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First Amendment LAW LETTER

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MEDIA ACCESS TO THE NEW SPECIAL TRIBUNALS: LESSONS LEARNED FROM HISTORY AND THE MILITARY COURTS

BY RICHARD L. CYS AND ANDREW M. MAR

The right of the public and the press to attend the recently authorized special military tribunals has not been established as of this writing. History suggests any such right will be limited, but there are steps members of the news media can take to maximize their access to the records and proceedings of such tribunals.

On November 13, 2001, President Bush signed a military order allowing special military tribunals to try non-citizens charged with acts of terrorism. 66 Fed. Reg. 57,833 (Nov. 13, 2001) ("Military Order"). As of mid-December, Secretary of Defense Donald Rumsfeld was developing the rules and procedures for such tribunals, including the right of the public (and the press) to attend. It is possible that the rules for each specific case may be different.

The Military Order itself does not spell out what rules, if any, will be used by these military tribunals, but some relevant sections of the order suggest that neither the Rules for Courts Martial nor the Federal Rules of Civil Procedure will necessarily apply, and the right of access to proceedings and documents may be scarce. The order states:

- "It is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." Military Order §1(F)
- The Secretary of Defense has the authority to issue orders and regulations regarding "the conduct, closure of, and access to proceedings." *Id.* §4(C)(4)(b)

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NOTICE REQUIREMENTS HELP JOURNALISTS FACING ABUSIVE SUBPOENAS

BY ROCHELLE L. WILCOX AND THOMAS R. BURKE

Prompted by media attention to a rash of subpoenas issued to California journalists, the California legislature has enacted new procedural safeguards, including a minimum of five days' notice before a journalist may be required to testify, that enhance the rights provided under California's Shield Law.[1] California Code of Civil Procedure Section 1986.1 represents a direct and straightforward legislative response, which could serve as a model for other states, to the increasingly prevalent practice of serving subpoenas on journalists without sufficient time for them to meet with legal counsel. In a number of cases, this practice had threatened to undermine the rights journalists have under the Shield Law to refuse to testify except under limited circumstances.

Stopping An Unfortunate Trend Against Reporters

Section 1986.1 responds to a problem that gained prominence in a 2000 case involving a small newspaper in the rural Northern California community of Altois, California. Tim Crews, publisher, editor and chief reporter and photographer of *The Sacramento Valley Mirror,* published several front-page articles concerning the arrest of a local California Highway Patrol officer for possession of a stolen gun. The newspaper's reporting was based on information Mr. Crews had received, in confidence, from law enforcement sources. Defense counsel subpoenaed Mr. Crews, to require him to reveal his sources at the preliminary hearing. Mr. Crews appeared without counsel at that hearing. Citing the First Amendment, Mr. Crews refused to disclose the name of his confidential sources, insisting that to do so

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Davis Wright Tremaine LLP

THINK TWICE BEFORE REMOVING CALIFORNIA SLAPP CASES TO FEDERAL COURT

BY JEAN-PAUL JASSY AND GIALISA WHITCHURCH

Unless there is a compelling reason to remove a case to federal court, defendants who plan to file a special motion to strike under California's anti-SLAPP statute, C.C.P. § 425.16, should stay in state court. Defendants *can* file anti-SLAPP motions in federal court, but for a variety of reasons defendants should strongly consider keeping SLAPP cases in state court:

- Unlike state court, there is no automatic stay of discovery once a special motion to strike is filed in federal court.
- The federal courts have not addressed whether the automatic right to appeal exists if a special motion to strike is denied.
- According to one federal court, Section 425.16 cannot be used to strike federal question claims in federal court.
- A federal judge may not have prior experience with the objectives of Section 425.16.
- It is uncertain whether, in federal court, defendants have a full 60 days from service of the complaint to file a special motion to strike without leave of court.

