I. Report

This report is submitted in furtherance of the Recommendation that the House of Delegates of the ABA support the principles inherent in the current legislative initiative for a Federal Shield Law for journalists, authors, publishers and the like ("journalists"). More specifically, it is urged that the ABA support the principles behind H.R. 581, the Free Flow of Information Act, introduced by Rep. Mike Pence (R-IN) and Rick Boucher (D-VA) in the House of Representatives. An identical bill, S-340, was introduced, also in February, by Sen. Richard Lugar (R-IN) and has been co-sponsored by Sen. Lindsey Graham (R-SC) and Sen. Christopher Dodd (D-CT).

The principles behind the proposed Federal Shield Law will work to protect the public's right to know by establishing reasonable standards for both compelling and shielding journalists with respect to requests or subpoenas that they disclose the names of sources and the information that they obtain though newsgathering. The bills introduced into Congress are largely based on Department of Justice guidelines that have been in place for some thirty years. *See Policy With Regard to the Issuance of Subpoenas to the News Media*, 28 C.F.R. § 50.10 (2005).

II. The Principal Policy Reasons for Support

This initiative should be supported by the ABA for two principal reasons. First, as a purely legal/logical matter, 31 states and the District of Columbia have a Reporter's Shield Law which protects journalists, on either an absolute or qualified basis, from having to reveal sources.[1] In an additional 18 states, *i.e.*, 49 in all, this protection derives from judicial decisions.[2] However, when a reporter relies upon state law, and makes an agreement of confiden-

[1] Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300 *et seq*.; Ariz. Rev. Stat. Ann. § 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. Art. I., § 2(b); Cal. Evid. Code § 1070; Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 *et seq*.; Del. Code Ann. Tit. 10, §§ 4320 *et seq*.; D.C. Code §§ 16-4701 *et seq*.; Fla. Stat. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. §§ 5/8-901 *et seq.*; Ind. Code Ann. § 34-46-4-2; Ky. Rev. Stat. Ann § 421.100; La. Rev. Stat. Ann. §§ 45:1451 *et seq*; Md. Code Ann. Cts. & Jud. Proc. § 9-112, Mich. Comp. Laws § 767.5a; Minn. Stat. §§ 595.021 *et seq.*; Mont. Code Ann. §§ 26-1-901 *et seq.;* Neb. Rev. Stat. §§ 20-144 *et seq*.; Nev. Rev. Stat. Ann. § 49.275; N.J. Stat. Ann. § 2A:84A-21 *et seq.*; N.M. Stat. Ann § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. § 2739.12; Okla. Stat. Ann. Tit. 12, § 2506; Or. Rev. Stat. §§ 44.510 *et seq.;* 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws §§ 9-19.1-1 *et seq*.; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208.

[2] *Connecticut State Bd. of Labor Relations* v. *Fagin*, 370 A.2d 1095, 1097 (Conn. Super. Ct. 1976); *State v. Salsbury*, 924 P.2d 208 (Idaho 1996); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978); *In re Letellier*, 578 A.2d 722, 726 (Me. 1990); *In re John Doe Grand Jury Investigation,* 574 N.E.2d 373 (Mass. 1991); *In re Grand Jury Subpoena,* No. 38,664 (Miss. 2d Cir. Ct. October 4, 1989); *Mississippi v. Hand*, No. CR 89-49-C (Miss. 1st Cir. Ct. July 31, 1990); *State ex rel. Classic III v. Ely*, 954 S.W. 2d 650, 653 (Mo. Ct. App. 1997); *State v. Siel,* 444 A.2d 499 (N.H. 1982); *Hopewell v. Midconti-*

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tiality with a source, the reporter may not be protected if many years later, the matter becomes relevant to a *federal* lawsuit or investigation. This is because the federal courts do not give any weight to state law in non-diversity matters and may offer no protection to the reporter. Given the importance of uniformity in our laws, and the goal of the judicial system to encourage citizens to rely on clearly stated law, it is essential to recognize a federal reporter's privilege in order to correct the anomaly and unfairness of having two inconsistent sets of law apply to the same conduct. In other words, a reporter who needs to give a promise of confidentiality to a source in order to acquire information that would otherwise be unavailable, and who relies on state law to make such an agreement, should not be put at professional or personal peril if the reporter later is subpoenaed in a federal case where no similar protections are afforded.

