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PROMISES OF CONFIDENTIALITY TO NEWS SOURCES AFTER *COHEN v. COWLES MEDIA COMPANY*: A SURVEY OF NEWSPAPER EDITORS

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I. INTRODUCTION

If a reporter promises confidentiality to a news source in exchange for information, and the reporter's editorial superiors break that promise by publishing the information and disclosing the source's name, may the source recover damages for breach of promise under state law without violating the First Amendment? In *Cohen v. Cowles Media Company*, the Minnesota state courts and the United States Supreme Court addressed that question.¹ The courts ultimately decided that such a source may

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1. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248 (Minn. App. 1989); 457 N.W.2d 199 (Minn. 1990); 111 S. Ct. 2513 (1991); 479 N.W.2d 387 (Minn. 1992); 481 N.W.2d 840 (Minn. 1992).

The first four *Cohen* decisions are discussed at length in this article. The fifth *Cohen* decision, reported at 481 N.W.2d 840 (Minn. 1992), is a one-paragraph order responding to defendant newspapers' petition for rehearing asking the Minnesota Supreme Court to consider whether Cohen was entitled to pre- and post-judgment interest. In its order, the Supreme Court remanded the interest issue to the trial court for its consideration, and denied Cohen's motion for Rule 11 sanctions and attorney fees in responding to the petition for rehearing.

Commentary on the *Cohen* case includes Julia A. Loquai, Comment, *Keeping Tabs on the Press: Individual Rights v. Freedom of the Press Under the First Amendment*,

indeed recover damages against the newspaper under state law without a First Amendment violation.

We undertook a survey of newspaper editors to determine their views regarding promises of confidentiality, to determine the effect of the *Cohen* case on the newspaper industry, and to discover related information. This article will discuss the *Cohen* case and report the survey results.

Section II of the article sets forth the facts that led to the lawsuit brought by source Dan Cohen against two Minneapolis newspapers for breach of promise of confidentiality. Section III sets forth the history of the lawsuit itself, as it proceeded through the Minnesota state courts to the United States Supreme Court, reaching a final resolution on remand to the Minnesota Supreme Court. The Minnesota Court of Appeals decision, the Minnesota Supreme Court's first decision, and the

16 HAMLIN L. REV. 447 (1993); Robert E. Drechsel, *Media Ethics and Media Law: The Transformation of Moral Obligation Into Legal Principle*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5 (1992); Patrick M. Garry, *The Trouble with Confidential Sources: A Criticism of the Supreme Court's Interest-Group View of the First Amendment in Cohen v. Cowles Media Co.*, 14 HASTINGS COMM. & ENT. L.J. 403 (1992); Kyu Ho Youm and Harry W. Stonecipher, *The Legal Bounds of Confidentiality Promises: Promissory Estoppel and the First Amendment*, 45 FED. COMM. L. J. 63 (1992); Jeffrey A. Brueggeman, Note, *Where Is the First Amendment When You Really Need It? Lowering the Constitutional Barrier to Suits Against the Press*, 9 J. L. & POL. 147 (1992); Timothy J. Fallon, Note, *Stop the Presses: Reporter-Source Confidentiality Agreements and the Case for Enforcement*, 33 B. C. L. REV. 599 (1992); Susan S. Greenebaum, Comment, *Confidentiality Agreements Between the Press and its Sources: Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 41 WASH. U.J. URB. & CONTEMP. L. 243 (1992); Elisabeth L'Heureux, Note, *Freedom of the Press - Confidentiality - Reporters are Liable Under Promissory Estoppel Doctrine for Breach of Source Confidentiality Agreement*, 23 SETON HALL L. REV. 345 (1992); Patrick M. McCarthy, Note, 69 U. DET. MERCY L. REV. 339 (1992); Gregory F. Monday, Note, *Cohen v. Cowles Media is Not a Promising Decision*, 1992 WISCONSIN L. REV. 1243; Harold B. Oakley, Note, *Promises of Confidentiality: Do Reporters Really Have to Keep Their Word?* 57 MO. L. REV. 955 (1992); William Penner, Note, *Cohen v. Cowles Media Co.: Upsetting the First Amendment Scales*, 26 U.S.F. L. REV. 753 (1992); Jeffrey A. Richards, Note, *Confidentially Speaking: Protecting the Press from Liability for Broken Confidentiality Promises — Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 67 WASH. L. REV. 501 (1992); C. Adrian Vermeule, Note, *Confidential Media Sources and the First Amendment: Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 15 HARV. J.L. & PUB. POL'Y 266 (1992); Susan Allison Weifert, Note, *Cohen v. Cowles Media Co.: Bad News for Newsgatherers; Worse News for the Public*, 25 U.C. DAVIS L. REV. 1099 (1992); Jens B. Koepke, Comment, *Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newspaper "Burns" a Confidential Source*, 42 FED. COMM. L. J. 277 (1990); Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553 (1989).

