The Libel Plaintiff's Perspective

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This article examines the tension between the use of confidential sources by journalists, a practice that is protected by shield laws in many states, and the legitimate need of libel plaintiffs to discover the sources of the allegations made against them. This need is particularly acute for public plaintiffs who must meet a higher standard of proof, i.e., malice. After a brief review of recent court decisions and state shield laws, this article suggests that libel plaintiffs often face insurmountable obstacles to prove their cases.

Confidentiality and Newsgathering

The use of confidential sources is often critical to the kind of investigative reporting that exposes social, corporate, or political malfeasance. Perhaps the most salient example is Bob Woodward and Carl Bernstein's persistent efforts to piece together the Watergate puzzle.[1] In a story that seemed doubtful, a confidential source (the still-unnamed "Deep Throat"), only with the complete assurance that his identify would remain secret, provided enough tips to allow the reporters to uncover the political scandal that led to President Nixon's resignation. Before each story was printed in the *Washington Post*, however, the reporters confirmed all information through a second source. Nevertheless, the Watergate scandal would not have surfaced without Deep Throat's involvement, and the face of history, or at least the 1970s, would be different.

Reporters argue that sources deserve the utmost protection and that the First Amendment protects any information obtained in news gathering. The press contends that forced disclosure of confidential sources or information will cause those sources to "dry up," especially considering that a journalist's ability to gather news frequently depends on the confidential relationship established with an informant.[2] Without some assurance of confidentiality, any source possessing sensitive information would be reluctant to come forward, often fearing economic or physical retaliation or public reproach.[3]

Normally, such promises of confidentiality can be maintained without incident, but when some type of litigation is involved, journalists may be asked to disclose a confidential source of information. The discovery request may stem from criminal cases in which prosecutors seek information concerning the commission of a crime or in which a defendant must obtain the material necessary for his or her defense. In other cases, the requesting party is the plaintiff in a libel suit against the reporter, the publisher, a third party, or all three, and is seeking the name of the source who provided allegedly libelous information. If journalists refuse court orders to reveal confidential sources, they may be held in contempt and face consequences, including the prospect of jail time.

On the other hand, plaintiffs argue that media defendants should not be allowed to withhold a source's identity when the identity and the substance of the information are required to withstand summary judgment and proceed with the action. Furthermore, plaintiffs claim that nondisclosure fatally impedes public figures who have to prove not only falsity but that the story was printed with actual malice.[4] Although shield law and common law precepts usually provide ways for the plaintiff to get the information, the burden of proof is often too onerous to overcome. Consequently, libel plaintiffs are often left without recourse as they watch their claims fail in summary judgment proceedings. Thus, in a defamation action, when the source of the information is needed to prove an element of the claim, the precise question becomes whether the press should be required to reveal the source of the information.

Early Cases

Journalists have a long history of aggressively guarding their confidential sources in the face of judicial penalties, but the first significant decision concerning the so-called "journalist's privilege" did not take place until 1958. In *Garland v. Torre*,[5] actress and singer Judy Garland, claiming libel and breach of contract, brought suit against Marie Torre and CBS. During discovery, Torre refused to reveal the confidential source from whom she got the libelous statements and was held in contempt of court.[6] On appeal, Torre argued that forcing a reporter to reveal a confidential source would encroach upon First Amendment guarantees of access to information by imposing a practical restraint on the flow of news to the public. She further contended that "apart from any constitutional question, the societal interest in assuring a free and unrestricted flow of news to the public should impel this court to hold that the identity of a confidential news source is protected by at least a qualified privilege."[7]

The Second Circuit did not agree. In an opinion written by then-Judge Potter Stewart, the unanimous court ruled that precedent did not support such a privilege and that freedom of the press is vital but "not absolute."[8] Thus, because the question went to the "heart of the plaintiff's claim," the court held that "the Constitution conferred no right to refuse an answer."[9]