No Discovery Stay in Federal Court

California's anti-SLAPP statute (California Code of Civil Procedure § 425.16) was enacted to assure prompt dismissal of lawsuits that would chill one's right to free speech through costly, time-consuming litigation. This statute permits a special motion to strike any cause of action arising from any act of the person in furtherance of his "right of petition or free speech under the United States or California Constitution in connection with a public issue . . . ." C.C.P. § 425.16(b). In 1997, reacting to court rulings that did not go far enough to quash lawsuits that targeted free speech rights, the Legislature amended the statute to ensure that it "shall be construed broadly."[1]

Due to a recent Ninth Circuit opinion, *Metabolife Int'l., Inc. v. Wornick,* 264 F.3d 832 (9th Cir. 2001), it is especially important for SLAPP defendants to pause before removing to federal court. The Ninth Circuit adopted a lower court's decision that the early-filing provision and automatic discovery stay of California's anti-SLAPP statute directly conflict with the right of discovery available under Federal Rule of Civil Procedure 56.

When a defendant meets its initial burden under Section 425.16(b) of showing that the anti-SLAPP statute applies to a plaintiff's complaint, the statute requires dismissal unless the plaintiff can show by competent and admissible evidence that he probably will prevail on his claims.[2] As an additional deterrent to filing lawsuits that would chill a person's right to free speech, a prevailing defendant will recover fees and costs under section 425.16(c). Consistent with the intent to protect defendants from burdensome legal expenses to defend meritless lawsuits, a special motion to strike can be brought without leave of court, early in the lawsuit (60 days after service of the complaint), and all discovery is stayed upon filing of the motion unless good cause for discovery is demonstrated.

In light of the Ninth Circuit decision in *Metabolife,* however, the subsection of the anti-SLAPP statute that stays discovery – probably the most effective mechanism for limiting a defendant's expenses – will not protect defendants when a SLAPP suit is being litigated in federal court.

The anti-SLAPP statute is relatively new to federal courts. In 1999, in a case of first impression, the Ninth Circuit found that Section 425.16 may apply in federal court. *United States v. Lockheed Missiles & Space Co.,* 171 F.3d 1208, 1218 (9th Cir. 1999). The court analyzed the issue by asking whether the provisions allowing the special motion to strike and fee-shifting would result in a "direct collision" with the Federal Rules of Civil Procedure. The court found no direct collision with federal rules because a litigant could bring other federal motions – such as a motion to dismiss or a motion for summary judgment – in addition to a special motion to strike. Under an *Erie* analysis, the court found that, if the statute were not applied in federal court, a SLAPP plaintiff would have considerable incentive to "shop for a federal forum" while a SLAPP defendant would find "considerable disadvantage" in a federal proceeding.

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Subsequently, a district court read *Lockheed* narrowly, as applying only to the right to bring anti-SLAPP motions in federal court and to the statute's fee-shifting provision. In *Rogers v. Home Shopping Network,* 57 F. Supp.2d 973, 979 (C.D. Cal.1999), Judge Pregerson refused to apply the "discovery-limiting aspects" of the anti-SLAPP statute, finding that the purpose of Section 425.16 conflicted with the purpose of Federal Rule of Civil Procedure 56. The court based its ruling on the tension between Section 425.16's limits on discovery and the policy under Rule 56 of favoring discovery to facilitate motions for summary judgment. The court noted that, as a general rule, procedural state laws are not to be used in federal court because they directly collide with federal laws. In the absence of a direct collision, the court must make a decision under an *Erie* analysis whether to follow state or federal law. However, because the early filing of an anti-SLAPP motion combined with the automatic stay of discovery "collided" with "discovery-allowing aspects" of Rule 56, the court found an *Erie* analysis unnecessary.

In *Metabolife,* the Ninth Circuit adopted the *Rogers* court's reasoning. In finding that Sections 425.16(f) and (g) were procedural matters in direct collision with the federal rules, the Ninth Circuit side-stepped formulating an analysis under the *Erie* doctrine. The Ninth Circuit found that a procedure testing the plaintiff's evidence "before the plaintiff has completed discovery" conflicts with Rule 56. Although the anti-SLAPP statute permits discovery when it is necessary to decide the merits of that motion, the *Rogers* court objected to the statute's making discovery "an exception, rather than the rule," whereas the federal rules ensure adequate discovery before summary judgment can be considered.

