

2005 DRAFTING REQUEST

Bill

Received: 12/12/2005

Received By: rnelson2

Wanted: As time permits

Identical to LRB:

For: Josh Zepnick (608) 266-1707

By/Representing: Connor

This file may be shown to any legislator: NO

Drafter: rnelson2

May Contact:

Addl. Drafters:

Subject: Courts - evidence

Extra Copies:

Submit via email: YES

Requester's email: Rep.Zepnick@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Privilege for reporter information

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
/P1	rnelson2 12/19/2005			_____			
/1		jdyer 12/23/2005	chaugen 12/28/2005	_____	sbasford 12/28/2005	lnorthro 03/15/2006	

FE Sent For: *none*

<END>

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/?	rnelson2	1 12/23 jk	dk 12/28	dk 12/28			

FE Sent For:

<END>

Nelson, Robert P.

From: Dsida, Michael
Sent: Friday, December 09, 2005 3:02 PM
To: Sabatino, Connor
Cc: Nelson, Robert P.
Subject: RE: Reporter Shield Law

Connor-

Since this arose in the context of a civil case, I am forwarding it to Bob Nelson. He and I will probably work on this together.

Mike Dsida
Legislative Reference Bureau
608/266-9867
michael.dsida@legis.state.wi.us

From: Sabatino, Connor
Sent: Friday, December 09, 2005 2:41 PM
To: Dsida, Michael
Subject: Reporter Shield Law

Michael,

Attached is the first page of the case. Our understanding is that this case set the precedent for reporters and they have been operating under it since. We are looking to codify this de-facto shield law for reporters into an actual statutory shield law.

We have some organizational contacts we could put you in contact with if this isn't straightforward enough. Let me know.

Thanks,

Connor Sabatino
Office of Rep. Josh Zepnick
<< File: Shield Law Supreme Court Case.PDF >>

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Kurzynski v. Spaeth, 196 Wis 2d. 182

journalist or not, may be forced to respond to a subpoena in Wisconsin unless the party seeking the information encompassed by the subpoena makes a preliminary showing that justifies the intrusion. *Id.*, 113 Wis. 2d at 421, 335 N.W.2d at 372. Thus, even in criminal cases, where a defendant's right to evidence is protected by the constitutional guarantee of compulsory process, there must be "some proof, beyond mere speculation, that there is a reasonable probability that the subpoenaed witnesses' testimony will be competent, relevant, material and favorable to his defense," or that there "is a reasonable probability" that the subpoenaed witnesses' testimony will lead to the discovery of admissible evidence. *Id.*, 113 Wis. 2d at 421-422, 335 N.W.2d at 372-373. Journalists, however, are given greater protection from the intrusions and disruptions of having to comply with discovery subpoenas seeking evidence gathered in the course of their work as journalists than are other witnesses. In order to prevent parties from using journalists as investigative tools, a party seeking evidence gathered by the journalist must also show "by a preponderance of the evidence either that he has investigated all reasonable and available alternative sources" for the information sought, "or that no such sources exist." *Id.*, 113 Wis. 2d at 422-423, 335 N.W.2d at 373.

[7, 8]

Although *Green Bay Newspaper Co.* was decided under Article I, section 3, of the Wisconsin Constitution and not the First Amendment to the United States

the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

OFFICIAL WISCONSIN REPORTS

Kurzynski v. Spaeth, 196 Wis 2d. 182

return for the elder Schoen's cooperation. *Schoen*, 5 F.3d at 1290. *Schoen*, however, recognized the danger to the values protected by the First Amendment's "free press" clause of requiring journalists to comply with discovery subpoenas even when confidential information was not sought:

"[T]he threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve non-broadcast material; and the burden on journalists' time and resources in responding to subpoenas."

Id., 5 F.3d at 1294-1295. (Citation omitted.)

[10]

Application of a qualified journalist's privilege in the context of civil litigation requires a balancing between, on the one hand, the need to insulate journalists from undue intrusion into their news-gathering activities and, on the other hand, litigants' need for every person's evidence. *See Schoen*, 48 F.3d at 415-416. This balancing is required irrespective of whether the journalist's information was obtained in return for a promise of confidentiality. *See Green Bay Newspaper Co.*, 113 Wis. 2d at 418, 335 N.W.2d at 371 (confidentiality promised); *Schoen*, 48 F.3d at 416 (confidentiality not promised). *Schoen* applied the following test:

[W]here information sought is not confidential, a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege [that is, that the person asserting the privilege is a "journalist"] by a nonparty only upon a

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Court of Appeals

showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. We note that there must be a showing of actual relevance; a showing of potential relevance will not suffice.

Id., 48 F.3d at 416. We examine each aspect of this test in turn.

[11-14]

The first element of the *Schoen* test, that there be no alternate sources for the information sought, mirrors the rule adopted by *Green Bay Newspaper Co.* for criminal cases involving information obtained by a journalist in return for a promise of confidentiality. See *Green Bay Newspaper Co.*, 113 Wis. 2d at 422-423, 335 N.W.2d at 373-374. *A fortiori*, there is no impediment to its use in civil cases, where neither a defendant's right to compulsory process nor the state's crime-solving responsibilities is implicated. The second element of the test, that the information sought from the journalist not duplicate that which is already known by the party seeking the information is, in essence, a weighing of the information's utility to a party against the burden on the witness to produce that information. This principle already shields witnesses who are not journalists from having to comply with discovery subpoenas when to do so would be onerous. See RULE 804.01(3)(a), STATS. (trial court may issue protective order to "protect a party or person from annoyance . . . oppression, or undue burden or expense"); *Vincent & Vincent, Inc. v. Spacek*, 102 Wis. 2d 266, 271-272, 306 N.W.2d 85, 88 (Ct. App. 1981); 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2037 at 496 (1994). The "clearly relevant" third aspect of the three-



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-4234/PT

RPN:.....

JLD

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

2005 Bill

Gen

1 AN ACT ...; relating to: limits on discovery from journalists. ✓

Analysis by the Legislative Reference Bureau

(I) This bill codifies the decision of the Wisconsin Court of Appeals in Kurzynski v. Spaeth, 196 Wis 2d. 182, 538 NW 2d 554 (Ct App., 1995), which limits the discovery of information from a member of a news media in a civil action. Generally, the parties to a civil action may obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter involved in the pending action. Currently, parties to a civil action may obtain by discovery any material that appears reasonably calculated to lead to the discovery of admissible evidence. ✓ (I)

This bill allows discovery of material from members of the news media in civil actions only if the requested material is not available from other sources, does not duplicate what is already known by the party seeking the material, and is clearly relevant to an important issue in the case and the relevance is actual, not just potential. ✓

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 804.01 (7) of the statutes is created to read: ✓

3 804.01 (7) LIMITS ON DISCOVERY FROM A REPRESENTATIVE OF A NEWS MEDIA. A party ✓
4 may obtain discovery from a member of the news media in a civil case only if all of ✓
5 the following conditions exist:

Northrop, Lori

From: Sabatino, Connor
Sent: Wednesday, March 15, 2006 10:43 AM
To: LRB.Legal
Subject: Draft review: LRB 05-4234/1 Topic: Privilege for reporter information

It has been requested by <Sabatino, Connor> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-4234/1 Topic: Privilege for reporter information