Fourteen years later, Stewart, by now a Justice on the U.S. Supreme Court, would have an opportunity to revisit the issue of qualified privilege for journalists. In *Branzburg v. Hayes*,[10] the Court consolidated three cases in which journalists had been denied any privilege to protect confidential sources. In a five-to-four opinion that is best described as fragmented, the Court ruled that the First Amendment did not allow journalists the right to refuse to

(Continued from page 3)

testify in a grand jury proceeding. Justice Byron White, writing for the majority, rejected the journalists' arguments that revealing the identities of confidential sources would either hinder the free flow of information or impede their ability to gather news.[11] Although the Court doubted that the ruling would block First Amendment rights, it was sure that lower courts would find it impossible to administer a decision supporting the concept of journalist's privilege. Instead, Justice White suggested that Congress and the state legislatures resolve the issue if such a privilege was so desperately needed.[12] The majority spurned any type of qualified privilege or a case-by-case approach to determining that privilege, reasoning that such a system would lead to confusion and would preclude the development of uniform standards.

Ironically, Justice Stewart, joined by Justices William Brennan and Thurgood Marshall, dissented, writing that the right to protect confidential sources stemmed from "a full and free flow of information to the public."[13] Stewart advocated weighing the constitutional First Amendment interests of the press against other societal interests on a case-by-case basis. Before forcing a reporter to testify before the grand jury, the government would have to satisfy a three-prong test:

- Probable cause exists to believe that the newsgatherer has clearly relevant information about a crime or other legal violation;
- The requested information is not available by alternative means that are less destructive of First Amendment rights; and
- The requesting party can demonstrate a compelling need to know.[14]

In a separate dissent, Justice William O. Douglas vehemently argued that a journalist's privilege should be absolute. Without such protection, governmental intrusion would be too extensive.[15]

Justice Powell concurred with the majority opinion, but suggested that a qualified privilege was appropriate in some instances and should be determined in a case-by-case approach. Disclosure should not be required when information was irrelevant, or the government really had no need for it.[16] Some scholars have described Justice Powell's decision as "enigmatic" because both sides relied upon his concurrence to bolster their arguments; however, if Justice Powell's opinion is read with the four dissenting justices, it appears to approve a qualified privilege under the First Amendment.[17]

The practical effect of the decision was to recognize a qualified privilege. *Branzburg* dealt with grand jury proceedings, but did not address media defendants in defamation cases. After the *Branzburg* ruling, other federal appellate courts followed Justice Stewart's approach and found a qualified privilege in criminal and, later, civil cases. Although most courts do recognize such a privilege, the amount of protection provided varies widely among different jurisdictions.[18]

State courts followed the trend as well, with many recognizing some variation of a common law privilege. By the early 1990s, the journalist's privilege was firmly entrenched, and most states and almost every federal circuit recognized it.[19] If the privilege is not absolute, a libel plaintiff may overcome it by either meeting certain elements of need or showing that the balance of interests at stake weigh in favor of disclosure. Under the traditional three-part test, courts first inquire as to whether the material is genuinely relevant to the claim, and this inquiry typically requires the plaintiff to demonstrate with "substantial evidence," which is a higher level of proof than simple relevance, that the substance of the publication was false.[20] Next, the libel plaintiff must show that all alternative means to get the information have been exhausted without success and that the reporter is the "last resort" for the information.[21] Finally, the plaintiff usually must show a compelling and overriding interest in the information, or, as this prong has been later interpreted, that the information goes to the "heart of the claim" and is essential to determining the ultimate question.[22]

Today, fifteen states offer some common law form of qualified privilege of nondisclosure,[23] and most also require that the information be confidential before protection is warranted. Interestingly, no court has awarded absolute protection of sources under the common law. Source protection seems the foremost concern of the courts, with eleven states clearly recognizing a privilege of source protection.[24] Five of those eleven states protect information as well.[25] Iowa protects information but not sources.[26] The Maine Supreme Court has consistently refused to recognize a qualified privilege of nondisclosure, but the court has instructed, without elaboration, that the rights of the reporter not to disclose information should be balanced against the public's interest in hearing the full evidence that a witness has to offer.[27]

Proof of Element versus Reporter's Privilege

Although common law protections have been used, states are continuing to follow the trend of statutorily codifying the common law protections under shield laws; however, the shield laws greatly vary in scope and application among the states. Unfortunately, Justice White's fears have been realized and, despite codification, little uniformity exists among the states, particularly in libel cases.