The Ninth Circuit, however, just as easily could have followed its own rationale in *Lockheed,* which found that the special motion to strike and the availability of fees and costs did not conflict with federal law, and could be applied in federal court under an *Erie* analysis. First, the statute's early filing requirement and discovery stay do not necessarily conflict with Rule 56's "discovery-allowing aspects." Both the federal rule and the state statute mandate that discovery be allowed if necessary to overturn the respective motions. As intended by the legislature when it enacted Section 425.16, the automatic stay on discovery prevents SLAPP defendants from having to respond to expensive and burdensome discovery requests until after the anti-SLAPP motion has been decided – *i.e.,* until after a determination has been made that plaintiff's case has merit. The *Metabolife* decision contravenes the express purpose of the statute by precluding a defendant from obtaining relief from the burden and expense of discovery pending a determination of an anti-SLAPP motion. *Especially* where a lawsuit is designed to chill the expression of free speech, a plaintiff has an interest in forcing defendants to spend money on discovery. This certainly could encourage plaintiffs to "forum shop," contrary to the policy behind the *Erie* doctrine, and the *Metabolife* decision will likely increase the occurrence of SLAPP suits brought in federal court.

In addition, the unavailability of the discovery stay in federal court will permit non-residents of California to have the advantage of suing in California federal court on diversity grounds, while residents of California are not afforded this same opportunity. The fact that all subsections of California's anti-SLAPP statute do not apply equally in state and federal court gives non-resident plaintiffs a distinct advantage over resident plaintiffs:they are entitled to discovery from defendant while resident plaintiffs are not. Arguably, this can result in inequitable administration of the anti-SLAPP statute. Thus, while the Ninth Circuit adhered to the "discovery-allowing aspects" of Federal Rule of Civil Procedure 56, it seemed to disregard the broader policy of deterring lawsuits brought to chill a person's constitutional right to free speech.

Other Disadvantages to Federal Court

The Ninth Circuit's decision in *Metabolife* highlights the biggest pitfall to litigating California SLAPP cases in federal court. There are, however, other issues to consider, and even more reasons to hesitate before removing a SLAPP case. For example, with almost no analysis, one district court concluded that the anti-SLAPP statute does not apply to federal question claims in federal court. *Globetrotter Software, Inc. v. Elan Computer, Inc.,* 63 F.Supp.2d 1127, 1130 (N.D. Cal.1999).

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Another area of uncertainty is how federal courts will treat appeals under the statute. Section 425.16(j) guarantees a right of appeal if a moving party's special motion to strike is denied. No reported federal decisions address the issue. It is possible a federal court could deem the right to appeal to conflict with the federal rules governing appellate procedure.

Moreover, it is less likely that a federal judge will have prior experience with the objectives of Section 425.16. There are dozens of published opinions from California's appellate courts, reflecting a history of Section 425.16 analysis that dates back to the statute's inception in 1992. In contrast, there are fewer than ten published federal decisions, at the trial and appellate levels combined, that discuss Section 425.16.

Among its other procedural analyses, the Ninth Circuit in *Metabolife* ruled that Section 425.16(f) – which provides that an anti-SLAPP motion may be filed within 60 days of service of the complaint without leave of court – "directly collides" with the Federal Rules of Civil Procedure. *Metabolife,* 264 F.3d at 846. In context, the Ninth Circuit's obvious concern was that a special motion to strike could be filed "immediately" to stop discovery, but the so-called "direct collision" with the federal rules makes the deadline for filing a special motion to strike without leave of court uncertain. The uncertainty is apparent in *Metabolife* itself, which incorrectly states that Section 425.16(f)'s 60-day limit runs from the *filing* of the complaint;but, according to the statute, the 60-day limit runs from *service* of the complaint.[3] On the one hand, this uncertainty could benefit defendants inasmuch as there may be no set deadline. On the other hand, the uncertainty could lead to more adverse federal rulings, further limiting the application and availability of the anti-SLAPP statute.

A few other federal published and unpublished decisions indicate that federal court can,with respect to certain SLAPP issues, be as advantageous a forum as state court. In an unpublished 1999 opinion, the Ninth Circuit applied Section 425.16 to individual causes of action, reflecting a pro-defendant stance in an area where California Courts of Appeal have been divided.[4] Moreover, the same unpublished decision rejected a trial court's across-the-board cut in the prevailing defendants' fee request.[5] Indeed, federal courts apply the mandatory fee-shifting in Section 425.16(c) even where the special motion to strike is technically moot, but must be heard as a precursor to a fee award.[6]

Despite these examples, from the moving party's perspective there are no procedural advantages – but there are numerous disadvantages – to removing a SLAPP lawsuit to federal court.