United States Supreme Court's decision in the case were all split decisions. Section III includes a summary of the arguments made by both the court majorities and the dissenters. Section IV reports and discusses the survey results. Section V provides a summary and conclusion.

II. FACTUAL BACKGROUND²

In the 1982 Minnesota state elections, Wheelock Whitney was the Independent Republican ("IR") party candidate for governor and former governor Rudy Perpich was the Democratic-Farmer-Labor ("DFL") party candidate.³ One week before the elections, IR supporter and former Hennepin county attorney⁴ Gary Flakne discovered two public court records concerning Marlene Johnson, the DFL candidate for lieutenant governor. The first record showed that Johnson had been arrested in 1969 for unlawful assembly, and that the charge was later dismissed. The second record showed that Johnson had been arrested and convicted of petty theft in 1970, and that the conviction was vacated in 1971.

On Wednesday, October 27, 1982, shortly after the discovery of the Johnson records, several IR supporters met to discuss the release of these documents to the media.⁵ Among the people

2. The facts of the *Cohen* case stated here are taken from the reported Cohen decisions. See *supra* note 1, and the newspaper and wire service stories cited in the footnotes to this article.

3. Perpich was Minnesota's governor between December 1976 and December 1978 but was not elected to that office. He reached it as follows: Wendell Anderson was elected governor of Minnesota in 1970 and Perpich was elected lieutenant governor. In November 1976, U.S. Senator Walter Mondale (D-Minn.) was elected Vice President of the U.S., and on December 29, 1976, Anderson resigned the governorship, which elevated Perpich to the governor's office. On December 30, 1976, now-governor Perpich appointed Anderson to fill Mondale's U.S. Senate seat. In November 1978, Perpich ran for governor against IR candidate Albert Quie. Perpich lost the election. See George Boosey, UPI, Oct. 22, 1982, available in LEXIS, Nexis Library, ARCHIV File; Biographical Directory of the U.S. Congress 1774-1989 (1989).

4. Hennepin County contains the city of Minneapolis and most of its suburbs.

5. At this point in the gubernatorial campaign, three polls (a private DFL poll, a private IR poll, and the Minnesota poll) all showed Perpich comfortably ahead of Whitney. Perpich had apparently been ahead of Whitney in these polls since the September 14 party primaries. DFL polls showed that Perpich's lead had increased from 18 to 23 to 27 points. A former IR state chairman talked about Minnesota's "love affair" with Perpich and predicted that Perpich would win the election. Whitney himself described Perpich as a "folk hero." George Boosey, *Minnesota Election — Governor's*

attending this meeting was Dan Cohen, a well-known IR supporter and the public relations director for Martin-Williams, the advertising agency that was handling the advertising for the Whitney campaign. At the meeting, the group decided that Cohen should be the one to release the documents because of his good rapport with the local media. The group also agreed that Cohen should retain anonymity in releasing the documents. After the meeting, Cohen contacted four journalists: Lori Sturdevant of the Minneapolis Star and Tribune ("Star Tribune"); Bill Salisbury of the St. Paul Pioneer Press Dispatch ("Pioneer Press"); Gerry Nelson of the Associated Press; and David Nimmer of WCCO Television. Cohen reached all but Nimmer by telephone and said: "I have some material which may or may not relate to the upcoming statewide election. And assuming that we can reach an agreement as to the basis on which I would provide this material to you, I will provide it."⁶

All three reporters agreed to meet with Cohen. Later that morning, Cohen met separately with Sturdevant and Salisbury in the State Capitol building news office, and made the following proposal to each reporter:

I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and that you will also agree that you're not going to pursue with me a question of who my source is, then I will furnish you with the documents.⁷

Both Sturdevant and Salisbury agreed to Cohen's proposal, and Cohen gave each of them copies of the court records. Cohen later met separately with Nelson and Nimmer, each of whom also agreed to Cohen's proposal, after which Cohen gave each of them copies of the court records.