Libel Litigation and the Reporter's Privilege

Most people would agree that reporters should enjoy the privilege from disclosure because, in the balancing of competing interests, the public's interest in protecting the source and permitting the free flow of information trumps the limited interest in compelling disclosure of the source for a singular case. As explained above, tensions often erupt when disclosure of confidential sources or information is requested in civil libel cases, and courts have much difficulty balancing the competing constitutional rights asserted by journalists under the First Amendment and the concerns of libel plaintiffs attempting to salvage reputations allegedly sullied by the press.

Although the precise definition varies among the states, libel occurs when a false or defamatory statement about a person is published to a third party that injures the person's reputation.[28] Publication can be by a traditional print medium, by picture or drawing, or by any electronic transmission, as long as the information is actually communicated to any third party.

In a libel action involving an ordinary

citizen plaintiff (a private figure), the plaintiff bears the burden of proving the falsity of the statement, and, when the matters are not of public interest, a negligence standard applies. The difficulty greatly increases, however, when the plaintiff is a public official or public figure because of the requirement to prove actual malice, which is defined as knowledge of falsity or reckless disregard of the truth or falsity of the published information.[29] Actual malice sets a constitutional standard of fault, not just the literal meaning of ill will or spite.[30] Further, the public figure plaintiff must prove actual malice or recklessness by a stringent standard, i.e., "clear and convincing" evidence.[31] Thus, *New York Times v. Sullivan* set up an inherent tension because, by trying to reduce the likelihood that libel suits would become so numerous as to thwart a free press, it essentially pitted protection of compulsory disclosure against the discovery of confidential sources critical to the plaintiff's burden of proof.[32]

Sometimes a defendant's malice is proved through direct evidence, such as a statement or testimony. Often, however, malice is proved through the accumulation of indirect or circumstantial evidence, such as the circumstances surrounding the publication of the materials. Malice can be shown if the plaintiff proves that the defendant entertained serious doubts as to the truth of the publication, if the defendant had "subjective awareness of its probable falsity," or if the reporter did not contact obvious sources to verify the information.[33] To prove actual malice, public figures must prove the publisher's state of mind. With the subjectivity of the actual malice standard, the credibility, and arguably the identity, of the confidential source becomes a crucial issue. To prove actual malice, a plaintiff must show that no reliable source existed (or that the source was fabricated); that the reporter misrepresented reports from an actual source; or that the reporter's reliance upon the source was reckless. Thus, the knowledge of the source's identity, as one federal appellate court noted, was the logical, initial element of proof.[34]

Because of the high burden of proof, the libel plaintiff is forced to request broad disclosure in discovery, including the confidential information, to prove actual malice. But with the First Amendment freedoms bolstering the reporter's position, courts are reluctant to grant a wide berth of discovery, reasoning that "fishing expeditions" should not be allowed.[35] By prohibiting inquiry into how a reporter got the information, the libel plaintiff may find it impossible to prove intent or reckless disregard. Further, states with strong protections for libel defendants, particularly those with shield laws, often ensure the failure of any libel claim.

Other courts, however, have recognized that, although a reporter's privilege in protecting sources is of utmost importance, a libel plaintiff alleging defamation may have an equally strong interest in getting confidential information, particularly when the reporter is a libel defendant. For example, in *Zerilli v. Smith*,[36] the D.C. Circuit refused to compel disclosure when one prong of its balancing test, which required appellants to fulfill their obligation to exhaust possible alternative sources of information, was not met. Yet, even while denying disclosure, the court cautioned that "a distinction should be drawn between civil cases in which the reporter is a party, as in a libel action, and cases in which the reporter is not a party," especially when the claimant is a public figure who requires proof of malice.[37]

Because a plaintiff must demonstrate that the informant was unreliable and that the journalist failed to take adequate steps to verify his or her story, proof of malice depends on knowing the identity of the newspaper's informant and whether one, in fact, exists.[38] Source confidentiality prevents recovery in most libel cases, and the D.C. Circuit noted that when a journalist is a party "and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure."[39] Despite some inroads made for libel plaintiffs under the common law, the litigation process still tends to tilt the scale in favor of the libel defendant. Moreover, the growing number of shield laws gives even more protection to the libel defendant.

