Are Bloggers, Citizen Journalists, and Other New Media Covered by Shield Laws?

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You represent a new media cli- ent—an unaffiliated blogger just out of college about to publish her first scoop. She is sitting at your office's conference table waving a subpoena issued by a trial court and asking desperately: "Well, I am a journalist. I don't have to turn anything over; there is a shield law here that applies, isn't there?" You take a look at the subpoena, a look your state's shield law, and a gander at the New Jersey Supreme Court's decision in *Too Much Media v. Hale*,[1] issued on June 7, 2011, and you reply, "maybe." Then you add, "There is a shield law, and it does apply to journalists, and we are just going to have to prove that it applies to you."

The issue of whether reporter's privileges apply to new media or unaffiliated bloggers is a sticky issue across the country and far from resolved. Indeed, very few cases to date have examined the elasticity of the definitions of *journalist* or *news media* in conjunction with new media claims for shield protections. As the *Too Much Media* court recently noted, "the popularity of the Internet has resulted in millions of bloggers who have no connection to traditional media[,]" making the question of who qualifies increasingly complicated.[2] Defense counsel, moreover, should be wary. As Judge Collyer of the U.S. District Court for the District of Columbia noted in her analysis of federal law in *Lee v. Department of Justice*: "Reporters cannot be readily identified. They do not have special courses of study or special degrees. They are not licensed. They are not subject to any form of organized oversight or discipline."[3] In *Lee*, the court declined to recognize a common law reporter's privilege similar to the psychotherapist-patient privilege and held *Washington Post* reporter Walter Pincus in contempt for failing to provide information about his sources during a deposition:

> This intangibility worked against Mr. Pincus in that case, but for various First Amendment-related reasons, we would not want journalists to be so easily defined, watched, and disciplined. The elusiveness of the definition, however, has its dangers. In attempting to determine whether an individual qualifies as a journalist under a shield law, a judge could, for example, destroy the privilege sought through an excessively in-depth evidence hearing. A too lenient application of the shield law, such as one that would allow everyone with Internet access and a web page to seek protection, could dilute the privilege for the traditional media. These concerns are raised in *Too Much Media*, and the court's opinion and analysis in that case is instructive for media defense counsel facing this issue.

New Jersey has what most consider to be one of the nation's most expansive shield laws: it covers both editorial processes and confidential sources; it can be asserted during a libel suit; and aside from a competing constitutional interest or waiver by a journalist, it is absolute. In case after case, the New Jersey Supreme Court has emphasized that the statute, which was last amended after the 1978 *cause célèbre* jailing of *New York Times* reporter Myron Farber for refusing to testify in a criminal case,[4] merits a broad application. But broad apparently does not mean limitless, and in *Too Much Media*, the court put the brakes on automatically providing the privilege to all persons using new media who claim to be journalists. Facing an argument from the blogger who received the subpoena and the ACLU of New Jersey that anyone who gathers news for the purpose of dissemination should be considered a journalist under the shield law, the court acknowledged that the statute's language "does not mean that a newsperson must be employed as a journalist for a traditional newspaper or have a direct tie to an established magazine. But he or she must have some nexus, relationship, or connection to 'news media' as that term is defined."[5]

The broad application of the statute has led the court in the past to protect journalists whose connections went well beyond the statutory language, in effect expanding the statutory definition of news media ("newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public"[6]). In these cases, the court essentially determined that a similarity to traditional media allowed it to interpret the statute beyond the strict definitions contained in the text and to apply the privilege in circumstances involving student journalists, rating agencies, free tabloids (although the definition of newspapers requires a paid circulation), television shows outside of straight news, and book authors.

Although the New Jersey Supreme Court has not specifically defined new media, the term almost always involves delivery through the Internet, whether via blogging, Twitter, Facebook, You Tube, or various other social media. Many of these news delivery systems are similar to the traditional journalism described in most state statutes, although unlike New Jersey, many state courts are loath to read into statutory definitions. Pages on Facebook, news briefs

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from Twitter, and many bloggers can easily be described as similar to the traditional journalist set forth specifically in the New Jersey statute. At the same time, the *Too Much Media* court acknowledged, without explicitly saying so, that a strict similarity test does not capture all to whom the Legislature intended to provide the privilege. In practice, the court has been careful to perform this analysis on a case-by-case basis, requiring only that the newsgathering at issue share essential attributes of traditional journalism and that the news be delivered in a systematic way. The court also expects that the news be gathered as part of professional activities, not necessarily paid, but systematic and serious newsgathering, especially if the medium is unusual.

The court wore its reasoning for eschewing a categorical test on its sleeve even before it delivered the opinion, reacting with clear distain during oral argument at the possibility that if the "intent to distribute news" test applied by the Second Circuit in *Von Bulow v. Von Bulow*[7] were allowed to be the sole determining factor, just about everyone using social media could qualify for shield protection. This was the position of Shellee Hale, the blogger who was accused of posting defamatory statements on an industry message board in *Too Much Media*, and the ACLU.

