense is based on the privilege accorded public officials and public documents. The theory is that people charged with the responsibility of carrying out the public’s business should not be held liable for any damage they might cause to someone’s reputation if the damage occurs while the officials are acting within their governmental capacity. When performing their official duties, public officials are granted an “absolute” privilege from libel suits. Those who report what the officials say have a “qualified” privilege; the qualification is that the reporter must *accurately* recount what the official said. The same rules apply to government documents. The reporter will not be held accountable in court for revealing the contents of those documents, no matter how false and damaging they might be, as long as the account accurately reflects the contents. The key is that knowledge of truth or falsity on the reporter’s part is irrelevant. What counts is whether the story accurately portrays what the official said or what the document contained. Privilege applies in a number of governmental settings. For example, members of Congress and members of the state legislature are immune from suit for remarks made on the floor during sessions of congressional or legislative bodies. Publication of those remarks also carries a qualified privilege. In Ohio, this privilege also extends to reports of judicial proceedings, hearings, official government meetings (city council, school board) and a vast array of public records.

- **Fair comment/opinion**

The defense of “opinion” seemed to be maturing for several years after its initial appearance as dictum (that’s legalese for “oh, by the way”) in the U.S. Supreme Court decision in *Gertz v. Welch* in 1974. Lower courts, with lots of help from news media lawyers, seized on the language in that decision that there was no such thing as a “false idea.” The comment had nothing to do with the case, but it had appeared in a Supreme Court ruling and that was enough. Gradually, a body of law built up that defined “opinion” in news media stories and made it exempt from libel. The key was the holding that something decreed by the trial judge to be opinion, by definition, could be neither true nor false. If it could not be false, no matter how nasty, hurtful or defamatory, it could not be libelous.

In any case where there was even a remote chance that a damaging statement could be considered “opinion,” defense lawyers would file a motion (a request to the trial judge to take some action) to rule that the offending statement was “opinion” and dismiss the case. In the spring of 1990, the U.S. Supreme Court revisited the opinion defense in *Milkovich v. the Lorain Journal*. The case grew out of a sports column written in 1974 (the same year *Gertz* was decided) about the aftermath of a fight at a high school wrestling match. At issue was a line in the column that said a wrestling coach and a school superintendent “lied” at a subsequent court hearing. The coach and the school official sued and the case spent the next 16 years kicking around the court system. In 1986, the Ohio Supreme Court ruled that the offending statement was an expression of “opinion.” But, in 1990, the nation’s top court held that the *Gertz* case was not intended to fashion a separate, constitutionally based defense of opinion. The decision reversed earlier dismissals of the coach’s suit and seemed to damage, if not eliminate, the defense of opinion.

The Ohio Supreme Court cleared up that issue for state law cases in the spring of 1995 with its decision in *Vail v. The Plain Dealer*. There, the court upheld the dismissal of a suit against

Plain Dealer columnist Joe Dirck on the grounds that statements in his column were opinion and protected under the Ohio Constitution's free press guarantees. The court went on to hold that, in determining whether a statement was a fact or an opinion, a court should consider the specific language used, whether the statement was verifiable, the general context of the statement and the broader context of where the statement appeared. Recently, the Supreme Court of Ohio emphasized that its ruling in *Vail* has "expressly declined to follow *Milkovich*" by relying on the Ohio Constitution's independent protection of opinion. This independent Ohio constitutional privilege to express opinion applies to both media and non-media defendants.

Also, the defense of *fair comment* remains, although its application is limited. It is useful in cases where the news media has reviewed some public performance, on the stage, on the screen (large and small) or in a restaurant. It would probably also apply to a sportswriter's commentary on the play of some college or professional athlete. To write that the actor exhibited a range of emotion from A to B or that the featured dessert at Benny's Ptomaine Palace could launch a wave of dieting is protected fair comment. It must, however, be based on facts and there must be an absence of spite or ill will.

