

**REPORT OF THE JUDICIAL COUNCIL  
PRESS SHIELD ADVISORY COMMITTEE  
DECEMBER 5, 2003**

**Background**

In 2002, the House Federal and State Affairs Committee introduced HB 2798, a bill providing for a reporter's privilege to shield confidential sources and other information. After holding a public hearing on the bill, the Committee Chairman Representative Doug Mays asked the Judicial Council to study the bill and advise the legislature on its public policy implications. The Judicial Council agreed to undertake the study and appointed the Press Shield Advisory Committee to conduct it. The members of the Judicial Council Press Shield Advisory Committee are:

Hon. Tyler C. Lockett, Chair, Topeka - Retired Supreme Court Justice;

Prof. Robert C. Casad, Lawrence - Retired Professor of Law at Kansas University School of Law and co-author of *Kansas Code of Civil Procedure 3<sup>rd</sup>* (with the late Honorable Spencer A. Gard);

James W. Clark, Topeka - Former County Attorney and former Executive Director of the Kansas County and District Attorneys Association;

John Holt, Kansas City, MO - Television journalist and graduate of Kansas University School of Law;

Prof. Mike Kautsch, Lawrence - Professor of Law at Kansas University School of Law and Director of Media, Law and Policy Institute;

Daniel Monnat, Wichita - Criminal defense attorney;

Hon. Donald R. Noland, Girard - District Judge of the 11<sup>th</sup> Judicial District;

John M. Settle, Larned - Pawnee County Attorney, President of the Kansas Association of County and District Attorneys, and newspaper owner;

Loren L. Taylor, Kansas City - Consultant and Instructor at Kansas City, Kansas Police Academy, former Legal Advisor to Kansas City, Kansas Police Department and author; and

William P. Tretbar, Wichita - Attorney who represents media clients.

The Press Shield Advisory Committee has conducted two sets of meetings. The first meetings were on August 30, October 11, and November 22, 2002. In conducting its initial study, the Committee worked from an amended version of HB 2798. Although the amendments were not formally adopted by the House Federal and State Affairs Committee, Rep. Mays' letter requested that the Judicial Council study the bill as amended. The Committees' 2003 meetings are discussed later in this report.

### **Materials Reviewed**

The Committee reviewed a variety of materials relating to this study including state and federal constitutional provisions, state and federal case law, background materials on HB 2798 including testimony of conferees, synopses of other states' press shield laws, newspaper articles, excerpts from books, and excerpts from the Internet website of the Reporters Committee for Freedom of the Press.

## **Committee Review of HB 2798**

In reviewing the provisions of HB 2798, Committee members perceived many flaws in the bill. Although there was disagreement as to any one of the specific problems, the Committee unanimously agreed that the bill should not be passed in its current form.

The first problem identified by Committee members was that the bill would create an absolute privilege for a confidential source or confidential information, without exception. The concept of an absolute privilege was troubling to many Committee members who believe that a reporter's privilege must be balanced against the due process right of a litigant seeking information crucial to his or her case. Also, when the person seeking information is a criminal defendant, the defendant's Fifth and Sixth Amendments must also be considered.

The term "absolute" privilege implies a privilege which can never be overcome. This was unacceptable to many Committee members who believed that the person seeking the privileged information should be able to obtain the information if the appropriate criteria are met.

Many Committee members thought that the provisions of HB 2798 were too broad, both in the types of information it would protect and in the persons who would be qualified to claim that protection. The bill would protect not only confidential sources and information, but non-confidential information and even previously published information.

Also, some Committee members thought that the bill contains an overly broad definition of "media" which might include, for example, any group which publishes a newsletter regardless of whether the newsletter is intended for public dissemination. Some believed the privilege should be limited to professional journalists. It was noted that, unlike attorneys and doctors, journalists are not licensed, thus making it harder to determine who meets the definition of a journalist. The growth of electronic media makes the term "journalist" more difficult to define.

One particular provision of the bill which raised concerns was section 6, which would allow the court to assess attorney fees against the party seeking enforcement of the subpoena for information if the court found there was no reasonable basis for requesting the disclosure. This provision was especially objectionable to criminal defense attorneys who must pursue every available avenue to discover exculpatory evidence. The defense attorney's need to vigorously defend his or her client is inherent in the adversary system and cannot be avoided.