State Shield Laws

Unlike the federal government, which protects the confidential source primarily through common law provisions, many states recognize by statute some form of qualified privilege for journalists. These laws, however, afford different degrees of protection to the news-gathering reporter. Like the federal appellate courts, most state courts have found that the privilege stems either from the state constitution or from common law.[40] Increasingly, states are awarding the privilege most commonly through the enactment of shield laws. By enacting statutory protections, some states give greater protection to journalists than is found under the qualified First Amendment privilege.[41] No federal law exists because of the difficulty, as Justice White predicted, of establishing a uniform standard regarding the varying degrees of protections, the scope of protected news-gathering activities, the precise definition of a journalist, and the threshold required to overcome the privilege.

In 1898, Maryland became the first state to pass a shield law, and at least ten more states codified the journalist's privilege between 1930 and 1960. By the time of the *Branzburg* decision in 1972, at least seventeen states had enacted shield laws.[42] Today, thirty-one states and the District of Columbia have enacted statutory shield laws, most of which have adopted some variation of Justice Stewart's three-prong test.[43] Of those jurisdictions, twelve offer a variation of absolute privilege of nondisclosure.[44] Five of those twelve states offer the absolute privilege for sources only, and the other seven states offer absolute protection for both sources and unpublished information.[45]

Many states provide a qualified privilege of nondisclosure—some for sources, others for information only, and a few for both sources and information.[46] Georgia and South Carolina offer a qualified privilege, but do not extend it when the reporter or newsperson is a party to the litigation.[47] California, Colorado, Louisiana, Montana, and New York offer protection against being found in contempt of court. Conversely, Illinois specifically provides that reporters can be held in contempt if they refuse to disclose information once a court has revoked the qualified privilege.[48] Finally, the State of Wyoming has no statutes or cases on qualified privilege.

Shield Laws and the Proof of Libel

Shield laws often make the burden more difficult for the libel plaintiff by providing broad protection to reporters and publishers and by limiting the plaintiff's ability to compel disclosure

of the source or information. In most cases, the privilege extends even to actions in which the journalist or publication is a party. "Perhaps in no other area of civil litigation is the burden so ominous as in the law of defamation."[49] Under the actual malice standard, "the granting of summary judgment is the rule, rather than the exception because of the difficulty encountered by a plaintiff in showing the existence of actual malice."[50]

Overcoming the qualified privilege varies among the states. Tennessee's statute extends a qualified privilege of nondisclosure for both information and sources. The plaintiff can overcome the qualified privilege with a showing of three elements: (1) the information is clearly relevant to a specific probable violation of law; (2) the information cannot be reasonably obtained by other means; and (3) the plaintiff has demonstrated a "compelling and overriding" public interest in disclosure.[51] The privilege, however, does not appear to cover a confidential source when, in a defamation action, the "defendant . . . asserts a defense based on the source of such information."[52] Further, the statute does not have a confidentiality requirement, and the Tennessee Supreme Court explicitly rejected such a requirement in *Austin v. Memphis Publishing Co.*[53]

The South Carolina statute, passed in 1993, requires the party seeking to compel disclosure to meet a similar three-prong test of need by a showing of clear and convincing evidence,[54] which (1) must be material and relevant to the controversy; (2) cannot be reasonably obtained by other means; and (3) is necessary to the proper preparation or presentation of the case by the party seeking production. Thus, the first two elements mirror the same requirements found in the so-called *Branzburg* test, but the third prong, the "heart of the claim" prong, seems to give the plaintiff a more reasonable threshold of proof to meet. The South Carolina statute, however, further aids the libel plaintiff by stating that the qualified privilege does not apply when the one asserting the privilege is a party in interest to the proceeding. Thus, the privilege does not extend to reporters who are sued for libel.[55]