[1] C.C.P. § 425.16(a); *see Briggs v. Eden Council,* 19 Cal.4th 1106,1120-21,969P.2d 564, 81 Cal.Rptr. 2d 471(1999).

[2] *See Marcias v. Hartwell,* 55 Cal. App. 4th 669, 675, 64 Cal. Rptr. 2d 222 (1997).

[3] *Id. Cf. Globetrotter Software,* 63 F.Supp.2d at 1129 (ruling that 60-day limit ran from filing of amended complaint).

[4] *Frias v. Los Angeles County Metro. Trans. Auth,* 176 F.3d 482 (Table), 1999 WL 273152 at *1 (9th Cir. 1999). *Compare ComputerXpress, Inc. v. Jackson,* 93 Cal. App. 4th 993, 113 Cal. Rptr. 2d 625 (2001) (allowing special motion to strike individual causes of action) and *Shekter v. Financial Indemnity Co.,* 89 Cal. App. 4th 141, 150, 106 Cal.Rptr. 2d 843 (2001) (same) *with M.G. v. Time Warner,* 89 Cal. App. 4th 623, 637, 107 Cal.Rptr. 2d 504 (2001) (imputing probability of success on one claim to others without analysis).

[5] *Frias,* 1999 WL 273152 at *2.

[6] *See, e.g.,eCash Technologies, Inc. v. Guagliardo,* 127 F.Supp.2d 1069, 1084-85 (C.D.Cal.2000).

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- "An individual subject to this order does not have a right to seek a remedy in any other tribunal, such as state or federal court, courts of a different nation, or an international court." *Id.* §7(B)(2)(i)-(iii).

While many of the specifics of these proceedings are unknown,they likely will be quite different from civilian and traditional military trials. The military tribunals will feature a panel of judges, not a jury, to decide guilt or innocence and the sentence, including the death penalty. Convictions may not require a unanimous vote, only a two-thirds majority, and the tribunals could convict on an evidentiary standard less stringent than "beyond a reasonable doubt." The military tribunals only apply to non-U.S. citizens, but may apply even if the individual is a resident alien. Therefore, it is possible that a U.S. citizen living abroad who is suspected of acts of terrorism may be tried in one of the existing (civilian or military) courts, while a non-citizen living in the U.S. may be tried before a military tribunal.

A Brief History of Secret Military Tribunals

The United States actually has a storied, if relatively unknown,tradition of using secret military tribunals. As early as the Revolutionary War, military tribunals were used to prosecute individuals accused of spying on the United States. The practice continued in the Civil War and World War II.[1]

The Supreme Court has acknowledged the constitutionality of military tribunals. During World War II, the Roosevelt administration used military tribunals to secretly try and convict a group of German agents accused of entering the United States illegally with explosives and the intent to commit acts of terrorism. In 1942, the Supreme Court upheld their convictions in *Ex parte Quirin,* 317 U.S. 1 (1942), and six of the eight agents were ultimately executed.

However, there are limits to the power of the executive and legislative branches to use or authorize military tribunals. In 1866, the Supreme Court held that military tribunals could only try civilians – in this case, a U.S. citizen – if the civil courts are actually closed and it is impossible to administer criminal justice. *Ex parte Milligan,* 71 U.S. 2 (Wall) (1866).[2] *Milligan's* other significant limitations were that martial law may only be declared by Congress, military tribunals may only be used during wartime, and decisions of military tribunals are subject to judicial review. During World War II, both local governments and the federal government implemented military tribunals. In Hawaii, authorities closed the traditional courts, declared martial law, and used military tribunals to prosecute ordinary civilian crimes, including securities fraud and assault. The Supreme Court found this unconstitutional because martial law did not allow the elimination of civilian courts in favor of military tribunals. *Duncan v. Kahanamoku,* 327 U.S. 403 (1946).

Quirin does not necessarily support President Bush's Military Order because the case is distinguishable in several ways. First, *Quirin* involved the trial of individuals who entered the country illegally. Second, the court upheld the rights of the accused to judicial review. Third, citing *Milligan,* the Supreme Court noted Congress formally had declared war and expressly authorized military trials for acts "against the law of war." In the current campaign against terrorism, Congress has not declared war, calling into question the President's authority to create military tribunals. Any authority the President has with regard to military powers is generally shared with the legislative branch. Congress, not the President, is empowered by the Constitution, Article I, Section 8, "[t]o make Rules for the Government and Regulation of the land and naval forces." The Military Order is not limited to individuals accused of entering the United States as spies or terrorists, and it provides no right to judicial review.