• **Neutral reportage**

This is another "don't-kill-the-messenger-just-because-you-don't-like-the-message" defense, similar to qualified privilege. Knowledge of the truth is irrelevant in this defense, as in qualified privilege. What is important are the parties involved. The nub of this defense is that the news media is serving as a neutral observer (and reporter) of a dispute between others over a matter of public concern. Further, those involved in the dispute must be public figures or public officials. The idea behind this defense is that the public has a right and need to know when such people are having a fight since the outcome could affect a much wider audience. Therefore, if such a dispute erupts (and is not generated by the news media) and the news media accurately recounts the charges made by one side against the other, the media *will not* be held responsible if those charges are libelous. It is an excellent defense when one of the participants in a public debate turns on the news media because he or she is miffed by the coverage of a fight. Caution is urged, however. Not every jurisdiction has accepted this defense and some states and federal circuit courts have rejected it outright. The Supreme Court of Ohio, in a 1996 decision, refused to recognize the defense in a case that focused on a qualified privilege issue. In *Young v. The Morning Journal*, the newspaper defendant reported that a contempt charge had been filed against a local lawyer. The paper omitted the lawyer's middle initial contained in the official record and added his hometown, which had not been part of the record. There were two lawyers with the same first and last names, but different middle initials. By adding the hometown and leaving out the middle initial, the paper identified the wrong lawyer. The Supreme Court found that the qualified privilege was lost because of the errors. The Court added that it would not recognize the neutral reportage defense in this case, either, because it had not done so in the past. The ruling did not foreclose the defense in future cases, but the prospects do not appear favorable.

• **Statute of limitations**

This statute sets limits on the time within which a plaintiff may sue. The limit for libel suits in Ohio is one year from date of publication. The statute acts as an absolute bar to a suit, regardless of the merits of the case.

- **Retraction**

Retracting a libelous statement will not prevent a suit, but it may lessen the damages. However, printing a retraction does eliminate the defense of truth. If a newspaper admits an error, it will not be able to later claim the statement was true. Despite that limitation, it makes good sense, legally and ethically, to print a retraction promptly when a mistake is made. If a suit is filed, the retraction is evidence of the newspaper's willingness to correct the harm it caused, to the extent a retraction can do so. A retraction may be an admission of negligence—the level of fault required for a private person to prove to win a libel suit. It would not necessarily be an admission of actual malice, e.g., that the newspaper knew the information was false prior to publication. A retraction is simply admission that an error was discovered *after* publication.

How to handle a libel suit

There is evidence to suggest that a substantial number of libel suits are generated by the way people are treated after a story has been printed or broadcast. Three professors at the University of Iowa surveyed libel plaintiffs and found that half of them contacted the newspaper before contacting a lawyer about suing. That suggests that there is the possibility of avoiding a suit, even though the story itself may be very damaging.

One way to almost guarantee a libel suit is for the potential defendant to dismiss a complaint or treat a caller rudely. The Iowa study found that to be the most common treatment—and clearly ineffective. Typically, the study found, the average libel plaintiff was a public official (most were male in this study which spanned the decade from 1974 to 1984) who felt his reputation was at stake and wanted a retraction or apology for what he believed to be a false story.

In handling a libel complaint, it is wise policy to keep a reporter who is the target of a complaint from dealing directly with the person complaining. The reporter is likely to be defensive. The reporter also may try to prevent superiors from finding out about the complaint until it is too late. It is not unusual for a person who feels wronged to call the reporter involved. The policy should require that reporter to forward the complaint immediately to an editor (assuming the nature of the error is potentially libelous; misspelled names don't require such treatment).

The editor should respond to the complaint by taking it seriously and determining exactly what the caller wants. Sometimes a "clarification" is sufficient to satisfy the target of an unflattering story without requiring the publisher to admit error. There is little to be gained by trying to negotiate over the telephone. Unless there is a quick and obvious solution satisfying to all concerned, the editor should agree to investigate and promptly respond. If the investigation reveals lapses in the story, it would be worthwhile to invite the complainant to the paper or station, or offer to visit the offended party's office to discuss the matter further. Again, the idea is conciliation, not confrontation. If it is not possible to reach an accord on what to do next, at least the effort has been made and that is worthwhile. It can also have the effect of calming an irate potential plaintiff. This is not the time for either defensiveness or arrogance—two traits the researchers found in abundance when examining 10 years' worth of libel suits. The object is to avoid a suit that is time-consuming, expensive and rarely a worthwhile experience.

If it is the lawyer for the aggrieved party who makes that initial call, politely refer all questions to the company's lawyer. Don't attempt to answer anything, no matter how innocent it may appear.

Invasion of Privacy

Simply put, invasion of privacy is a violation of a person's right to be left alone. Unfortunately, the very essence of newsgathering is minding everyone else's business. When these interests collide, there is the potential for an invasion. Generally, the issue is one of expectation of privacy. A person who decides to streak across campus nude cannot later be heard to complain if his or her photo appears in the college yearbook. A couple amorously engaged in a public park have the same problem. But move that scene to a hotel bedroom and try to capture the action with a keyhole camera and the outcome could be different. Where the legitimate expectation of privacy is high, the rights of the news-gatherer are often correspondingly low.