On the other end of the spectrum, Indiana grants an absolute privilege of nondisclosure of the source and provides no statutory recourse to overcome that privilege [see sidebar on page 8].[56]

The Net Effect of State Shield Laws

The libel plaintiff's route leads to a dead end under most shield laws. As the result of being restricted from getting intimate details of the reporting process, the libel plaintiff often cannot make a threshold showing of falsity, much less show with clear and convincing evidence that malice tainted the writing of the story. Thus, the libel defendant usually successfully moves for summary judgment either during or immediately after the discovery process, most often on the grounds of lack of proof of falsity and, most certainly, of malice.[57] Because the plaintiff bears the burden of proof and demonstration of the threshold showing under the shield law, the defendant can easily obtain summary judgment not by "disprov[ing] fault or falsity but [by] simply point[ing] to a plaintiff's inability to prove either."[58] Between 70 and 80 percent of defense motions for summary judgment are granted in libel cases, a number far above the average for other civil claims.[59] A 1997 survey by the Reporters Committee for Freedom of the Press showed that nearly 45 percent of quashed press subpoenas were successfully challenged by a state shield law.[60] Summary judgment is not the only procedural advantage available to libel defendants. The trial process also favors the defendant, particularly because the plaintiff still bears a heightened requirement of proving falsity and malice, along with jury instructions that ardently point to the high burden.[61]

The myriad of resources for the libel defendant also echoes, if not promotes, the statistical success rates. For instance, the Media Defense Resource Center, previously called the Libel Defense Resource Center, maintains an annual survey of the number of libel, privacy, and related cases that go to trial. In 1998, for example, libel defendants won 75 percent of the public figure cases.[62] The year 2000 marked the fewest trials on libel, privacy, and related claims in recent times, with only eleven cases actually reaching courtrooms.[63] The report, however, does not indicate how many claims were actually filed; many were undoubtedly settled or dismissed at the early stages of litigation. Despite high jury awards in those cases for the occasional winning libel claimant (sometimes averaging more than $2 million), libel defendants won at least 46 percent of the trials last year.[64] The report also indicated that defendants fare better on appeal. During the last two decades, libel defendants successfully appealed in more than two-thirds of the cases and were granted a reduction of the damages award.[65]

Fewer libel or privacy trials were held in the 1990s (177) than in the 1980s (261),[66] and defendants won more of those trials. Many of the jury awards for plaintiffs were reversed on appeal.[67] On average, the 1980s saw an average of 26.1 trials per year, and the following decade averaged only 17.9 trials per year. Further, the media defendants have increasingly been more successful, averaging about 35.4 percent of wins in the 1980s and about 39.1 percent in the 1990s.[68]

Conclusion

Statutory Nondisclosure of Sources

The State of Indiana grants an absolute privilege of nondisclosure of the source and provides no statutory recourse to overcome that privilege:

> Privilege against disclosure of source of information
>
> A person described in section 1 of this chapter shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of the person's employment or representation of a newspaper, periodical, press association, radio station, television station, or wire service, whether:
>
> (1) published or not published:
>
> (a) in the newspaper or periodical; or
>
> (b) by the press association or wire service; or
>
> (2) broadcast or not broadcast by the radio station or television station; by which the person is employed.

IND. CODE ANN. § 34–46–4–2 (West 2000)

First Amendment traditions encourage the free flow of information and the paramount importance of the public's right to know. Courts reluctantly require disclosure of confidential sources and information with an eye toward the possible "chilling effect" that disclosure may have on the reporter's ability to get sensitive information. At the same time, libel plaintiffs whose reputations may be significantly damaged by defamatory stories often have a legitimate interest in discovering confidential sources or information, particularly when this information is material in proving the all-important actual malice element of defamation.

Shield laws seek to protect the news-gathering journalist from compelled disclosure of confidential sources or information, but they were never intended to provide unfettered immunity for journalists. Rather, they should only give journalists protection, while requiring the probing party to make reasonable attempts to get the information from other available sources before compelling disclosure of the journalist's private and confidential information.