### **Need for a Press Shield Statute in Kansas**

The Committee discussed whether there is a need for a Kansas statute dealing with the issue of a reporter's privilege but did not reach a majority decision. Those Committee members in favor of enacting a statute point out that the current shield law in Kansas is contained in a single case which is 25 years old. In that case, *In re Pennington*, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied* 440 U.S. 929 (1979), the Kansas Supreme Court recognized a reporter's qualified privilege to protect information and sources; however, the case does not clearly set out the requirements for overcoming the privilege.

Instead of attempting to interpret and apply *Pennington*, some state trial court judges have relied on the law of the 10<sup>th</sup> Circuit Court of Appeals. The 10<sup>th</sup> Circuit has recognized a stronger reporter's privilege than Kansas state courts. See *Grandbouche v. Clancy*, 825 F.2d 1463 (10<sup>th</sup> Cir. 1987); and *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10<sup>th</sup> Cir. 1977).

Those Committee members in favor of enacting a press shield statute believe that it would clarify the law and produce more consistent trial court decisions. One Committee member who is a reporter stated that he frequently deals with confidential sources and that it would be beneficial to have a statute setting out clear rules for when he might be required to reveal a source's identity.

Other Committee members believe that the concept of a reporter's privilege should be allowed to develop by case law. These Committee members believe that the press is currently doing its job, is investigating stories, and seems to be unhampered by any perceived lack of clarity in the current state of the law. Some expressed the opinion that the media is simply trying to avoid the cost and hassle of responding to subpoenas.

### **Results of 2002 Meetings**

The diverse nature of the Committee resulted in much enlightening discussion, but little agreement. Although the Committee was unanimous in its opinion HB 2798 should not be passed, the members were unable to reach a consensus sufficient to draft a single proposed bill as an alternative.

The Committee agreed to include in its December 20, 2002 report to the Judicial Council three different proposals submitted by different Committee members which seemed to capture the different views expressed on the Committee. The specific areas of disagreement concerned the following issues:

1. **Protected information**

Some states have enacted press shield laws which protect only the identity of confidential sources. Others protect confidential sources and information, and yet others protect all types of information including non-confidential information. Some statutes contain different standards which must be met to overcome the privilege depending upon the type of information involved.

The Committee generally agreed that confidential sources and information which might lead to the discovery of confidential sources should be protected. However, some Committee members would extend protection to non-confidential information while others would not. Also, among those

members who would protect both kinds of information, some would favor different standards of protection while others favor a blanket privilege which applies equally to both types of information. One benefit of the blanket privilege approach is that courts need not make the difficult factual determination about whether the information being sought is confidential, particularly where the only evidence of confidentiality may be the reporter's word.

Those Committee members who would extend the privilege to non-confidential information argued that non-confidential information should be protected because it is the work product of the reporter, and protecting the reporter's work also protects the free flow of information from the reporter to the public. They also argue that there is recognition at the federal level that even non-confidential information deserves some level of protection.

The three proposals presented to the Judicial Council in December, 2002, contained different ways of defining and handling the types of information protected. Two versions did not distinguish between confidential and non-confidential information, creating instead a blanket privilege that applies equally to both. The two versions differed substantially, however, in what would be included in the protected category. The third version offered some protection for unpublished information, but less protection than would be afforded confidential information or the identity of confidential sources.

## 2. Who can claim the privilege

Another issue on which the Committee was unable to agree was the question of who could claim the reporter's privilege. The question, phrased more specifically, was how broadly should the terms "reporter" and/or "media" be defined?

Some Committee members would define these terms only in their traditional sense by allowing the privilege to be claimed only by persons engaged in professional investigative reporting. They would not extend the privilege, for example, to authors of books. Others disagreed, stating that

the test should be whether the information is being gathered for dissemination to the general public. The author of a book would meet that test as would a documentary film maker, but a newsletter distributed by an organization to its own members and not the public would not qualify to claim the privilege. Yet other Committee members thought that this issue should be decided by the courts on a case-by-case basis rather than being strictly defined by statute.