Although there is just the one tort known as invasion of privacy, it actually comes in four different forms: intrusion, publication of embarrassing private facts, false light and appropriation. Not all states recognize all four branches. For example, Ohio does not recognize false light, defined as portraying someone in a fashion that is both inaccurate and that the average person would find highly offensive. Ohio does allow suits for the other three invasion of privacy claims.

Intrusion

This is simply being someplace where you have no right to be and acting in a fashion that the average person would find highly offensive or outrageous. This branch of tort is similar to the criminal charge of trespass, though it takes more than a technical violation to result in a successful suit. Taking a shortcut across someone's lawn is trespassing, but not intrusion unless you were in a four-wheel vehicle and tore up the grass. Intrusion can be physical—being on someone's property without permission or straying from an area where you are allowed to one where you are not. Intrusion can also be electronic or photographic. Electronic eavesdropping could result in an intrusion suit. So could taking pictures while the subject is in a private area and the photographer is trespassing. Generally, taking pictures from a public area is not intrusion, even if the subject matter is obviously private. The key is whether the activity could be seen from a public street or other public area.

Note: The privilege that law enforcement or other public officials have to tread upon private property does not extend to the news media. An invitation from the sheriff to tag along during a drug raid does not confer any special privilege on the reporter or photographer who accepts. The sheriff may have a search warrant, which legitimizes his presence. But that right does not extend to the private citizen, reporter or photographer. Trooping into someone's house behind a deputy, or trekking across private property with the FBI, is intrusion for the private citizen. The risk of suit may not be high, particularly if the miscreant sought is the property owner. But being convicted of a crime does not rob a person of privacy rights. There was a successful suit some years ago against an undercover reporter-photographer team for *Life* magazine who helped unveil a bogus healer. The man was convicted of practicing medicine without a license, but later won a suit against the magazine because the reporter misrepresented herself to gain access to his home and get treatment that later formed the basis of the charge against him.

The best defense against an intrusion suit is consent. But to be effective, consent must be both competent and knowing. That means young children cannot give consent, nor can the feeble-minded. Also, the person giving the consent must be aware of the significant facts. In the *Life* magazine case, the quack would never have consented to the presence of the *Life* reporter and photographer had he known who they were. Consent can also be withdrawn. A reporter invited

into a home is not guilty of intrusion. Refusing to leave after being asked could be considered a violation.

Embarrassing private facts

In this type of case, the essence of the complaint is that the information is true, but is not of public concern. Further, the information must be private. Information gleaned from public records, regardless of age, are not private and may be published, regardless of how embarrassing. But there is a wealth of information available about people from quasi-public sources like hotel records, credit reports and private letters that are not covered. Using such sources could subject a reporter to a suit if the information is of the highly offensive sort. This tort does not recognize any formal distinction between public figure and private citizen. The latter may have a greater expectation of privacy, but even public officials have a right to privacy. The best defense in this case is the argument that the information is of legitimate public concern. But reporters should be careful when dealing in private, personal kinds of information. The invasion of privacy tort does not have the legal history that libel does with all its formal rules. In many cases, because of those rules, a libel case may be dismissed without ever getting to the merits of the issue—that is, whether the story was false and defamatory. Privacy suits are much more likely to go to trial where arguments about legitimate public concern must be made to a jury that may well believe the news media is too intrusive most of the time.

Misappropriation/Rights of publicity

This is a specialized form of invasion of privacy that applies more often in a commercial setting than in a news setting. The law recognizes that a person has the right to make money from his or her name and/or likeness and to prevent others from doing the same without permission. Some years ago, an entertainer (guess who) sued a portable outhouse company for using the name, “Here’s Johnny.” The same rights apply to the private person who does not want to be used to make money for someone else. Thus, it would *not* be appropriate to take a woman’s picture and use it in a perfume ad without her permission. The law recognizes a “news exception” to this rule. Under that exception, the same woman’s picture, if taken in some public place, may be used in a newscast or on the front page of a newspaper—even though the picture may help the owners of the TV station or newspaper make money by making their product more attractive to readers or viewers on the day of the news event. Re-using that picture later on a company calendar that is sold or even given away for promotional purposes is another matter. Then, it would be best to have a release signed by the subject to avoid the risk of litigation.

Journalist’s Privilege

Overview

The concept of a journalist’s privilege is rooted in the belief that the First Amendment will not function as intended if journalists are not permitted to protect their sources. The U.S. Supreme Court has *not* agreed, though numerous lower courts have afforded journalists most of the constitutional protection they have sought. The U.S. Constitution is not the only source of protection, however. There are state constitutions with news media freedom clauses as well as shield statutes. All of these afford varying degrees of protection for sources. This section deals with that protection and the related problems of subpoenas and search warrants.