Because both the free press and the libel plaintiff have important competing interests, courts must carefully scrutinize those interests when deciding issues of disclosure. Current shield laws should only aid judges in making those decisions, without being an invincible hurdle to the libel plaintiff's case.

Endnotes

1. *See generally* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).
2. Numerous informational sites apprise news gatherers of their First Amendment rights, and one such website offers detailed information on libel litigation, the privilege against revelation of sources, and state shield laws in the various states. Reporter's Committee for Freedom of the Press, *Confidential Sources and Information, at* www.rcfp.org/csi.
3. Branzburg v. Hayes, 408 U.S. 665, 693 (1972) (noting that informants may fear that disclosure will threaten their job security or personal safety or, at the very least, disclosure will result in dishonor or embarrassment).
4. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).
5. 259 F.2d 545 (2d Cir.).
6. *Id.* at 547.
7. *Id.* at 547–48.
8. *Id.* at 548.
9. *Id.* at 550.
10. 408 U.S. 665 (1972).
11. *Id.*
12. *Id.* at 703.
13. *Id.* at 725.
14. *Id.* at 743.
15. *Id.* at 711–12.
16. *Id.* at 710.
17. Robert T. Sherwin, *"Source" of Protection: The Status of the Reporter's Privilege in Texas and a Call to Arms for the State's Legislators and Journalists*, 32 TEX. TECH. L. REV. 137, 146–47 (2000).
18. Reporter's Committee for Freedom of the Press, *supra* note 2 (brief discussion of how each federal circuit has treated the journalist's privilege).
19. LIBEL DEFENSE RESOURCE CENTER, INC., LDRC 50-STATE SURVEY, MEDIA LIBEL LAW 1998–99.
20. Note, *Disclosure of Confidential Sources in International Reporting*, 61 S. CAL. L. REV. 1631, 1652 (1988).
21. Carey v. Hume, 492 F.2d 631, 649 (D.C. Cir. 1974).
22. Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting); Sherwin, s*upra* note 17, at 154.
23. Those states are Connecticut, Hawaii, Idaho, Iowa, Kansas, Massachusetts, Mississippi, Missouri, New Hampshire, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Although the Mississippi Supreme Court indicated the existence of a qualified privilege in *Eason v. Federal Broad. Co.*, 697 So. 2d 435 (Miss. 1997), no other case has addressed the issue; thus, the scope of the privilege is unknown.
24. The eleven states that allow common law protection of sources include: Connecticut (Goldfeld v. Post Publ'g Co., 4 Med. L. Rptr. 1167 (Conn. Super. Ct. 1978)); Hawaii (*In re* Goodfader, 376 P.2d 472 (Haw. 1961)); Idaho (Marks v. Vehlow, 671 P.2d 473 (Idaho 1983)); Kansas (State v. Sandstrom, 581 P.2d 218 (Kan. 1978)); Massachusetts (*In re* John Doe Grand Jury Investigation, 574 N.E.2d 373 (Mass. 1991); Pet. for Promulgation of Rules, 479 N.E.2d 154 (Mass. 1985); Ayash v. Dana-Farber Cancer Inst., 706 N.E.2d 316 (Mass. App. Ct. 1999)); Missouri (State v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997)); South Dakota (Hopewell v. Midcontinent Broad. Corp., 538 N.W.2d 780 (S.D. 1995)); Vermont (State v. St. Peter, 315 A.2d 254 (Vt. 1974)); Washington (Senear v. Daily Journal Am., 618 P.2d 536 (Wash. Ct. App. 1980)); West Virginia (State v. Hanson, 488 S.E.2d 5 (W. Va. 1997)); and Wisconsin (Kurzynski v. Spaeth, 538 N.W.2d 554 (Wis. Ct. App. 1995)).
25. Idaho, Kansas, Vermont, West Virginia, and Wisconsin protect both confidential sources and information.
26. Lamberto v. Brown, 326 N.W.2d 305 (Iowa 1982).
27. *In re* Lelellier, 578 A.2d 722 (Me. 1990); State v. Hohler, 543 A.2d 364 (Me. 1988).
28. *See* RESTATEMENT (SECOND) OF TORTS § 568(1) (1965).
29. "Reckless disregard" has been defined to require "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
30. *Sullivan*, 376 U.S. at 279–80.
31. *Id.* at 285–86.
32. Carey v. Hume, 492 F.2d 631, 634 (D.C. Cir. 1974).
33. *St. Amant*, 390 U.S. at 731.
34. *Carey*, 492 F.2d at 637.
35. *See* Note, *Disclosure of Confidential Sources*, *supra* note 20, at 1651.
36. 656 F.2d 705 (D.C. Cir. 1981).
37. *Id.* at 714.
38. *Id.*
39. *See also Carey*, 492 F.2d at 637–38 (finding that, in a case in which reporters were libel defendants, identity of sources should be compelled where disclosure went to the heart of the claim and was crucial evidence to plain-

