

State Courts Consider Reporter's Privilege Issues

During the fall of 2016, several individuals sought to invoke reporter's privilege in various jurisdictions throughout the United States to prevent being compelled to reveal their confidential sources and non-confidential notes. In Massachusetts, a judge ordered conservative media host Glenn Beck and his producers to identify confidential sources when he was a defendant in a civil lawsuit arising from his reporting on the Boston Marathon bombings in 2013, which ultimately led Beck to settle the suit out of court. Meanwhile, *New York Times* reporter Frances Robles won an appeal in front of a New York state appellate court that allowed her to withhold notes from a jailhouse interview in 2013. Finally, the Minnesota Court of Appeals reversed a district court decision that would have compelled *Star Tribune* reporter Paul McEnroe to reveal his confidential source that was at the center of a defamation lawsuit brought by the subject of a 2013 story.

Glenn Beck Ordered to Identify Two Confidential Sources; Reaches Settlement in Defamation Suit

On Aug. 9, 2016, U.S. District Court for the District of Massachusetts Judge Patti B. Saris ruled that conservative media host Glenn Beck and two of his producers must identify unnamed Department of Homeland Security (DHS) officials that the host said linked Saudi national Abdulrahman Alharbi to the Boston Marathon bombing in 2013, which killed three people and injured 264 others. In the month following the attack, Beck reported that Alharbi, a 20-year-old Saudi Arabian student, was involved in the plot to place bombs at the finish line of the annual race. Beck alleged that Alharbi was a "proven terrorist" who "funded the operation," according to an August 9 *Washington Post* story.

The Washington Post reported that although police had investigated Alharbi and found that he was in the marathon audience during the bombing, law enforcement officials cleared him of any wrongdoing. Nevertheless, Beck continued to claim in several radio broadcasts and on his website, *TheBlaze*, that Alharbi was responsible for recruiting the brothers who carried out the attack and directing when the bombs should be detonated.

In March 2014, Alharbi brought a defamation lawsuit against Beck as well as several organizations associated with Beck in the U.S. District Court for the District of Massachusetts. *The Washington Post* reported that Alharbi alleged that Beck falsely accused him of participating in the bombing, which caused "grave

injury.” In trial depositions, Beck revealed that two of his editors at *TheBlaze*, then-head of the investigative unit Joe Weasel and chief content officer Joel Cheatwood, had obtained the information about Alharbi from confidential sources. The sources included four DHS investigative officers as well as two congressional aides. According to their depositions, Weasel talked to five of the sources while Cheatwood spoke with one.

In the August 2016 order, Judge Saris explained that Alharbi had argued that he needed the identities of the confidential sources because the information was “directly relevant to his claims, and cannot otherwise be determined from a less sensitive source.” *Abdulrahman Alharbi v. TheBlaze, Inc. et. al.* No. 14-11550-PBS (D. Mass. Aug. 9, 2016). In response, Beck and his co-defendants, *TheBlaze*, Mercury Radio Arts, and Premier Radio Networks, argued that “the motion to compel is untimely, and that the sources’ identities are protected by a qualified privilege under the First Amendment.”

In her decision, Judge Saris applied a balancing test in which “the defendants’ promise of confidentiality to the sources weighs against compelled disclosure. Although Massachusetts does not have a statutory shield law protecting journalists from revealing confidential sources, Judge Saris used precedent from previous court decisions interpreting the scope of the reporter’s privilege in Massachusetts that required a “heightened sensitivity to First Amendment concerns and invite[s] a balancing of considerations.” *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004). According to Judge Saris’ decision, courts must “balance the potential harm to the free flow of information that might result against the asserted need for the requested information.” *Bruno & Stillman*, 633 F.2d 583, at 596 (1st Cir. 1980). After applying this balancing test, Judge Saris found that Alharbi was able to demonstrate a compelling need for the information. “The plaintiff has a strong need for the sources’ identities to meet his burden of demonstrating that the defendants did not act with the proper standard of care in their reporting about Alharbi,” Judge Saris wrote. As a result, she ordered Beck and his co-defendants to identify at least two of the officials from DHS.