First Amendment rights

The U.S. Supreme Court held in *Branzburg v. Hayes* in 1972 that reporters *do not* have a constitutional right to refuse to testify in a criminal proceeding. The decision was softened somewhat by a dissent written by Associate Justice Potter Stewart, who proposed a three-part test for prosecutors to meet before they could compel a reporter to testify. Although Stewart's "test" had no force of law, it has received wide acceptance by lower courts at the state and federal level.

The test (used to determine whether a reporter should have to provide information sought through a subpoena) has the following components:

- Is there a reason to believe that the reporter actually possesses the information sought? (Import: No fishing expeditions to see what a reporter might know are allowed; the request for information must be specific.)
- Have all other possible sources of the information been checked first? (Import: Go to the reporter last, after all other attempts to find the information have failed.)
- Even if the reporter has the information, and is the only available source, is there a critical need for the information, i.e., will a miscarriage of justice occur if the reporter does not testify? (Import: Save subpoenas for serious issues; don't use them to harass reporters.)

Courts have granted motions to quash subpoenas that have failed to meet one or more parts of this test, including several Ohio cases.

IMPORTANT: Subpoenas should never be ignored, despite a valid belief that they can be quashed if challenged in court. Receipt of a subpoena in person or by mail should result in a call to the company lawyer immediately. Failure to respond could result in a contempt of court charge.

Service

Subpoenas may be mailed, either by certified or regular mail or delivered in person. In order to compel a reporter's appearance, a prosecutor (or any lawyer involved in a court case) must first have "good" service—evidence that the reporter actually received the subpoena. For that reason, regular mail is risky. A reporter who signs a receipt for a mailed subpoena has supplied evidence of receipt. Frequently, service of a subpoena is attempted at a reporter's workplace. There is no provision in Ohio law that requires a news media company to permit such service on company premises. It is permissible to tell a process server (often a deputy sheriff or a police officer, but it can be anyone assigned by the lawyer issuing the subpoena) that the subpoena may be left at the front desk or information counter, but that does not mean it will be delivered to the reporter. A subpoena is not like a search warrant; the server does not have the right to enter the premises without permission. If the process server leaves the subpoena, someone other than the reporter should check to see who issued it (it will say on the subpoena where it came from) and then call the company lawyer. If the process server won't leave it, try to find out from him or her who issued the subpoena and then call the company lawyer.

Shield statute

Ohio has two statutes, one for broadcasters and one for print journalists that protect them from having to reveal the source of any information gathered in the course of their work. The statute makes no distinction between confidential and other sources, so all sources are covered.

The statute does not mention notes or other documents. They are not automatically protected and may be subpoenaed, even if the reporter is able to avoid testifying personally. The statute offers protection against having to testify in all the usual places: grand jury, petit jury, board, commission, committee, etc. Because it is a statute, however, it may not stand up to a demand for testimony from someone asserting a constitutional right such as a criminal defendant with a Sixth Amendment right to a fair trial. In such situations, the better argument would be to use Justice Stewart's three-part test—which raises a First Amendment constitutional argument.

Far too often, the news media reacts to a subpoena in a predictable fashion: no way will a reporter be allowed to testify or will a photographer be compelled to turn over pictures. Calling the company lawyer is expensive; it doesn't always work. A more practical approach is to find out what the lawyer issuing the subpoena wants. If the lawyer is a county prosecutor or defense counsel involved in a criminal trial, there may not be much room for negotiation. If, however, the lawyer represents a private client and is seeking clips, pictures or videotape, the company should consider simply offering to provide the material for a price. A subpoena for personal testimony may still be resisted, but there is no need for a reporter to testify that he or she wrote a story, or taped one that was broadcast. The clip or tape will speak for itself and may be admissible as evidence with an affidavit stating that it was written or taped by the author and appeared on such-and-such a date. If pictures or videotape is sought, it is permissible to charge for it—at whatever price the market will bear. Lawyers with private clients expect to pay for material they want (but not prosecutors who can demand it as evidence for the state). A lawyer who asks for all accident photos, published and unpublished, may quickly back off if told the pictures will cost \$100 apiece and that there are 30 of them. A newspaper may also charge for search time and copying expense for someone who wants back clips—say \$50 an hour plus \$5 per copy. The fee has a way of turning a very broad subpoena into a much more reasonable request that produces revenue for the paper rather than costing legal fees.

Note: Material in the preceding section has been excerpted from Handbook for Reporters, a publication originally developed by the author for the Associated Press Society of Ohio.