Second, and more important, if the federal courts do not afford such protection, the result ultimately will be the limiting of information to the pubic. Either if journalists are not in a position to grant confidentiality to sources who legitimately need anonymity to survive or if sources do not believe that journalists will indeed keep to their promise of anonymity, information ultimately going to the public will be chilled. More critical, the information which will be lost is most often information from the whistleblower or the critic of government or management who needs anonymity to keep his job or to keep from personal jeopardy. Hence, it will be the news particularly important to the public, critical of government and big corporations, which will be lost. Such restriction on information to the public is not good either for our legal system or for our informed democracy. Thus, it should be emphasized that this initiative's main goal is not merely the protection of journalists; it is the protection of the free flow of information to the public. Thus the ABA should support a Federal Shield Law that balances the public's need for information and the fair administration of justice. As well, it should be underscored that even in states where absolute privileges have existed, the ability of prosecutors to successfully prosecute crimes has not been thwarted by the application of the reporter's privilege.

III. Timing

The need for the ABA's support for the principles inherent in the proposed federal legislation is immediate. The proposed bills await action this legislative session. Within the last several months, a slew of reporters nationwide have been subpoenaed in the federal courts and questioned about their confidential sources. One (a television reporter in Rhode Island) has

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nent Broad. Corp., 538 N.W.2d 780, 782 (S.D. 1995); *Dallas Morning News v. Garcia*, 822 S.W.2d 675, 678 (Tex. App. 1991); *Lester v. Draper,* No. 000906048 (Utah 3d Dist. Ct. Jan 16, 2002); *Utah v. Koolmo,* No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999); *State v. St. Peter,* 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth,* 204 S.E.2d 429 (Va. 1974); *State v. Rinaldo,* 689 P.2d 392, 395 (Wash. 1984); *State ex rel. Hudok v. Henry,* 389 S.E.2d 188, 193 (W. Va. 1989); *State v. Knops,* 183 N.W.2d 93, 98-99 (Wis. 1971).

already been convicted of contempt and sentenced; at least seven others, all reporters of well-respected media entities, have been found in contempt in two different cases in federal district court in Washington, DC; their cases are all currently on appeal, although in one case a contempt finding has been affirmed by the U.S. Court of Appeals for the District of Columbia in a decision containing four separate opinions by the three judge panel. *In re Special Counsel Investigation, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005) ("*In re Judith Miller*"), *petn. for reh'g and reh'g en banc denied*, Apr. 19, 2005 (No. 04-3138).

IV. The Proposed Legislation

Due to the organic nature of the legislative process, the Recommendation is not tied to support of specific legislation. Instead, the Recommendation is stated in terms of principles inherent in the legislative initiatives for a Federal Shield Law. We thus set forth: (i) a Summary of the Pence/Boucher/Lugar legislation as of May 9, 2005; (ii) the status of such legislation as of May 9, 2005; and (iii) a Summary of the principles inherent in the legislation that we believe the ABA should support, regardless of whatever form the legislation may ultimately take.

(i) Summary of the Legislation: Like many state shield laws, the Pence/Boucher/Lugar legislation initially proposed in both the House and the Senate would provide complete protection for a reporter's confidential sources and information. It would also provide a qualified privilege for other information that a reporter learns but does not publish. This would include a reporter's resource materials, such as his notes. In such cases, reporters would only be required to provide information if the information sought is unavailable from alternative sources, (*i.e.* exhaustion of alternative means to get the information) and is essential to a significant legal issue in the case. Most state laws, as well as the Department of Justice's own guidelines, provide similar protection. The proposed legislation would protect a reporter's personal information held by others, such as telephone, credit card and hotel records. (It has become more common for prosecutors to try to get around shield laws by subpoenaing third parties to obtain a reporter's telephone and travel history in an attempt to determine the identity of sources.) The proposed legislation is structured to apply to "covered persons," which is defined as an "entity that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic or other means" and that (a) publishes a newspaper, book, magazine, or other periodical; (b) operates a radio or television broadcast station, cable system, etc; or (c) operates a news agency or wire service. The proposed legislation also covers a parent, subsidiary or affiliate of such an entity, as well as an employee, contractor, or other person who gathers, edits, photographs, etc., news or information for such an entity. The import of this section is that the shield law protections are meant to apply to the media entities (and their employees and contractors) that are most directly responsible for ensuring the free flow of information to the American public, regardless of the medium of the information.

(ii) Summary of Bill Status (as of May 9, 2005): The Pence/Boucher legislation, entitled the "Free Flow of Information Act of 2005" (H.R. 581), was introduced in the House of Representatives on February 2, 2005. It has 23 co-sponsors. It has been referred to the House Committee on the Judiciary.

The Luger legislation, S-340, is identical to H.R. 581 and was introduced to the Senate by Sen. Richard Luger on February 9, 2005. It has 4 co-sponsor. It has been read twice and is currently referred to the Committee on the Judiciary.

(iii) Principles Inherent in the Legislation: The Pence/Boucher/Lugar legislation may change between the date of this Report and time for vote. For example, there is debate as to whether an absolute privilege for confidentiality of sources is justified, as opposed to a qualified privilege in such circumstances. At a minimum, we believe that a qualified privilege must exist for a reporter's confidential sources and other information. Inherent in the pending legislation, then, are the following principles that we think important to any Federal Shield Law:

(i) That a Federal Shield Law promote both the public's need for information and the fair administration of justice.