Politico reported on Aug. 24, 2016 that despite the order, at least one of Beck’s producers planned to refuse to disclose the names of the DHS sources. Beck’s attorney, Michael Grygiel, also told Judge Saris that the radio host would refuse to name any sources, according to *Politico*. “Defendants cannot disclose the identities of Confidential Sources 1 and 2 for several compelling reasons. First and foremost, as a matter of fundamental journalistic integrity, Defendants cannot disclose the identities of the Confidential Sources without their authorization,” Grygiel wrote in a letter to Judge Saris that *Politico* had obtained.

Grygiel's letter added that Beck's sources were told of the judge's demand, but "were unwilling to be identified," despite the fact that Judge Saris said she would withhold their names from the court record and bar those involved in the litigation from revealing the sources.

Politico reported that Grygiel's letter also appeared to restate a claim that Beck had made earlier in August that he believed that his sources would be harmed or killed if they were publicly identified. "As previously represented to the Court, Defendants are justifiably concerned that substantial harm could come to the Confidential Sources if they are identified," Grygiel wrote. "Second, if Mr. Weasel were to disclose the identities of the Confidential Sources, it is a near certainty that no confidential sources would ever again speak to Mr. Weasel or The Blaze Inc. and its affiliates, to the detriment of an informed public."

Politico reported that at the time Grygiel wrote the letter, it appeared Weasel could be held in contempt of court and jailed for refusing to name the five confidential sources he spoke with even though he was not a named defendant in the case. If the producers and Beck refused to comply with the order, Judge Saris could have imposed fines on *TheBlaze* or "take[n] action to limit the company's defenses in the lawsuits, such as instructing a jury that it could infer that the sources did not exist." *Politico* also noted that it was unlikely that Beck would be held in contempt because Grygiel wrote in the letter that the radio host had no direct contact with the sources and "could not identify" them.

On September 13, *Politico* reported that Beck reached an out-of-court settlement with Alharbi. The parties declined to disclose any specific terms of the deal. However, a joint statement released by the parties indicated that both sides benefitted from the settlement. "No party has admitted any fault, wrongdoing, or responsibility as part of the settlement," representatives for Beck and for Alharbi wrote in the statement, according to *Politico*. "Defendants have agreed to settlement of the pending action in furtherance of fundamental principles of journalistic integrity by preserving the confidentiality of their sources consistent with their rights and privileges under the First Amendment. The Plaintiff has pursued this action for the reasons set forth in his Complaint and believes those interests have been served by this resolution."

New York Times Reporter Wins Appeal after Judge Ordered Her to Testify

On Oct. 20, 2016, a New York state appellate court determined that the New York shield law protected *New York Times* reporter Frances Robles from testifying about jailhouse interviews she had conducted with Conrado Juárez, who was accused of killing a toddler in 1991. The appellate court's decision overturned an August 4 order from Justice Bonnie G. Wittner, a trial judge for the New York

Supreme Court for New York County, who ruled that Robles must testify during the Juárez's trial. Justice Wittner's August 4 decision had raised concerns among news organizations and press advocates because the New York shield law prevents courts from compelling journalists to testify about information from confidential and non-confidential sources. However, the organizations praised the reversal by the appellate court for basing its decision on a broad view of the types of protections that the state shield law provides.

In October 2013, New York police officials arrested Juárez after they determined the identity of a murdered four-year-old girl nicknamed "Baby Hope." The child's body had been found in July 1991 but remained unidentified for more than 20 years, according to an April 13, 2016 story by *The New York Times*. After an extensive interrogation, Juárez confessed on videotape to committing the murder. Juárez also told investigators that he and his sister dumped the body in the woods off a highway. Four days after the videotaped confession, Juárez withdrew his confession, telling Robles during a jailhouse interview that he had helped dispose of the toddler's body but denied killing the child. Instead, Juárez told the *Times* reporter that detectives had "browbeat him into a confession." *The New York Times* later published Juárez's account of the interrogation on Oct. 17, 2013.