Of the four reporters, only Sturdevant raised the issue of exclusivity with Cohen. After Sturdevant had agreed to Cohen's

Race, UPI, Oct. 28, 1982, available in LEXIS, Nexis Library, ARCHIV File.

6. *Cohen*, 445 N.W.2d 248 at 252.

7. *Id.*

proposal and received the documents, she asked Cohen if he was giving the documents to her alone. Cohen said "no" and Sturdevant expressed no objection to the lack of exclusivity.

The Star Tribune, Pioneer Press, Associated Press and WCCO-TV handled the information obtained from Cohen and their reporters' promises of confidentiality made to Cohen in various ways. The Star Tribune's actions were similar to those of the Pioneer Press.

On October 27, after Sturdevant and Salisbury met with Cohen, both the Star Tribune and the Pioneer Press interviewed Marlene Johnson for her explanation. Johnson explained that the unlawful assembly charge resulted from her participation in a demonstration at a St. Paul construction site. The demonstrators were protesting the city's alleged failure to hire minority workers on construction projects. The unlawful assembly charge was dismissed on April 27, 1970, the day Ms. Johnson's father died. Johnson explained further that the death of her father had left her very upset, and that her emotional distress had led to the petty theft (theft up to \$150) incident. She stated that in May, 1970, while under this emotional distress, she forgot to pay for \$6 worth of sewing materials at a St. Paul Sears store. The petty theft conviction was vacated in 1971. The court records obtained by Cohen did not contain the underlying facts of the two criminal charges.

On the afternoon of October 27, the Star Tribune editorial staff met to discuss the story. Sturdevant was not present at the meeting and had no input into whether the story was reported. The group present at the meeting considered several options. One option was not to publish the story on the grounds that the Johnson incidents were not newsworthy. However, most editors appear to have considered the Johnson incidents newsworthy. Further, the Star Tribune had editorially endorsed the Perpich-Johnson ticket. Some editors feared that if the Star Tribune did not print the Johnson story, other media would, leaving the Star Tribune open to the charge that it was suppressing information damaging to its endorsed ticket.

A second option explored by Star Tribune editors was to publish the information about Johnson's arrest and conviction,

and to honor Sturdevant's promise to Cohen by describing the source of the information either as a source close to the Whitney campaign, or a prominent Independent Republican. However, some editors argued that Cohen's identity as the source was as newsworthy as the Johnson incidents, and that to attribute the story to an unidentified source would be misleading. Thus, the editors rejected the second option.

The Star Tribune editors next explored a third option: to determine whether Cohen would agree to have his name published as part of the Johnson story. The editors asked Sturdevant to see if Cohen would release the Star Tribune from its promise of confidentiality. Sturdevant strongly objected to the breaking of her promise of confidentiality to Cohen, and demanded that her name not appear on the article if it were published. Sturdevant telephoned Cohen, but he refused to agree to the publication of his name.

In the end, the Star Tribune decided to publish the Johnson story, including Cohen's name. Sturdevant telephoned Cohen about 7:30 p.m. and informed Cohen of the editors' decision. Cohen replied that if his name was to be published, he wanted to make the following statement: "The voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie."⁸

The Pioneer Press editors also discussed the Johnson story. Acting independently of the Star Tribune, the Pioneer Press editors also decided to publish the story, identifying Cohen by name. Salisbury, like Sturdevant, objected to the breaking of Salisbury's promise of confidentiality to Cohen; however, he did not object to his name appearing on the article.

The Associated Press honored its reporter's promise of confidentiality to Cohen. It published the Johnson story but stated that court documents relating to the arrests and conviction "were slipped to reporters." WCCO-TV decided not to broadcast the story at all.