Access to Military Courts

Because it is unclear if the press will have access to military tribunals, a discussion of the existing military court system may be instructive. Courts-martial are presumptively open to the public, but there is no right to camera,photojournalism, or radio access.[3]

The media has access rights based on military court rules and the First Amendment. Rule for Courts-Martial 806(b) states courts are presumptively open to the public, unless

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certain exceptions apply. The most relevant ground for closure is introduction of classified information. Military Rule of Evid. 505(j). If the decision to close is supported by individual findings, is narrowly tailored, and protects compelling government interests, as a general matter, closure to protect classified information is possible. *United States v. Grunden,* 2 M.J. 116 (C.M.A. 1977). Closure should not be greater than necessary: military courts have held that a witness testifying in part to classified information requiring closure should testify in open court during the remainder of his or her testimony. *Id.* at 123.

The media also have First Amendment rights of access to military trials. "It is clear that the general public has a qualified constitutional right under the First Amendment to access to criminal trials." *ABC, Inc. v. Powell,* 47 M.J. 363, 365 (1997); *U.S. v. Scott,* 48 M.J. 663 (Army Ct. Crim. App. 1998). The press has standing to complain if access is denied. *ABC,* 47 M.M. at 365.

There is no indication,however, that these rules or the First Amendment right will apply to tribunals established under the Military Order. The Supreme Court held it unconstitutional to bar all access at all times, but this holding may be limited to the federal court system and not military courts or the military tribunals. *Globe Newspapers v. Superior Court,* 457 U.S. 596 (1982). None of the Supreme Court cases involving special military tribunals addresses whether the proceedings must be open to the public, but there is some historical precedent for access. Towards the end of the Civil War, military tribunals were established to try the alleged conspirators to President Abraham Lincoln's assassination. The proceeding initially was closed. Reporters complained about their lack of access to witness General Ulysses S. Grant. Grant arranged for a meeting with President Andrew Johnson, and the tribunals were opened to the public and press the following day. [4]

Access to Military Records: Media Action Steps

Military court rules and the First Amendment also provide for access to judicial records.[5] Because the procedures for tribunals permitted under the Military Order have not yet been made public, it is difficult to ascertain the potential for journalists and media organizations to gain access to proceedings. Since these proceedings may occur outside of the United States, or even on aircraft carriers or military bases, it may be logistically difficult to obtain access even if the proceedings were open to the public. Therefore, it may be best for news organizations to familiarize themselves with military court laws and procedures to obtain documents once the proceedings are over.

This procedure is less than clear. Because the tribunal documents may be classified, it is questionable whether the Freedom of Information Act will be useful. Also, because military attorneys likely will represent both the government and the defendant,[6] there may not be any party willing to give reporters access to records or to offer accounts of the proceedings, even on an "off the record" basis.

In general,there is a First Amendment right of access to judicial records in courts-martial trials.[7] Military judges are required to consider if sealing a particular record meets the compelling interest, specific finding, and narrow tailoring prongs of the traditional First Amendment analysis. Moreover, there is a limited common law access right to court records, but the procedure for obtaining such records is unclear. FOIA and the Privacy Act do not apply to federal court or courts-martial records while the proceedings are on-going.[8] But because the armed services, in their capacity as federal agencies, maintain the records of courts-martial, FOIA and the Privacy Act may be used to obtain judicial records once a case ends. The problem is that a specific record may be subject to FOIA until the start of a proceeding, then not subject to disclosure because proceedings are on-going, and then subject to FOIA again once the proceedings end. Finally, the Department of Defense has multiple grounds, many particular to DOD, to deny FOIA requests, making access particularly difficult.

In sum, access to the newly authorized special military tribunals may be difficult to obtain. Media organizations should be prepared to marshal arguments for access based on the history and legal precedent discussed above. Ultimately, however, they may be served best by understanding how to access judicial records efficiently in order to analyze the proceedings, or at least their outcomes, after they have concluded.

[1] *See generally Ex parte Quirin,* 317 U.S. 1, 42 n. 14 (1942) (listing historical uses of military tribunals without juries).