During pre-trial proceedings, prosecutors announced that they would seek to have Robles testify about her interview with Juárez in order to prove that his confession was freely given and should be admitted at trial. On April 13, 2016, the *New York Times* reported that Justice Wittner determined that Robles would not be compelled to testify at a pretrial hearing about Juárez's confession. Justice Wittner also quashed two subpoenas that would have required Robles to turn over her notes from the interview she had with Juárez. In the one-page decision, Justice Wittner relied upon New York's shield law to quash the subpoenas, writing that the district attorney's office had not shown "that its case would rise or fall on Ms. Robles's testimony and her notes, as the shield law says it must in order to compel a journalist to take the witness stand."

New York's shield law states that journalists cannot be compelled to testify or provide information about news obtained from confidential sources. N.Y. Civ. Rights Law § 79-h. However, *The New York Times* noted in its April 13 story that when journalists have named their sources, such as when Robles identified that her information came from Juárez, journalists receive fewer safeguards under the law. In such contexts, a journalist can be forced to take the stand or turn over notes if prosecutors can show the information is "highly material and relevant" as well as "critical or necessary to the maintenance of a party's claim" to prove

their case. The prosecution must also show that the information cannot be obtained from another source.

In the wake of the April 13 ruling, The New York Times Company assistant general counsel David McCraw praised Justice Wittner's decision to quash the subpoenas. "New York law recognizes that the proper role of journalists is out reporting stories, not serving as witnesses in court cases," McCraw told the *Times* on April 13. "The court's decision underscores that the public interest is best served by protecting reporters from unnecessary subpoenas."

The *Times* reported that despite the victory, Justice Wittner's decision "left the door open for prosecutors to argue again at trial that Ms. Robles's testimony was critical to their case." In August 2016, prosecutors again sought to compel Robles to testify about Juárez's recanted confession but in the context of the trial rather than during pre-trial proceedings. The *Times* reported that court documents filed by lead prosecutor Melissa Mourges argued that there was no scientific evidence available that directly linked Juárez to the crime. As a result, Mourges maintained that Robles interviews with Juárez corroborated many of the details he told the police. "Simply stated, the prosecution cannot succeed unless the jury accepts the statements as both voluntary and true," she wrote. "This means the case virtually rises and falls on evidence surrounding all the statements Juárez made."

The *Times* reported that Robles' lawyer Kate Bolger argued that Juárez's confession could be corroborated in ways that did not require Robles' to testify or disclose her notes. "The district attorney has three hours of a video confession along with the corroborating evidence from the victim's body and related physical evidence; it does not also need to question Ms. Robles about an interview in which Mr. Juárez did not confess," Bolger wrote in documents opposing the prosecutor's motions seeking to compel Robles' testimony. On Aug. 4, 2016, Justice Wittner agreed that Robles should testify during the actual trial, ruling that Robles' notes and testimony were "material, relevant and critical to the people's case" against Juárez because the only other public statements he gave in addition to his confession were to the journalist during the jailhouse interview, according to the *Times*.

After the decision, Bolger told *The New York Times* that she intended to file an appeal immediately with the New York Supreme Court, Appellate Division. "Ms. Robles believes the court had it right the first time," Bolger told the *Times*, referencing Justice Wittner's decision to quash subpoenas during pre-trial proceedings in April 2016. "This kind of subpoena interferes with the reporter's ability to communicate news and the public's right to hear it, and Ms. Robles remains hopeful that the appellate court will reverse today's decision." Justice

Wittner also agreed to stay her decision pending appeal, but she predicted the appellate court “will confirm what I did.”

During the appeals process, the Reporters Committee for Freedom of the Press (RCFP), which led a coalition of 57 media organizations, filed an *amicus* brief on Aug. 19, 2016 that urged the appellate court to overturn Justice Wittner’s order. The brief argued that “the lower court incorrectly interpreted the Shield Law’s strict standards for determining when the privilege against disclosure of nonconfidential information may be overcome and plainly erred by treating its disclosure not as a last resort, but rather as a routine occurrence.”