On Thursday, October 28, 1982, the Star Tribune published

8. *Id.* at 253.

a front page article under the headline “Marlene Johnson arrests disclosed by Whitney ally.”⁹ Pursuant to Sturdevant’s demand, the article was attributed to “Staff Writer.” The thirty-three paragraph article named Cohen as the source in paragraph one. The article described Cohen as “a friend and political associate of IR gubernatorial candidate Wheelock Whitney” and “an advertising executive with Martin-Williams, Inc.” The article disclosed Johnson’s arrests and conviction, along with the mitigating information provided by Johnson. It included Cohen’s statement to Sturdevant that “[t]he voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie.” The article noted Cohen’s position that the issue he hoped to raise by releasing the Cohen records wasn’t “whether Johnson had been convicted, but whether she tried to conceal it from the public.” The article then observed that Cohen was a “former Independent-Republican alderman in Minneapolis who this year ran unsuccessfully for the Hennepin County Board.” The article also reported Cohen’s statement that “when he [Cohen] was arrested for scalping a ticket at the Kentucky Derby three years ago, he publicized the incident immediately.” The article contained a photograph of Johnson and a photograph of Cohen. The article said that “Cohen took copies of the court records to several news organizations. . . .” The article did not mention Sturdevant’s promise of confidentiality to Cohen.

That same day the Pioneer Press published an article under the headline “Perpich running mate arrested in petty theft case in ‘70.”¹⁰ The article appeared on the first page of the Pioneer Press’ local news section. “Bill Salisbury, staff writer” was identified as the article’s author. The nineteen-paragraph article named Cohen as the source in paragraph fourteen. There were no photographs. The article described Cohen as “a prominent Independent Republican” and “a Minneapolis advertising and public relations consultant”, but did not name Martin-Williams as Cohen’s employer. The article disclosed Johnson’s arrests and conviction, along with the mitigating information provided by Johnson. It included Cohen’s statement that Perpich and Johnson had been “living a lie” by failing to reveal Johnson’s arrests

9. See *infra* Appendix B, Exhibit 1.

10. See *infra* Appendix B, Exhibit 2.

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to the public. The article also included Cohen's statement that the issue was not whether Johnson had been convicted but whether she had concealed it. The article said that Cohen "gave the court records to at least three reporters, but asked that his name not be used." The article did not mention Salisbury's promise of confidentiality to Cohen. This was the first time either the Star Tribune or the Pioneer Press had ever broken a reporter's promise of confidentiality made to a source.

Later in the day on October 28, after the Star Tribune and Pioneer Press articles identifying Cohen and his employment appeared, Cohen's employer confronted him. According to Cohen, he was fired. According to Cohen's employer, Cohen resigned.

In the days after the original Johnson/Cohen articles of October 28 and before the November 2 election, the Star Tribune and Pioneer Press published several items concerning the Johnson/Cohen story. On Friday, October 29, the Star Tribune published a commentary by columnist Jim Klobuchar criticizing Cohen for unfair campaign tactics.¹¹ On Saturday, October 30 (the day before Halloween), the Star Tribune published an editorial cartoon in which a trick-or-treater dressed as a garbage can was at the door of Perpich headquarters. The garbage can was labeled "Last minute campaign smears," and Perpich, standing in the doorway looking at the trick-or-treater, was saying "It's Dan Cohen."¹²

Perpich and Johnson won the election, held on November 2, by a fifty-nine to forty-one percent margin.¹³ After the election, the newspapers published further items concerning the Johnson/Cohen story. On Sunday, November 7, the Star Tribune published a letter to the editor from Gary Flakne,¹⁴ the IR supporter who had originally discovered the Johnson court records. The letter criticized the Star Tribune for breaking its reporter's promise of confidentiality to Cohen. On the same page, the Star Tribune published a column entitled "If you ran the newspaper. . .", written by Lou Gelfand, the Star Tribune's "readers'

11. See *infra* Appendix B, Exhibit 3.

12. MINNEAPOLIS STAR TRIBUNE, Oct. 30, 1982, at 10A.

13. *Gubernatorial Race Results*, N. Y. TIMES, Nov. 4, 1982, at A20.