[2] *But see Mudd v. Caldera,* 134 F.Supp. 2d 138, 146 (D.D.C. 2001) (in reconsidering a Civil War-era conviction, court found it proper for citizen charged with a "law of war violation" to be tried by military commission, even though civilian courts were open).

[3] *See* Rules for Courts-Martial 806(c); U.S. Court of Appeals for the Armed Forces, Rules of Practice and Procedure 41(a) (prohibiting photographing, televising, recording or broadcasting of hearings).

[4] James H. Johnston, *Swift and Terrible,* Wash. Post, Dec. 9, 2001 at F1.

[5] *See Scott,* 48 M.J. at 665. There is also a common law right of access to civilian court records, and this may apply to military court records. *Id.* at 666, *discussing Nixon v. Warner Communications,* 435 U.S. 589, 599 (1978) (establishing, in non-military case, common law rights in addition to First Amendment rights).

[6] This was true in the World War II secret military tribunals. *See e.g., Quirin,* 317 U.S. 1 (1942).

[7] *United States v. Scott,* 48 M.J. 663 (Army Ct. Crim. App. 1998) (setting aside judicial seal).

[8] Courts-martial are not agencies for the purpose of FOIA or the Privacy Act. 5 U.S.C.A. § 551(1)(B), (F) (2001); *but see* 5 U.S.C.A. § 552(a)(e)(4); Privacy Act System Notice Requirement Applies to Courts-Martial Files, Op. Defense Privacy Board, No. 32 (Armed services maintain records of courts-martial proceeding).

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would endanger their safety and livelihood and undermine his ability to effectively report on local law enforcement activities. The presiding judge, Tehama County Superior Court Judge Noel Watkins, took the position that defendant needed to know the name of the confidential sources – stating at one point that defendant was "only" asking Mr. Crews to reveal their identities. When Mr. Crews continued to refuse, Judge Watkins found him in "open contempt" and sentenced him to five days in the county jail. Mr. Crews was given 72 "judicial hours" to attempt to obtain a stay from the Court of Appeal, although this later was extended to allow Mr. Crews to pursue a review of the court's decision in four other courts.[2]

On short notice, Mr. Crews was able to gather compelling evidence that defendant had a number of alternative sources for the information he subpoenaed and that Mr. Crews' testimony would not materially assist the defense.[3] Nevertheless, Mr. Crews was unsuccessful in his requests for extraordinary relief. California's Court of Appeal and Supreme Court, the U.S. District Court for the Eastern District of California, and the Ninth Circuit Court of Appeals all refused to hear Mr. Crews' case on its merits before expiration of the stay of Judge Watkins' contempt order. On February 26, 2000, Mr. Crews reported to the Tehama County jail to serve a five-day contempt sentence. Later, he was served with a trial subpoena by defense counsel. In the end, defense counsel voluntarily agreed to withdraw the trial subpoena without a legal fight, but not until after Mr. Crews already had spent five days in jail and had incurred substantial interruption to the operations of *The Valley Mirror* as he fought his contempt sentence.[4]

The California Legislature's Response

The California legislature took notice of Mr. Crews' ordeal and other recent examples of abusive journalist subpoenas. Assemblywoman Carol Migden introduced AB 1860, along with a legislative report declaring the bill "makes a number of *clarifications* relative to the rights of journalists under the media shield law. …" The report discussed Mr. Crews' case and also stated, "[i]n a second case, a journalist faced fines of $1,000 per day for exercising his shield law rights. … In another case, a college newspaper journalist was subpoenaed into

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court to testify and threatened with jail time if he did not turn over his confidential notes. … Each of these journalists would have been spared hours in court and thousands of dollars in attorney fees through this bill." The report went on to explain that,

> Journalists are professional investigators. The main purpose of the shield law is to prevent government from making journalists its investigative agents and to prevent a journalist who is trying to cover the story from becoming part of the story (which makes them wholly unable to cover it). Increasingly, when a criminal case is newsworthy, the first thing (not the last thing) defense attorneys do is subpoena any journalist who has covered the story. This has several negative impacts: (1) it makes journalists the unpaid investigators of the party's counsel; (2) it harms journalists' ability to gather information in the future (e.g.,sources willing to be interviewed by a journalist on the condition of confidentiality will be unwilling to do so if they understand that the government can routinely violate that confidentiality agreement); and (3) it takes resources away from newsgathering. A reporter who becomes a witness is unable to cover the story. Additionally, successfully asserting one's constitutional shield law rights is expensive and time-consuming. Tim Crews' successful battle cost him five days in jail and legal fees of $70,000.

