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Judge Frank M. Coffin, of the United States Court of Appeals, First Circuit, has put into a single sentence of his opinion in BRUNO STILLMAN, INC. v THE GLOBE NEWSPAPERS (1980), the essence of the Robert Hohler case.

He said: "In determining what if any limits should be placed upon the granting of such requests (for discovery of testimony) courts must balance the potential harm to the free flow of information that might result against the asserted need for the required information."

That is what this case is about. The courts have been struggling with this problem since 1958 when GARLAND v TORRE, raised the issue, and they have increasingly acknowledged the existence of a testimonial privilege residing in the press. Torre went against the press, but acknowledged that there could be situations where the privilege existed.

BRANZBURG v HAYES, U. S. Supreme Court, 1972, enlarged upon the principle or privilege, and although it went against the press, Justice Lewis Powell's concurring opinion set forth the need to balance demonstrated need for disclosure against the requirements of a free press. Justice Potter Stewart in a dissent in which Brennan and Marshall joined, held that journalists should not be required to reveal confidential information to a grand jury unless the government could show there was probable cause to believe the newsman had information clearly relevant to the specific probable violation of law, and demonstrated that the information sought could not be obtained by alternative means less destructive of First Amendment rights, and demonstrate a compelling and over-riding interest in the information. (Testimonial Privileges, Page 418)

Interest in this balance grew over the years as law enforcement officials began to use more frequently the power

to subpoena reporters and editors to testify in criminal and civil cases. From 1970 to 1975 there were 500 subpoenas. They have been almost too numerous to count since: the Reporters Committee for Freedom of the Press from 1986 to September 1987 has had 1,500 calls for legal advice on the subject. Maine, according to David Cheever, of the Maine Attorney General's office, has had three journalist subpoenas in the last two years and five requests for reporter testimony, but he acknowledges his information is imcomplete.

Other events in this effort to unfold a rule have included many cases in the circuit courts, such as:

STATE v ST. PETER, in 1974, a Vermont case in which information sought from a journalist was held not related to guilt or innocence.

RILEY v CITY OF CHESTER, in the Third Circuit Court in 1979, in which the court refused to enforce disclosure because the journalistic source was only marginally related and the court refused to enforce disclosure.

BRUNO STILLMAN, INC. v THE GLOBE NEWSPAPERS, 1980, in the First Circuit, where testimony was not required because of the impact on the journalistic newsgathering ability had not been sufficiently weighed in the district court. In a footnote, Judge Coffin cited the late Alexander Bickel, who said: "The issue is the public's right to know. That right is the reporters by virtue of the proxy which the freedom of the press clause of the First Amendment gives to the press in behalf of the public." Another footnote called attention to Branzberg's stating that "without some protection for seeking out the news, freedom of the press could be eviscerated." This, said Coffin, points to the kind of Constitutionally sensitized balancing process stressed by Justice Powell in Branzberg.

The Department of Justice, long ago recognized the problem and 14 years ago in 1973 issued a guideline regulating the

government's power to issue subpoenas to the media. As summarized in the Practicing Law Institute's Communications Handbook, the guidelines "gave reporters a qualified privilege against government subpoenas. Members of the media could not be subpoenaed if the desired information was obtainable through alternative sources or investigative steps. They could be subpoenaed only in criminal cases, and then only if the government had reason to believe the information sought was essential to the investigation of a crime that had occurred. Subpoenas were to be limited to matters concerning the accuracy of published information except under exigent circumstances and were not to involve volumes of unpublished materials."

The modern version of these guidelines appears in the 1980 rules of Judicial Administration, Title 28, section 50.10. They set forth the widely known three-fold rule of: relevance to the case, availability of alternative sources, and the degree to which the sought information is essential to the conduct of the case. The guidelines also provide that no subpoena may be issued to the media without the express authorization of the Attorney General.

In a preamble to the detailed guides, the Department of Justice says that "in determining whether to request the issuance of a subpoena to a member of the news media.....the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement."