The unanimous court focused more heavily on a broader test based upon the statutory language, stating that the statutory language "did not extend the shield law to all people who proclaim they are journalists."[8] Although the court did not explicitly define the parameters of just how similar new media news providers must be to traditional media, it left the burden of proof on the providers themselves. On the other hand, the Court took pains to reinforce broad application of the privilege for traditional news media and, by implication, for websites that are similar to traditional newspapers or magazines.

The court also rejected a series of criteria that had been established by the state appellate court. Among other things, these included "[m]aintaining particular credentials or adhering to professional standards of journalism—like disclosing conflicts of interest or note taking."[9] Not only were such criteria limiting for the profession, in which practices vary widely, but they were also not part of the statutory language. New Jersey's statute, the court noted, requires that a connection to the news media, as well as an underlying purpose for newsgathering and dissemination. Professional standards do not enter into the consideration. Interestingly, however, the court suggested that other states' statutory language may leave them open to the imposition of such criterion. It mentioned that the New York state legislature had drafted its shield law to apply only to "professional journalists and newscasters."[10] To the extent a state statute limits application to a "professional journalist" who earns her "principal livelihood by" reporting[11] or works as "a salaried employee of, or independent contractor for" the media,[12] the application of shield privileges to new media grows more complicated.

The procedure of seeking the privilege also holds potential pitfalls for the less traditional, new media client. In New Jersey, like many other states, journalists need do little more than set forth their affiliation and a sworn statement that they were pursuing information in the course of their professional activities to obtain shield protection. In *Too Much Media*, the blogger was attempting to protect purported confidential sources who had told her that the plaintiffs were involved in criminal activity. The trial court allowed, with little protestation by her counsel, an intensive cross examination of her motivations and writings. This very examination pierced the editorial processes. In its decision, the New Jersey Supreme Court set new, clear ground rules: intrusive hearings by a trial court faced with a subpoena that might determine who is a journalist are prohibited. A certification/affidavit is essentially sufficient for traditional news media. If the issuer of a subpoena rebuts or materially undermines the certification or affidavit, any hearing must be careful to avoid eviscerating the privilege and must focus on three issues: that the journalist had a (1) connection to news media; (2) a purpose to gather or disseminate news; and (3) that the material was gathered in the course of professional newsgathering activi- ties. "If the Legislature wanted to cre- ate an intent test, it could have done so," Chief Justice Rabner wrote. "Instead, the shield law requires claimants to show three things: first, a connection to news media, second, a purpose to gather, procure, transmit, compile, edit or disseminate news, and third that the materials sought were gathered in the course of professional activities."[13] Although the second prong is similar to an intent test, the court said that purpose or intent is not enough.

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While the New Jersey Court said that posting a comment to an online message board does not establish a connection with the news media, it left the door wide open for prospective journalists to show that they are either "connected with" a new media that is similar to traditional news media, where there is an intent to disseminate and where the gathering was done in the course of actually gathering materials for dissemination in this new media, rather than simply dishing gossip or making idle accusations. As the court noted, "self-appointed journalists or entities with little track record who claim the privilege require more scrutiny."[14]

So you can, with a educated guess, provide the neophyte blogger with an answer: her blogging vehicle has many of the characteristics of an online newspaper. Although she has yet to publish, she has readied the site; methodically gathered information for the purpose of publication; and made clear that, although she will not be earning money from her first publication, she was making a serious and professional foray into publishing. Although not mentioned explicitly by the *Too Much Media* court as a factor, her scoop involves

a matter of public interest. The likelihood is that the court will determine she is indeed a journalist entitled to shield protection.

Endnotes

1. 20 A.3d 364 (N.J. 2011).
2. *Id*. at 383.
3. 401 F. Supp. 2d 123, 140 (D.D.C. 2005).
4. Farber wrote an article for *Communications Law* in which he described the events leading up to his incarceration for forty days in the Bergen County jail. Myron A. Farber, *A Reporter's Reluctant Education in the Law*, 22 Comm. Law. 5 (Winter 2005).
5. *Too Much Media*, 20 A.3d at 376.
6. *Id*. at 378 (quoting N.J. Stat. ann. 2A:84A-21a (a.)).
7. 811 F.2d 136, 144 (2d Cir. 1987).
8. *Too Much Media*, 20 A.3d at 377–78.
9. *Id*. at 382.
10. *Id*. (citing N.Y. Civ. Rights Law § 79-h).
11. 10 Del. Code ann. § 4320(4)(a).
12. Fla. Stat. ann. § 90.5015.
13. *Too Much Media*, 20 A.3d at 380 (Rabner, C.J.).
14. *Id*. at 383.