The California legislature unanimously adopted the bill, and Governor Davis promptly signed it into law. Section 1986.1 is designed to prevent many of the procedural problems that result in a loss of the substantive rights protected by the Shield Law. It ensures that a journalist will not be deemed to have waived his or her Shield Law rights by – often inadvertently – divulging privileged information in response to a subpoena. It provides that, except in "exigent circumstances," journalists must have at least five days' notice before being required to testify. Section 1986.1 also mandates that trial courts provide findings to support any infringement they might make on the journalist's Shield Law rights. These requirements *should* – except in "exigent circumstances" – provide journalists with the time needed to retain counsel and fully evaluate their rights, and force trial courts to evaluate and balance the interests being asserted.

Procedural Protections Available In Other States

A few other states have similar procedural mechanisms designed to protect the substantive rights conferred by their respective shield laws. For example, Louisiana's Shield Law protects a journalist's rights by providing that,

> [A] person entitled to claim the qualified protection provided under the provisions of Subsection B of this Section to whom a subpoena is directed may, within ten days after the service thereof, or, on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the attorney designated in the subpoena written objection specifying the grounds for his objection. Once objection is made, the party serving the subpoena shall not be entitled to compliance except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the person who served the objection for an order compelling compliance with such subpoena after a hearing in conformity with the provisions of Subsection B of this Section and based upon the findings required therein.

La. Rev. Stat. § 1459(C). This statute provides a different mechanism for protecting the subpoenaed journalist's rights, but presumably would be an effective tool for the journalist. Once served with a subpoena, a journalist need only serve a written objection on the attorney who issued it, and specify the grounds for the objection. Such notice may be done without the assistance of counsel. The result is that with minimal effort, the journalist can buy some time by shifting the burden back to the party issuing the subpoena, who then must evaluate the need for the journalist's testimony and, if appropriate, file a noticed motion to obtain that testimony.

New Jersey offers a different approach for protecting journalist rights. Its Shield Law provides that:

> Proceedings pursuant to this act shall take place before the trial, except that the court may allow a motion to institute proceedings pursuant to this act to be made during trial if the court determines that the evidence sought is newly discovered and could not have been discovered earlier through the exercise of due diligence.

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N.J. Stat. Ann.2A:84A-21.2. The New Jersey statute also provides that,

> The determinations to be made by the court pursuant to this section shall be made only after a hearing in which the party claiming the privilege and the party seeking enforcement of the subpoena shall have a full opportunity to present evidence and argument with respect to each of the materials or items sought to be subpoenaed.

N.J. Stat. Ann.2A:84A-21.3(c). In addition, the New Jersey statute establishes the burden of the party seeking to overcome the journalist's rights. N.J. Stat. Ann.2A:84A-21.3(b). Here, as with Louisiana's statute, a formal hearing must be held before the journalist's rights can be compromised. The journalist must be given the opportunity to present argument and legal authority to support his privilege claim, and the court is given specific criteria for evaluating those rights. Although New Jersey does not have a built-in delay for enforcement of the subpoena – as do California and Louisiana – the requirement of a hearing and "a full opportunity to present evidence and argument" may effectively delay enforcement of the subpoena long enough to enable the journalist to retain counsel to protect his or her rights.

Tennessee's laws also feature a procedural mechanism designed to protect the substantive rights conferred by the Shield Law. In Tennessee, the Shield Law establishes an apparently absolute privilege against divulging information "procured for publication or broadcast," and then provides:

> (1) Any person seeking information or the source thereof protected under this section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action or other proceeding in which the information sought is pending.
> (2) The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that [the information is necessary in light of three enumerated factors].

Tenn. Code Ann. § 24-1-208(c). The Tennessee statute also places the burden on the party issuing the subpoena to move for an order compelling disclosure of the sought-after information. The journalist's privilege is absolute – and cannot be compromised – unless the issuing party establishes a compelling need for that information. Again, the result should be that the journalist has *some* time to consult with counsel and prepare a response to the subpoena.

