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Nation Needs Law on State's Model to Shield Sources

By Michael Berry

In the last couple of years, two courts on opposite ends of the country held newspaper reporters in contempt for refusing to disclose the sources of leaked grand jury testimony.

In California, a federal judge ordered two San Francisco Chronicle reporters to reveal who leaked testimony from a grand jury investigating steroid use in sports. Here in Pennsylvania, a state judge ordered a reporter for the Scranton Times to name the person who gave her information about the grand jury testimony of two local officials.

The reporters in both cases appealed.

This month, a Pennsylvania appeals court overturned the state judge's contempt order. The court based its decision entirely on Pennsylvania's shield law, which provides that no reporter "shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial, or investigation before any government unit."

Consistent with Pennsylvania Supreme Court precedent, the appeals court ruled again that this law unambiguously forbids courts from forcing reporters to reveal their confidential sources and that the trial judge "violated" the Scranton reporter's privilege by requiring her to identify her source.

With the San Francisco Chronicle reporters' appeal hanging in the balance and Congress returning to work in Washington, the timing of the Pennsylvania decision could not be better.

Unlike in Pennsylvania, in the federal system there is no statute shielding confidential sources. Instead, the rules governing sources differ from federal court to federal court, with some providing no protection.

Standards differ according to where a reporter writes an article, where a case is filed and even which judge hears the case. Against this backdrop, reporters may promise confidentiality but can't be sure their promises will be enforced by courts -- or be the basis for contempt sanctions.

Not surprisingly then, the number of subpoenas served on the press has skyrocketed in recent years.

In fact, the general counsel for the Hearst Corp. recently told The New York Times that the company's media outlets received 80 subpoenas in the last year and a half, compared with "maybe four or five" in the two years before that.

When the press receives an avalanche of subpoenas, its reporters and editors must spend their time haggling with lawyers and filing motions in court, rather than focus on reporting the news.

In addition, the uncertainty in the law could compromise reporters' ability to gather news. Without safeguards protecting the sources and information most critical to an informed public -- those that would not otherwise be reported -- the press's ability to report on important matters of public concern might be severely restricted, particularly when the threat of contempt is real.

The Pennsylvania decision handed down this month shows how a clearly articulated shield law addresses each of these issues.

First, as the Pennsylvania appeals court recognized, a shield law lays out the "boundaries" for protecting confidential sources. Reporters, sources and litigants are given precise guidelines detailing how an effort to compel disclosure of a source will be resolved if it winds up in court. Everyone understands the ground rules from the moment a reporter talks to a source to the time a litigant contemplates subpoenaing the reporter.

Second, the Pennsylvania court reminded us that judges must enforce the law's protections as written -- and that judges are "forbidden from reading" exceptions into the statute and from rewriting the law as passed by the legislature. With a shield law in place, judges are bound to apply the statute's text, not their individual policy preferences.

Finally, and most importantly, as the Pennsylvania appeals court stressed, shield laws "exist to promote the free flow and exchange of ideas and information to the news media," and that exchange "is essential to the existence of a democratic republic." For this reason, Pennsylvania has long recognized that the public benefits "more extensively and to a far greater degree" by protecting confidential sources of newsworthy information.

In emphasizing these three important principles, the Pennsylvania court effectively highlighted the need for federal legislation. A federal shield law would provide the certainty, predictability and uniformity that is missing in federal courts today. It would also guarantee that the public continues to receive news from sources that might not otherwise reveal it.

Policymakers in Washington would be wise to consider these benefits and the clear message coming from Pennsylvania. As Congress gets backs to work, it should put a federal shield law on its agenda.

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