

CHAPTER FOURTEEN: REPORTER'S PRIVILEGE

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Reporters have the privilege of not having to reveal unpublished information. To protect this privilege it is essential that the reporter, editor or news organization consult with counsel immediately upon receipt of a subpoena or other request for unpublished information.

Sections 8-901 to 8-909 of the Illinois Code of Civil Procedure 735 ILCS 5/8-901, provide a statutory reporter's privilege for all media in Illinois. The Illinois Reporter's Privilege Act makes no distinction between print or broadcast media, and includes newsreels and motion picture news. (See section 8-902(b).) Who and what are covered: the statute precludes a court from compelling a reporter to disclose the source of any information, unless the person seeking disclosure has met specific requirements. Let's start with who is covered (who is a "reporter"), and what is covered (who is a "source"), and then move to the requirements for disclosure.

Section 8-902(a) broadly defines "reporter": reporter means any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis, and includes any person who was a reporter at the time the information sought was procured or obtained. The statute clearly covers all persons in the newsgathering, news writing and news editing process. Photographers are covered, producers are covered, and researchers for radio, TV and newspapers are covered. There has been very little reported litigation on the question of who is a "reporter" under the act. The statute uses very broad language to define "reporter," and it is anticipated that, when called upon to do so, the courts will give a broad

interpretation to this language.

Likewise, the statute broadly defines “source” to be “the person or means from or through which the news or information was obtained.” (See section 8-902(c)) There has been litigation on this issue, and the court has given a liberal interpretation to the statute. The statute makes no distinction between confidential and non-confidential “sources.” Even if a reporter has made no promise of confidentiality, the statute still provides a claim of privilege (*People v. Silverstein*, (1980). Disclosure of some sources for a story does not waive the privilege as to other sources not otherwise disclosed.

The statute establishes that under certain conditions, the court can compel disclosure of a source. In this instance, the statute sets out a different standard for libel and slander cases. In all cases other than defamation cases, the person seeking disclosure must file an application with the court alleging (1) the name of the reporter and the news medium involved; (2) the specific information sought; and (3) its relevancy to the pending proceedings and a specific public interest that would be adversely affected if the information were not disclosed. (See section 8-904) The court may order disclosure only if it finds (1) that the information is not required to be kept secret under state or federal law; (2) that all other available sources of the information have been exhausted; and (3) that the information sought is essential to the protection of the public interest involved. Again, there are only a few reported cases discussing these issues.

The Fourth District Appellate Court, in a case in which the public interest screamed for disclosure, set a rigid standard the state must meet before a reporter will be forced to disclose unpublished information. In October 1988, unknown persons robbed the S & S Liquor Store in Bloomington, and in the process beat the store clerk and shot and killed three innocent bystanders.

The case had not been solved three years later. One person had been arrested, but the state was convinced other persons had been involved in this terrible crime. Bob Arya, a reporter for WHOI-TV in Peoria and Bloomington, conducted his own investigation into the S & S murders, and compiled audio and videotapes of interviews with people who purportedly had overheard confessions to the crimes, or had conversations with participants in the crimes. The Circuit Court of McLean County ordered Arya to turn over all materials to the state's attorney's office. The Fourth District vacated the order compelling disclosure. The record did not support the order of divestiture.

Two thoughts on this subject: first, it is essential that media litigants take seriously this statutory expression of a public interest in confidentiality of sources and unpublished information. The legislature has recognized the benefits of confidentiality in newsgathering and the editorial process, and any efforts to set aside that privilege must be put to strict proof. Second, the requirement that defamation plaintiffs make a prima facie showing of actual damages resulting from defamation as a condition of disclosure would seem to place an additional burden as a condition to obtaining relief under this statute for plaintiffs in libel per se cases, who need make no showing of actual damages.

With this background on the statute, reporters should consider their reactions to a subpoena or other effort to discover their sources. The desire to protect the confidentiality of sources will vary from reporter to reporter, and from publisher to publisher, and from station to station. When subpoenaed, a reporter should gather the information requested, consider applicable policies of his/her employer, consult with counsel, consider the impact of revealing sources on ability to gather information in the future and make a personal evaluation of the desire and need to protect the confidentiality of sources.

In addition to the protection offered by the Reporter's Privilege Act, reporters who are subpoenaed should also consider invoking the protection of a conditional privilege under the First Amendment. That protection stems from the U.S. Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The court in *Branzburg* rejected claims of absolute privilege, but Justice Stewart's dissent has established the basis for a qualified constitutional privilege: "The government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information." *Branzburg v. U.S.* at 743 (Stewart, J., dissenting). *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) and *U.S. v. Criden* 633 F.2d 346 (3d Cir. 1980) are also good background reading on the extent of the constitutional privilege.