The coalition’s *amicus* brief also emphasized the benefits for the public of protecting journalists from compelled disclosure of their nonconfidential sources. “It is not exclusively the compelled testimony in one case that harms the news media, but also the broader perception it creates that the news media must routinely testify against their own sources, thus chilling future cooperation,” the coalition wrote in the brief. “Protecting nonconfidential information from compelled disclosure, whether in the form of testimony about an interview or notes describing such an encounter, is vitally important to the free flow of information to the public. Routine compelled disclosure of nonconfidential but unpublished information would stymie reporting by threatening the independence of the news media and deterring sources from speaking to journalists, as well as burdening the news media’s time and resources and discouraging journalists from reporting on controversial matters and maintaining records of past reporting.”

Additionally, the RCFP-led coalition argued that jailhouse interviews, such as the one Robles conducted with Juárez at Rikers Island, played an important role in informing the public. “Jailhouse interviews are an essential source of information not just about the particulars of one case, but about how the criminal justice system operates,” the coalition wrote. “Because such interviews typically arise from criminal prosecutions, they are also likely to tempt prosecutors into eying subpoenas to the news media as a way to gather evidence for trial. Consequently, the news media’s ability to report on matters concerning crime, criminal justice, and prison conditions, as informed by jailhouse interviews, hinges upon a strong interpretation of the Shield Law’s qualified privilege against compelled disclosure of nonconfidential information.”

On Oct. 20, 2016, *The New York Times* reported that the New York Supreme Court, Appellate Division, First Department ruled that Robles could not be subpoenaed to testify about the jailhouse interview. *In re People of the State of New York v. Juarez*, 39 N.Y.S.3d 155 (1st Dept. 2016). In a unanimous decision, the court found that Robles’ notes were not “critical or necessary,” as required by the state

shield law, to the prosecution of Juárez, which was contrary to the finding by Justice Wittner. According to the *Times*, the court based its decision on “the consistent tradition in this state of providing the broadest possible protection to ‘the sensitive role of gathering and disseminating news of public events.’” Additionally, the appellate panel found that the prosecutors failed to make “a clear and specific showing” that Robles’ notes and memories of the interview with Juárez were instrumental to their case.

In an October 20 interview with the *Times* after the decision, McCraw praised the appellate court for taking a broad view of the New York shield law. “We are grateful to the court for recognizing how important this issue is not just to *The Times* and to Ms. Robles, but to journalists everywhere,” McCraw said. “It’s important that our reporters be allowed to give voice to people who are incarcerated, and this subpoena threatened to silence those voices.” Bolger agreed that the appeals court’s decision to overturn Justice Wittner’s ruling was the correct outcome. “We are very happy with the results and that the court reiterated New York’s policy to protect journalists,” Bolger told the *Times*.

The *Times* reported on Oct. 20, 2016 that a spokeswoman for the Manhattan district attorney’s office did not say whether they would appeal the ruling. As the *Bulletin* went to press, an appeal had not been filed.

Court of Appeals of Minnesota Says Journalist Does Not Have to Reveal Confidential Sources

On Sept. 12, 2016, the Minnesota Court of Appeals ruled that a former investigative reporter for the Minneapolis *Star Tribune* would not be required to reveal an anonymous source related to a defamation case brought by an assisted living facility located in Chisholm, Minn. The case arose after *Star Tribune* reporter Paul McEnroe wrote about abuses taking place at the facility. Range Development Company, which owned the facility at the center of the story, later filed a lawsuit against McEnroe, alleging that his story contained several “misstatements.” During the pre-trial proceedings, a St. Louis County District court judge ordered that McEnroe must reveal his source, which led to the appeal.

