PROTECTING CONFIDENTIAL SOURCES

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DEFINING SUCCESS TOGETHER

HYPOTHETICAL

- You are an investigative journalist who was specially commissioned to write an article about corruption in the local City Attorney's office;
- During the course of your investigation, a source tells you that an Al Qaeda cell has popped up in the City and its members are implementing a new tactic – several members of the cell have been elected or appointed to important offices in the City and they plan to destroy the City from the inside out.
- Your source only has spoken to you because you promised to keep his/her identity confidential.

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HYPOTHETICAL CONTD.

- The local paper – thrilled at the opportunity to "scoop" all the major newspapers – publishes the article without asking you any questions.
- Weeks after the article is published, you receive a subpoena, which you dutifully present to the editor of the local paper.
- The local paper hires an attorney, who accompanies you to Court on the date listed in the subpoena.

HYPOTHETICAL CONTD.

- When the case is called, the prosecutor calls you as a witness.
- You take the witness stand and the prosecutor asks you to identify your source.
- On advice of counsel, you refuse, citing your First Amendment rights.
- The judge orders you to answer the prosecutor's question, and warns that if you refuse, he will hold you in contempt.
- The judge recesses for lunch, giving you one hour to consult with your attorney and your family about revealing your source.

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Would you go to jail to protect a source?

- No separate holding cell for journalists; journalists are housed with general jail population.
- No special treatment or priorities for journalists; treated just like any other inmate.

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What Questions Will You Ask Your Attorney?

State Court

- California Evidence Code § 1070 (a) states: "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication … cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication."

Federal Court

- In *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), the U.S. Supreme Court recognized that the First Amendment protects the newsgathering process, as well as news reporting, because "without some protection for seeking out the news, freedom of the press could be eviscerated."
- The Ninth Circuit has interpreted *Branzburg* as recognizing a constitutionally-based qualified privilege for journalists to resist the disclosure of unpublished information gathered or obtained during the course of newsgathering activities in non-grand jury cases.

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How does compelling journalists to testify harm freedom of the press?

- "Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted harassment. The larger purpose was to protect public access to information." *Bursey v. U.S.*, 466 F. 2d 1059, 1083-1084 (9th Cir. 1972).
- "Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis…. The deterrent effect [that] such disclosure is likely to have upon future 'undercover' investigative reporting … threatens freedom of the press and the public's need to be informed." *Baker v. F&F Investment Co.*, 470 F. 2d 778, 782 (2d Cir. 1972).
- "A comprehensive reporter's immunity … has the effect of safeguarding 'the autonomy of the press.' … The threat to press autonomy [from subpoenas] is particularly clear in light of the press's unique role in society. As the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information." *Miller v. Superior Court*, 21 Cal. 4th 883, 898 (1999).

BALANCING TESTS IN CRIMINAL CASES

State Court

The immunity afforded by the Shield Law may be overcome in a criminal proceeding only "on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial." *Delaney v. Superior Court*, 50 Cal. 3d 785, 805 (1990). There is a two-stage inquiry:

1. Has defendant shown that nondisclosure would deprive him of his right to a fair trial, i.e., is there a reasonable possibility that the information will materially assist his defense?
2. If so, do the balance of equities tip in favor of disclosure?
    a) Would disclosure unduly restrict the newsperson's access to future sources and information?
    b) Would the policy of the Shield Law be thwarted by disclosure?
    c) How important is the information to the criminal defendant?
    d) Are there any alternative sources for the information?

Federal Court

Prosecutor cannot compel production of protected newsgathering information without first establishing that the information she seeks is:

- Unavailable despite exhaustion of all reasonable alternative sources;
- Non-cumulative; and
- Clearly relevant to an important issue in th[e] case. *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995).

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Based on the information you know so far, what additional questions, if any, would you ask the attorney in our hypothetical?

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What Should I Do If:

A Prosecutor/Defense Attorney Calls:

- Do NOT disclose any unpublished information!
- End the call as soon as possible (i.e., invoke Shield Law).
- Call your editor.

I Receive A Subpoena:

- Call your editor immediately.
- If you cannot contact your editor before the court date, appear in Court and invoke the Shield Law; ask the Court for time to retain a lawyer.

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