Failing to reach agreement on this question, the three proposals presented to the Judicial Council in December, 2002, defined the group of those protected by the statute in three different ways.

3. Criteria to overcome the privilege

All three proposals required the person seeking the information to meet three criteria in order to overcome the reporter's privilege. Although the wording of the proposals differs slightly, all three proposals contained essentially the same criteria. The application of these criteria still sharply divided the Committee, however, because of the differences in what information would be protected in the first place.

4. Burden of proof

Some states' shield laws require a litigant to produce clear and convincing evidence to overcome the reporter's privilege, while other require a litigant to meet a preponderance of the evidence standard. This difference in the burden of proof was reflected in the three proposals.

Two proposals used the "preponderance of the evidence" standard. The third proposal, however, required a showing by "clear and convincing evidence."

### **2003 Committee Meetings**

As stated above, the Committee presented a written report with three separate statutory proposals to the Judicial Council on December 20, 2002. The Judicial Council declined to consider multiple versions and requested that the Committee meet again and attempt to draft a single unified proposal for its consideration. In response to the Council's request, the Committee met on August 29 and October 24, 2003.

The Committee reached agreement on many major issues. Agreement was reached as to the definition of who was entitled to claim the privilege. The Committee also was able to agree that confidential information was to be treated differently than other unpublished information. It was agreed that the privilege as to confidential information or identities can only be overcome by clear and convincing evidence that the production sought: 1) is relevant and material to the proper administration of the legal proceeding for which the production is sought; 2) cannot reasonably be obtained from any other source; and 3) is essential to the maintenance of the claim or defense of the party on whose behalf the production is sought.

The sole area of remaining disagreement concerns the requirements for overcoming the privilege as to other unpublished information. The Committee agreed that the burden of proof should be less in this instance, and should be by a preponderance of the evidence. The majority of the Committee felt that the party seeking the production of this type of information should only have to show the first two elements as set forth in the preceding paragraph. Committee members who are members of the media, or represent the media, felt very strongly that other unpublished information, such as the work product of a reporter, was entitled to the protection of all three elements, with only the burden of proof being lessened.

The final two versions upon which the Committee voted were identical in all ways except as described above. When put to a vote, a majority of the Committee (5 of the 8 members present) voted to submit the proposed statute attached hereto as Exhibit B. Two members voted for the version that would have afforded more protection to unpublished information. The remaining member declined to vote for either proposal, stating that neither version offered sufficient protection for unpublished information and that they were inconsistent with current 10<sup>th</sup> Circuit case law.

## Proposed Press Shield Statute

### General Comment

The United States Supreme Court considered whether the First Amendment provides newsmen with a privilege against disclosure of confidential information and sources in *Branzburg v. Hayes*, 408 U.S. 665, 92 S Ct. 2946, 33 L. Ed. 2d 626 (1972). In that case, newsmen claimed a privilege to withhold the identity of some confidential sources, information that a grand jury had subpoenaed. The Supreme Court majority denied their claim. The court said "We were asked to create another [testimonial privilege, other than the self-incrimination privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." 408 U.S. at 690. However, Justice Powell indicated in his concurring opinion that the decision did not mean that newsmen had no First Amendment protection. He believed that in a proper case the courts would protect a newsman from forced disclosure.

"The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with regard to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

408 U.S. at 710.

The Kansas Supreme Court interpreted the *Branzburg* case as meaning that "the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality." *In re Pennington*, 224 Kan.. 573, 575, 581 P. 2d 812 (1978). In that case the Kansas Supreme Court held the privilege was properly denied.

The United States Court of Appeals for the Tenth Circuit spoke to the question of the reporter's privilege to refuse disclosure of the identity of a confidential news source in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10<sup>th</sup> Cir. 1977). The case was a civil case, but the court indicated that the balancing approach should apply as well as in criminal cases. The court did endorse the following criteria for determining when a reporter could be compelled to disclose the identity of a confidential news source:

1. Whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful.
2. Whether the information goes to the heart of the matter.
3. Whether the information is of a certain relevance.
4. The type of controversy.