Top Ten for Libel Lawyers

- Find out if the journalist's privilege is available where the case is filed.
- Discover if the privilege has been established via a statutory shield law or under the First Amendment through common law.
- Determine the scope of the privilege (absolute or qualified).
- Discern what exactly the privilege protects (sources, information, or both).
- Find out if the rule of law protects confidential and nonconfidential information and sources to the same extent.
- Follow the directives of the law.
- Prepare to meet each prong, if the statute or common law adheres to a three-part test, before issuing a subpoena or motion to compel.
- If the information is vital to the heart of the claim, always say so.
- Exhaust all other possible avenues for getting the information before requesting the court to compel disclosure.
- Review the sources available for the libel defendant. Many websites and publications recount what defense strategies are the most successful.[69]

tiff's ability to prove the element of actual malice); Miller v. Mecklenburg County, 606 F. Supp. 488 (W.D.N.C. 1985) (disclosure of source ultimately ordered the name of source after alternative sources were exhausted and identity went to heart of plaintiff's case).

40. *See* Reporter's Committee for Freedom of the Press, *supra* note 2.

41. For specific cases construing a shield law statute to provide extended privileges, *see* PRACTISING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES: LITIGATING LIBEL AND PRIVACY SUITS, 446 PLI/Pat. 17 (June 20–21, 1996).

42. States with shield laws in 1972 included Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Pennsylvania. Branzburg v. Hayes, 408 U.S. 665, 689 (1972).

43. The states offering statutory shield law protection (and the applicable statute) include Alabama, ALA. CODE § 12–21–142 (Michie Supp. 2000); Alaska, ALAS. STAT. §§ 09.25.300–.390 (Michie 2000); Arizona, ARIZ. REV. STAT. ANN. §§ 12–2214, 12–2237 (1994); Arkansas, ARK. CODE ANN. § 16–85–510 (Michie Supp. 2001); California, CAL. EVID. CODE § 1070 (Supp. 2000); Colorado, COLO. REV. STAT. §§ 13–90–119, 24–72.5–101 through –106 (2000); Delaware, DEL. CODE ANN. tit. 10, §§ 4320–26 (1999); District of Columbia, D.C. CODE ANN. §§ 16–4701 through –4704 (Supp. 2001); Florida, FLA. STAT. Ch. § 90.507 (1999); Georgia, GA. CODE ANN. § 24–9-30 (2000); Illinois,735 ILL. COMP. STAT. §§ 5/8–901 through –909 (2000); Indiana, IND. CODE § 34–46–4-1, 2 (1998); Kentucky, KY. REV. STAT. ANN. § 421.100 (1970); Louisiana, LA. REV. STAT. ANN. §§ 1451–59 (West 1999); Maryland, MD. CODE ANN., CTS. & JUD. PROC., § 9–112 (1998); Michigan, MICH. COMP. LAWS § 767.5a (2000); Minnesota, MINN. STAT. §§ 595.02, 595.021 through .025 (2000); Montana, MONT. CODE ANN. §§ 26–1–901 through –903 (1999); Nebraska, NEB. REV. STAT. §§ 20–144 through –147 (1997); Nevada, NEV. REV. STAT. §§ 49.275, 49.385 (1999); New Jersey, N.J. STAT. ANN. § 2A:84A-21 (1994 & Supp. 2001); New Mexico, N.M. STAT. ANN. § 5–11–514 (Michie 1978); New York, N.Y. CIV. RIGHTS LAW § 79-h (1992); North Carolina, N.C. GEN. STAT. § 8–53.11 (1999); North Dakota, N.D. CENT. CODE § 31–01–06.2 (1996); Ohio, OHIO REV. CODE ANN. § 2739.04 (2000); Oklahoma, OKLA. STAT. 12 § 2506 (West 2000); Oregon, OR. REV. STAT. §§ 44–510 through –540 (1999); Pennsylvania, 42 PA. CONS. STAT. § 5942 (West 2000); Rhode Island, R.I. GEN. LAWS §§ 9–19.1 through 1–19.1–3 (1956 & Supp. 1999); South Carolina, S.C. CODE ANN. § 19–11–100 (Law Co-op 1992); Tennessee, TENN. CODE ANN. § 24–1-208 (2000).