In April 2013, the *Star Tribune* published McEnroe’s story reporting that an assisted living facility owned by Range Development Company had abused several of its patients. McEnroe wrote that the facility had left a man with developmental disabilities and mental illness “alone and sitting in filth.” Additionally, McEnroe’s story indicated that when police arrived, the patient was found “in a urine-soaked chair and still not responding.” Police on the scene also found that the resident’s room was cluttered and that the carpet was soaked in urine. Further, McEnroe reported that the patient had critically low blood sugar

and was diagnosed at the hospital with a severe urinary tract infection, from which the patient later recovered. Ambulance-service employees later filed a report against the assisted living facility alleging neglect of the patient under the Minnesota Vulnerable Adults Act. Minnesota Public Radio (MPR) reported in a Sept. 12, 2016 story about the case that McEnroe's information about the poor conditions had been obtained from a confidential source who leaked a not-yet-released Minnesota Department of Health (MDH) report investigating the incident.

Shortly after the *Star Tribune* published McEnroe's story, Range Development filed a defamation lawsuit in the St. Louis County District Court against McEnroe and the newspaper, claiming the story contained nine damaging "misstatements." The company alleged that the false statements included descriptions that "black mold festered on a table," that the resident was found "barely alive," and that "[t]he case ha[d] been referred to the St. Louis County attorney's office for possible criminal charges." Range Development also claimed that McEnroe's story contained information that went beyond what was in the MDH's report. The company filed a motion to compel McEnroe to divulge the name of his confidential source, arguing that the name was necessary in order to determine the basis for the additional information about the case that appeared in the *Star Tribune*. A St. Louis County District Court judge granted Range Development's request that McEnroe reveal his source, finding that "the identity of defendant McEnroe's source will provide evidence as to whether or not he, or any other named defendant, spoke with actual malice in making the allegedly defamatory statements." McEnroe appealed, arguing that both a qualified First Amendment reporter's privilege and the Minnesota Free Flow of Information Act, the state's shield law, protected him from testifying about his source. Minn. Stat. 595.01 *et seq.*

On Sept. 12, 2016, a three-judge panel for the Minnesota Court of Appeals overturned the district court's order. In the unanimous decision, Judge Lucinda Jesson noted that the case implicated many aspects of the law governing defamation and reporter's privilege. "This case stands at the intersection of common-law defamation, the First Amendment right to free speech, and the parameters of a journalist's privilege, if any, under the First Amendment," Judge Jesson wrote. "McEnroe seeks to protect his source through recognition of a constitutionally imposed qualified journalist's privilege and a broad reading of the journalist's privilege provided by Minnesota statute in the act."

Judge Jesson next focused on the relevant portions of the Minnesota Free Flow of Information Act, writing that "[w]hile the [Minnesota Free Flow of Information] act affords news media a substantial privilege not to disclose

sources, it also carves out certain exceptions to this journalist's privilege. See Minn.Stat. § 595.024, .025. One exception applies to disclosure of sources in defamation cases if certain conditions have been met. Minn.Stat. § 595.025." Under this latter section, the statute states that a defamation plaintiff must meet two conditions before a journalist can be compelled to disclose the identity of a source. First, "that there is probable cause to believe that the source has information clearly relevant to the issue of defamation," and second, "that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights." Minn. Stat. 595.025.

Applying this test, the three-judge panel found that Range Development did not satisfy their burden required to compel disclosure of source information by a journalist. "We are not convinced that [Range Development's] justifications demonstrate that the identity of the source will lead to persuasive evidence of falsity or actual malice," the court said. "Range [Development] has not made the affirmative showing required to merit an exception to the act's general rule that a court may not require a reporter to disclose confidential sources." As a result, the panel wrote that "[b]ecause the district court erred by concluding that the statutory standards for disclosure were met, we reverse the district court's order requiring disclosure of McEnroe's confidential source."

In a September 12 press release, Star Tribune Media Company general counsel Randy Lebedoff praised the Minnesota Court of Appeals decision. "We are pleased that the court strongly and clearly upheld the reporter's privilege in Minnesota," Lebedoff said, according to the *Star Tribune's* September 12 story. According to the Minnesota appellate court case management system, Range Development's attorney James Clark did not file an appeal of the Minnesota Court of Appeals decision. The *Star Tribune* reported on September 12 that the defamation case was still set for trial, but a start date had not yet been determined.

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