563 F. 2d 438.

The Tenth Circuit again addressed the problem in a civil case, *Grandbouche v. Clancy*, 825 F. 2d 1463 (10<sup>th</sup> Cir. 1987). In that case, the privilege was claimed for information other than confidential sources. Again, the court endorsed the balancing test:

"Among the factors that the trial court must consider are (1) The relevance of the evidence; (2) the necessity of receiving the information sought. (3) Whether the information is available from other sources, and (4) the nature of the information."

825 F. 2d 466.

These cases all reflect the flexible balancing standard. That constitutional privilege exists apart from the proposed statutory privilege. The statute, however, clarifies the process of claiming and overcoming the privilege in the kinds of cases it applies to. It does not deny the existence of some possible privilege in other cases.

This proposed statute recognizes a limited privilege against forced disclosure of some kinds of information acquired by journalists in the news gathering process. Some such protection is necessary to insure freedom of the press. At the same time, the statute recognizes that the due process rights of litigants may sometimes require such disclosure. This statute seeks to balance these two competing constitutional interests.

## **PROPOSED 2004 HB \_\_\_\_\_**

**Section 1.** Any person, company or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, internet, or radio or television broadcast shall have a qualified privilege against disclosure of the following information obtained in gathering news for ultimate publication:

- (a) the identity of the source of any information obtained under conditions of confidentiality or anonymity; or
- (b) unpublished information that could compromise an important ongoing investigation if prematurely disclosed; or
- (c) unpublished information that would likely lead to the identification of a confidential source; or
- (d) other unpublished information.

### **COMMENT**

Section 1 identifies the persons entitled to claim the privilege and the kinds of information entitled to protection. Essentially, it extends to all unpublished information acquired in the course of news gathering. However, later sections make a clear distinction between the information described in subsections 1(a), (b) and (c) and that in subsection 1(d).

**Section 2.** The privilege declared in section 1 shall not apply in any judicial proceeding where the person claiming the privilege is a party.

### **COMMENT**

Section 2 excludes the privilege in judicial proceedings to which the one claiming the privilege is a party.

12

**Section 3.** The privilege declared in sections 1(a), (b) and (c) may be overcome if the person seeking to compel the production of the information establishes by clear and convincing evidence that the production sought:

- (a) is relevant and material to the proper administration of the legal proceeding for which the production is sought, and
- (b) cannot reasonably be obtained from any other source, and
- (c) is essential to the maintenance of the claim or defense of the party on whose behalf the production is sought.

### **COMMENT**

Section 3 states the conditions for overcoming the privilege in connection with the information described in subsections 1(a), (b) and (c). It can only be overcome by a showing by "clear and convincing evidence" (the higher degree of proof required in some special cases, such as fraud) that the material sought is relevant, unobtainable from any other source and essential to the claim or defense of the party seeking the material.

**Section 4.** The privilege declared in section 1 (d) may be overcome if the person seeking to compel the production of the information establishes by a preponderance of the evidence that the production sought:

- (a) is relevant and material to the proper administration of the legal proceeding for which the production is sought, and
- (b) cannot reasonably be obtained from any other source.

**COMMENT**

Section 4 states the conditions for overcoming the privilege in connection with other unpublished information. It requires a lesser degree of proof ("a preponderance of the evidence," the normal standard in civil cases), and it does not require a showing that the information sought is essential to the case of the party.

**Section 5.** In assessing relevance under subsection 3(a) and 4(a), the court should consider the relative strength of the need of the party seeking production and the seriousness of any potential damage disclosure might entail.

**COMMENT**

Section 5 in terms refers only to how a court is to determine "relevance" as used in this statute. However, it is very important to the plan of the statute. It directs the court in every case where the assertion of the privilege is challenged to consider the relative strength of the need of the party seeking the information and the seriousness of the potential damage disclosure might entail. The court should look carefully to see if the party seeking the information has any real need for it, or whether it is just a "fishing expedition." The court should also consider carefully whether there is any real need for protecting the information from disclosure, or whether the claim of privilege is raised merely to avoid the inevitable inconvenience of responding, to a subpoena.

**Section 6.** This act does not create or imply any limitation on, extension of, or otherwise affect, any right, privilege or immunity provided by the United States Constitution or Kansas Constitution.

**COMMENT**

Section 6 Declares that the statute is independent of any privilege or immunity that might be provided by the State or Federal Constitutions.