44. Jurisdictions offering some form of absolute privilege include California, Colorado, the District of Columbia, Indiana, Maryland, Montana, Nebraska, Nevada, New York, Oregon, Pennsylvania, and Rhode Island. Among these jurisdictions, however, some are unclear as to what the absolute privilege encompasses and other statutes have not been challenged.

45. States offering absolute protection of sources and information include California, Colorado, Montana, Nevada, New York, Oregon, and Rhode Island.

46. States offering some version of a qualified privilege include Alabama (although unclear whether privilege is qualified or absolute), Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, and Tennessee. Although Colorado and California have an absolute privilege against contempt, they both offer a qualified privilege of nondisclosure.

47. Georgia, GA. CODE ANN. § 24–9-30 (2000); South Carolina, S.C. CODE ANN. § 19–11–100 (Law Co-op 1992).

48. 735 ILL. COMP. STAT. 5/8–909 (West 1992).

49. ROBERT SACK, SACK ON DEFAMATION § 16.3.1.2 (2000) (citing Ragano v. Time, Inc., 302 F. Supp. 1005, 1010 (M.D. Fla. 1969) (motion for summary judgment denied), *aff'd*, 427 F.2d 219 (5th Cir. 1970)).

50. *Id.*

51. TENN. CODE ANN. § 24–1-208 (2000).

52. *Id.*

53. 655 S.W.2d 146, 150 (Tenn. 1983).

54. S.C. CODE ANN. § 19–11–100 (2000).

55. *Id.*

56. IND. CODE ANN. § 34–46–4-2 (West 2000).

57. Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1770 (1998).

58. *Id.*

59. *Id.* at 1774.

60. Sherwin, *supra* note 17, at 159 (citing REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1997 (1999)).

61. Gilles, *supra* note 56, at 1770.

62. LIBEL DEFENSE RESOURCE CENTER, INC., 1999 REPORT ON TRIALS AND DAMAGES (1999).

63. LIBEL DEFENSE RESOURCE CENTER, INC., 2000 REPORT ON TRIALS AND DAMAGES (2000).

64. *Id.*

65. *Id.*

66. LDRC, *LDRC Releases Findings of New Two-Decade Survey on Trials Against Media Defendants*, *at* www.ldrc.com/bull1999–1 (accessed on Aug. 20, 2001).

67. 1999 REPORT, *supra* note 61.

68. 2000 REPORT, *supra* note 62.

69. For instance, the Practising Law Institute, as well as other websites and sources mentioned in this article, have many sections devoted to defending the libel claim. Although geared toward a libel defendant, these resources can provide insight into prosecuting the libel claim, too. PRACTISING LAW INSTITUTE, *supra* note 41 (discussing such topics as "Attacking the Plaintiff," "Trial Strategies," and "The Role of the Journalist in an 'Actual Malice' Trial").