The Law Institute's Communications Law of 1986, Vol. II, notes the litigation since the issue of the guidelines. In the Federal Circuit courts, newspaper privilege to withhold has been recognized in the D.C. Circuit, the First Circuit, the Second Circuit, the Third Circuit, the Fourth Circuit, the Fifth Circuit, the Eighth Circuit, the Tenth Circuit, and the Eleventh Circuit. It has been recognized at the district level in the Sixth Circuit and the Seventh Circuit. District Courts are in conflict in the Ninth Circuit.

The work of Stone and Liebmann, in the Trial Practise Series, published by McGraw Hill, notes that "the journalists First Amendment privilege has gained such widespread acceptance that its applicability in most situations is no longer open to question. There is now a sufficiently large body of law dealing with the privilege that its contents are fairly well defined."

One notable Circuit Court opinion is that of the District of Columbia circuit court holding that "compelled disclosure by a journalist must be 'a last resort after pursuit of other opportunities has failed'." (Page 442, Stone and Liebmann.)

In the only reported federal case where the prosecution sought to compel a journalist to confirm that a defendant had made statements attributed to him in the journalist's article, disclosure was denied. S and L 443. U.S. v BLANTON 534 Fed Supp 295 (SD Fla 1982). In this case S and L say: "A reporter was subpoenaed to appear at trial for the sole purpose of verifying that the defendant had made the statements attributed to him in a published article. The district court held that even this limited imposition would have a chilling effect on press operations and quashed the subpoena for failure to exhaust non-media avenues for obtaining the same or equivalent information."

Stone/Liebmann after an exhaustive study of cases, concludes that "In recent years, courts have broadened their conception of the press interests threatened by compelled disclosure. Forced production of any unpublished material or information is now widely seen to constitute a serious intrusion on the press's functional autonomy in newsgathering and editing, an autonomy deemed vital to the press's effective fulfillment of its societal role."

They also acknowledge that "journalists are generally considered to have no significant interest, or a substantionally

diminished interest, in the protection of information and materials in the following circumstances: (1) when they have previously published or broadcast the information, (2) when the information involves criminal events to which they were eye witnesses, and (3) when the information was not obtained in a newsgathering or editorial role."

Hohler's information was published, but as I understand the situation he faced a threat that he would be asked questions beyond the published material in cross examination, and there was no enumeration of or specification limiting the issues to published matter in the order to appear and testify.

It is against this background on the state of the law that I think we must examine the Hohler case. From the testimony of Assistant Attorney General Thomas Goodwin I gather that: (1) He obtained the indictment of Richard Steeves without Hohler's story; (2) He was confident that he had a prosecutable case without ever knowing of it; (3) he commenced the trial of the case without having issued a subpoena to get Hohler to testify. His conduct did not conform to the rules of the U. S. Department of Justice or the policy prevailing in the circuit courts generally, in that: (1) he had alternative sources for the same information in a statement given to his own investigator; (2) he did not seek other sources; (3) he did not feel Hohler's testimony essential to convict (and in fact it proved unnecessary in the trial of the case.)

Given the state of the law and the facts in this case, in my opinion, the subpoena should not have been issued, no contempt charge should have been made, there should have been no prosecution of Hohler for contempt of court, and he should not have been tried and convicted. I think the Maine Attorney General ought to have guidelines like those laid down by the Attorney General of the United States. I think the conduct of the Attorney General's office, in its reckless efforts to

use the press, is a threat to freedom of the press; a violation of the Constitution of the United States as it is generally construed in the federal courts at this time (even though an affirmative case has not reached the U. S. Supreme Court.)

Robert Hohler was tried and convicted for an act inspired by his professional belief in the right of the press to a testimonial withholding privilege consistent with the preponderant views of the federal courts, many state courts, and the U. S. Department of Justice. He is, in my opinion, the victim of an outrageous miscarriage of justice.

James Russell Wiggins