A Success Story In California

The initial experience of journalists under California's new statute indicates that its goal of protecting journalists from abusive subpoenas is being met. In our practice, at least two subpoenas have been withdrawn after counsel were alerted to the five day notice requirement. In another situation, in a rural court setting, the publisher brought section 1986.1 to the attention of the local bench and obtained assurances that in the future, its reporters would not be forced to testify, without counsel, on shortened notice.

One recent example demonstrates how effective section 1986.1 can be. In November, a prosecutor in a criminal case was interviewing the arresting officer a day before trial was scheduled to begin – as often happens in California's busy criminal law system – and learned for the first time that a local journalist had been on a ride-along with the police and had seen the defendant's arrest. The prosecutor promptly issued a subpoena to the reporter.

Counsel for the newspaper immediately referred the prosecutor to section 1986.1, and argued that the subpoena was invalid because the prosecutor failed to give the five days' notice required by the statute. The prosecutor – who had never seen section 1986.1 and did not know before counsel's letter that five days' notice was required – seized on the "exigent circumstances" exception and convinced the presiding judge to schedule a hearing to determine whether section 1986.1 precluded issuance of the subpoena. The court continued the trial, which was scheduled to last only a few days, to take argument on the applicability of section 1986.1.[5]

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At the hearing, the court found that the "exigent circumstances" exception did not apply. It held that exigent circumstances cannot exist if the arresting officer knows about the reporter and merely fails to relay that information to the prosecutor (which could effectively nullify the statute in California,given the busy schedules of prosecutors and their propensity to prepare their cases a few days, or less, before trial). Rather, exigent circumstances are circumstances – as defined in other areas of criminal law – that cannot be anticipated or prepared for, and which require an immediate response. The court found that the prosecutor's imputed knowledge (based on the arresting officer's knowledge), and his delay in preparing his case and interviewing the arresting officer, undermined any claim of exigent circumstances.

The court did, however, agree to the prosecutor's request that the trial be continued to allow him to subpoena the journalist on five days' notice. In the end, the prosecutor decided that the journalist's testimony was not worth the extra effort and delay, and elected to rest his case rather than hold the matter open the full five days.

The important role of section 1986.1 in this story is evident. Were it not for this statute, the journalist would have been required to appear for testimony on less than a days' notice. Although he certainly would have been represented by counsel when he appeared, it would have been difficult or impossible to fully brief the journalist's Shield Law rights on such short notice. In addition, the prosecutor would have had no incentive to evaluate his need for the journalist's testimony and no reason to voluntarily withdraw his subpoena. Section 1986.1 forced the prosecutor and the court to consider what the journalist's testimony offered to the prosecution, and whether that testimony was truly valuable. Other states, which undoubtedly have similar problems, should consider providing their journalists with protections like that offered by section 1986.1.

[1] California's Shield Law is embodied in Article I, section 2(b) of the California Constitution and section 1070 of the California Evidence Code. In virtually identical language, it provides persons connected with news organizations with an immunity from being held in contempt "for refusing to disclose the source of any information procured while so connected or employed for [public dissemination]… or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."

[2] Mr. Burke was co-counsel to Mr. Crews in his efforts to obtain extraordinary relief and to obtain the withdrawal of the trial subpoena later issued by the defense.

[3] California's Shield Law is absolute in its terms. However, the California Supreme Court held that the Shield Law must yield to a criminal defendant's constitutional right to a fair trial and established a two-part test for evaluating the respective rights. *See Delaney v. Superior Court,* 50 Cal.3d 785, 789 P.2d 934, 268 Cal.Rptr. 753 (1990). First, the defendant must establish a "reasonable possibility the information will materially assist his defense." 50 Cal. 3d at 807-08. If the defendant makes this showing, the trial court then must balance a number of factors, including whether the information is confidential or sensitive, and whether there is an alternative source for the information. *Id.* at 809-811.

[4] In recognition of his efforts, Mr. Crews was awarded the 2000 Bill Farr Award from the California Society of Newspaper Editors and the Francis Frost Wood Courage in Journalism Award from Hofstra University, among other honors.

[5] Ms. Wilcox represented the newspaper at the hearing.

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Our purpose in publishing this law letter is to inform our clients and friends of recent First Amendment and communications law developments. It is not intended, nor should it be used, as a substitute for specific legal advice since legal counsel may be given only in response to inquiries regarding particular factual situations.

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