

What Judges Have to Say

In Texas, there are Inequities in the Current System Excluding Newsrooms from Search Warrants but Subjecting Reporters to Subpoenas with No Threshold.

Texas ex rel. Healey v. McMeans, 22 Med. L. Rptr. 1707 (Tex. Crim. App. 1994) – Maloney, J., joining – “Admittedly an evidentiary search warrant is a much more drastic invasion of privacy than a subpoena; but the Legislature has at least evidenced some intent to maintain the privacy of a news office and its contents in passing article 18.01(e). We might ask if you can’t seize it by court order (search warrant), how can you subpoena it by clerk order?”

Ex Parte Grothe, 10 Med. L. Rptr. 2009 (Tex. Crim. App. 1984) – fn. 3 – “We recognize that the Texas Legislature has adopted a search shield law which provides more protection than the *Zurcher* court did. Art. 18.01(e), V.A.C.C.P. However, to this date the Legislature has *not* adopted a newspaper testimonial privilege, a reporter’s sources shield statute or excluded newspapers from subpoenas.

In re: KPRC-TV’s Motion to Quash Grand Jury Subpoenas Duces Tecum, In the District Court of Harris County, Texas, 351st Judicial District (January 10, 2006) - Judge Mark Kent Ellis: “Basically, the gist of the case, the holding of the Court of Criminal Appeals – I mean, they don’t mince words, really, in saying that there is no protection. Whether that’s a good idea or not – because one of the things raised by KPRC in their brief, there are certainly – it cannot be – in my opinion it cannot be that the DA’s Office can subpoena anything. I mean, there has to be – at some point there has to be a balancing between the First Amendment rights of the media versus the right of the DA’s Office to investigate crime. ... In addition, it does seem odd that the Legislature would protect the news media from a search warrant but not from a Grand Jury subpoena, because certainly a search warrant requires probable cause, requires review by a judge and obviously a much more serious and statutorily reviewed matter, whereas a Grand Jury subpoena is simply a piece of paper filled out by a prosecutor and sent to a party demanding compliance and threatening contempt without any review other than what we are here today doing which is a motion to quash. So there are certainly some important policy matters that are troubling.”

“I did in the process of this...read an account of James Madison in 1798 when they passed the Alien and Sedition Acts in Virginia, the first thing the Government did was seize the local printing press of the newspaper and – because he didn’t like what they were writing about. But, you know, all those policies and all those reasons that we have the Bill of Rights in the first place, the Court of Criminal Appeals at least in this particular area has just ran right past it, and the Legislature – again, I find it very odd that the Legislature would make an exception to search warrants but not for providing protection for Grand Jury subpoenas or other subpoenas. But unless until they change their mind, my job is to uphold the laws of the State of Texas.”

A Balancing Test is Needed

Channel Two Television Co. v. Dickerson, 725 S.W.2d 470 (Hou. [1st Dist.] App. – 1987) – Levy, J., concurring, “[B]efore a reporter can be ordered to turn over material acquired in the investigation and dissemination of a news story, the litigant seeking the information must show more than that the material be highly significant and relevant, necessary to his claim, and not available from other sources. The litigant should demonstrate the existence of a *compelling* need for the information, which should not be required to be predicated on economic interest alone. ... The likelihood or even possibility of court-ordered disclosure of confidential sources diminishes the flow of news by encouraging self-censorship by news gatherers and by dissuading potential informants from divulging their information.”

Miller v. TransAmerican Press, Inc., 628 F.2d 932 (5th Cir. 1980)- “We do not mean to intimate that a plaintiff will be entitled to know the identity of the informant merely by pleading that he was injured by an untrue statement. Before receipt of such information the plaintiff must show: substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.”

Mize v. McGraw-Hill, Inc., 86 F.R.D. 1 (S. D. Tex. 1980) –

* **“The ready disclosure of confidential sources would have a chilling, perhaps freezing effect on the free flow of truthful information.”**

* “Applying the balancing test [herein], ..the plaintiff has not attempted to uncover the source through other avenues. In short, the plaintiff demonstrates no need to resort to the court to compel discovery. At this stage of the proceedings, the plaintiff’s interest in disclosure is minimal. On the other hand, the defendant’s interest in preserving the confidentiality of its sources is strong. As at all times in the course of litigation, compelled disclosure of confidential sources might chill the flow of information so essential to the freedom and effectiveness of the press.”

Campbell v. Klevenhagen, 760 F. Supp. 1206 (S.D. Tex. 1991) – “The defendant’s asserted need for the information from the petitioners was based on a series of contingencies: if the reporters were able to recognize their sources if those sources were to give testimony which was otherwise inconsistent with the defense’s theory of self defense then the petitioners would be called to impeach that testimony. Before either of these contingencies materialized, the petitioners were adjudged in contempt for refusing to disclose their sources. ... This adjudication of contempt is unconstitutional.”

Courts Have Called for the Legislature to Act

Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646 (1972) – “At the federal level, Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. ***There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.*** ... [A]t the federal level the Attorney General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials. These rules are a major step in the direction the reporters herein desire to move.”

“The Supreme Court disapproved of involving the lower courts in making preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporters’ appearance ... ***Such value judgments are more properly left to the legislature.***” *Id.* at 2669.

The Current System is an Affront on the Basic Tenet of American Litigation that a Party Should Conduct Its Own Investigation.

Holland v. Centennial Homes, Inc., 1993 WL 755590, 22 Med. L. Rep. 2270 (N.D. Tex.) – “In the case of investigations conducted by law enforcement or regulatory agencies, a private party’s access to information is circumscribed by statute and regulation. Compelling the production of an investigation conducted by a non-public employee—for consideration paid and as part of that person’s principal livelihood – appears unfair to the interest of the investigator and the person or entity which paid for such services. It also appears inimical to the basic tenet of American litigation that a party should conduct its own investigation.”cf. *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947).