(ii) That a Federal Shield Law set forth reasonable standards and balances for both compelling and shielding journalists with respect to subpoenas requiring them to disclose the names of sources and the information they collect in the course of their work, much as is set forth in the Department of Justice Guidelines.

(iii) That journalists play in important role in providing information of significance to the public that aids in ensuring an informed democracy.

(iv) That prior to requiring information from journalists, a party should demonstrate that the information sought is essential to a critical issue in the matter, that all reasonable alternative sources have been exhausted, and that the need for the information clearly outweighs the public interest in protecting the free flow of information.

(v) That a federal shield law should apply to those entities and their reporters who primarily provide the American people with their information on matters of public importance, such as newspapers, magazines, periodicals, television and radio broadcasts and cablecasts, irrespective of the medium in which such entities provide such information.

V. Historical Background and Context

From a historical and legal perspective, the principles and purposes behind this legislation are not new. In 1857, The New York Times published an editorial criticizing lobbying activity involving congressmen who were paid to support certain legislation. A congressional committee was established to probe the charges. However, instead, it sought out The Times reporter and asked him to reveal his sources. He refused, and was held in contempt by the House of Representatives, serving 19 days in jail. After he was released, the House members in question resigned when the full story became public.

In 1972, after many states and some circuits already recognized some form of reporter's privilege, the U.S. Supreme Court in *Branzburg v. Hayes,* 408 U.S. 665 (1972), dealt with this

question for the first and only time. Its five justice majority opinion rejected a reporter's privilege in the grand jury context. But interpretations of the meaning of *Branzburg's* 4-1-4 decision still vary, since Justice Powell, the necessary fifth vote for the majority, wrote in a concurring opinion that First Amendment values were implicated and that a case-by-case balancing test ought to be applied even where reporters are asked to surrender confidential information to a criminal grand jury. Whatever the meaning of *Branzburg*, in the years following that decision, more states passed shield laws and almost all the state courts and some federal circuit courts recognized the reporter's privilege, generally applying a so-called three-part balancing test requiring relevance, essentiality (does the information sought go to "the heart of the matter") and the exhaustion of alternative sources. *See, e.g., Bruno Stillman, Inc. v. Globe Newspaper Corp.,* 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986). Indeed, for decades, federal prosecutors and courts have rarely tried to punish reporters for protecting confidential sources. However, recent actions by the courts and prosecutors, including special prosecutors, have threatened that protection and undercut the laws passed by 31 states and recognized judicially by 49. *Compare In re Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

VI. Additional Reasons to Support the Principles Inherent in the Legislation

Americans generally understand the reliance on confidential sources as an integral part of our system of balanced government. In a recent national survey, 72% agreed with the statement, "Journalists should be allowed to keep a news source confidential." Interestingly, our federal system has less protection in this area not only than all of the states except Wyoming (which has never ruled on the question) but than many countries around the world. Bill Safire recently wrote "the sudden wave of judicial repression, unless checked quickly by higher courts or by congressional action, will make it much easier for the government to deny a citizen's right to know about every miscreant, from corrupt officials to sports heroes" (a reference to the BALCO steroid scandal).

As stated above, the public interest is served when whistleblowers can reveal official abuses of power or corporate mismanagement without fear of reprisal. Moreover, the federal government itself uses confidential sources as a communication tool. It is the unofficial method of providing the public with information on important public policy matters. In other areas, planned leaks are often used to float proposals and gauge public response. However, if courts force reporters to disclose sources and other information obtained in confidence, it will create the appearance that journalists are — or can be — an investigative arm of the government.

The attorney-client relationship as well as those between physician and patient, priest and penitent, and spouse and spouse, are all protected by our legal system. They allow the speaker in those cases to speak openly to his counselor or adviser. The reporter-source relationship, the result of which inures to the benefit not only to either party, but more important, to the public at large, should be no less protected.

Democracies such as Australia, Japan, Mexico, German, Italy, Norway and others have stronger legal protection of sources than does our federal system. In Sweden, a journalist violates the law in revealing a source. British courts have called confidentiality of sources "one of the basic conditions of press freedom."

In sum, the public expects the media to provide them with important news and information on matters of public concern, including matters related to the justice system and government. If journalists are prevented from getting all aspects of a story because their access to confidential sources is not secure, citizens will not receive the information to which they are entitled, and the public interest will not be served. The public's ability to stay informed and hold its government accountable, both, in the end, will be diminished.

VII. Conclusion

For all of the above reasons, it is submitted that the ABA support the principles inherent in the congressional initiative to enact a Federal Shield Law for journalists, entitled the "Free Flow of Information Act".

Respectfully submitted,
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