14. See Appendix B, Exhibit 4.

representative.”¹⁵ Gelfand’s column discussed the decision process of the Star Tribune and Pioneer Press editors regarding the disclosure of Cohen’s name. As to the Star Tribune’s confidentiality policy, Gelfand quoted Star Tribune editor Frank Wright who said that a Star Tribune reporter should not promise confidentiality to a source without consulting an editor. Gelfand wrote that the Star Tribune’s editors had published the article because the Johnson information was “marginally” newsworthy. Further, the editors had several reasons for identifying Cohen. One reason was that even though Cohen had asked for confidentiality, many people knew Cohen was the source of the Johnson records. A second, closely related reason was that Cohen had “openly” supplied the Johnson records to several reporters. In the editors’ view, “[e]xpecting confidentiality while so brazenly distributing the material was ridiculous.”¹⁶ A third reason was that in the editors’ view Cohen’s action of providing the Johnson records so near to the election was itself newsworthy. Gelfand stated that had the Star Tribune published the Johnson story without identifying the source, the Star Tribune would have endangered its credibility with readers, and that identifying Cohen without his consent was justified by “an unspoken standard of journalism that defines the substance of Cohen’s tip as beneath the threshold of acceptable, unattributable information.” Gelfand concluded by saying that, “If the incident contributes to the cleansing of political campaigning, then it will have served a purpose.”

That same Sunday, November 7, the Pioneer Press pub-

15. See Appendix B, Exhibit 5.

16. The Johnson court records were public records, self-authenticating and self-explanatory (although they were not “fully” explanatory because they did not provide the underlying facts of the Johnson arrests). The authenticity and meaning of the records did not depend on Cohen’s identity, and he provided no information beyond the records themselves that would give the records any added meaning. Thus, this situation was unlike the case where a confidential source provides oral or written information whose authenticity or meaning or both depend on the identity of the confidential source. A good example of the latter situation is the information regarding the Watergate incident provided by “Deep Throat” to Washington Post reporter Bob Woodward. See CARL BERNSTEIN AND BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974). Further, Cohen did not attempt to extract a promise to publish the records from any of the journalists he spoke to. Thus, one might wonder why Cohen did not just anonymously mail the Johnson court records to the journalists. By an anonymous mailing, it appears that Cohen could have achieved the result he intended (informing the journalists of the Johnson arrests and thereby providing the opportunity for publication thereof) while completely avoiding the risk that his name would be disclosed.

lished a letter to the editor from Gary Flakne that made the same point as Flakne's letter to the Star Tribune, though slightly different in text.¹⁷ On the same page, the Pioneer Press published a column entitled "Editor's Notebook," written by John R. Finnegan, its vice-president and editor.¹⁸ Finnegan's column, like Gelfand's, discussed the decision process of the Pioneer Press editors regarding the disclosure of Cohen's name.¹⁹

III. DAN COHEN'S LAWSUIT AGAINST THE STAR TRIBUNE AND PIONEER PRESS FOR BREACH OF PROMISE OF CONFIDENTIALITY

In December 1982, Cohen filed a lawsuit in a Minnesota state court against Cowles Media Company (owner of the Star Tribune) and Northwest Publications (owner of the Pioneer Press). Cohen alleged breach of contract and fraudulent misrepresentation, and sought compensatory and punitive damages.

In July 1988, the case went to trial in Hennepin County District Court. The trial court ruled that there was no state action and thus rejected the newspapers' argument that the First Amendment barred Cohen's lawsuit. The jury found that the newspapers had formed contracts with Cohen. The jury concluded that the newspapers had breached these contracts and had made misrepresentations to Cohen. The jury awarded Co-

17. See Appendix B, Exhibit 6.

18. See Appendix B, Exhibit 7.

19. Finnegan's column stated in part that:

[Pioneer Press executive editor David] Hall agreed the information should be published. He believed, however, that the source also should be identified. Because of the nature of the charge, he felt strongly that the public should be made aware of the source. . . .

[O]ur staff acted in good faith. [Pioneer Press reporter Bill] Salisbury made a quick decision that was contrary to the newspaper's policy. The decision was reviewed by a senior editor who decided this was an exceptional case that called for overruling the reporter.

In political campaigns newspapers should rarely accept data from sources who are unwilling to be publicly identified with charges against opposing candidates.

There are times when confidentiality must be protected at all costs.

This was not one of them.

Id.

hen \$200,000 in compensatory damages jointly and severally against the two newspapers, and \$250,000 in punitive damages against each newspaper.²⁰ The newspapers moved for judgment notwithstanding the verdict or a new trial. The trial court denied these motions and entered judgment for Cohen.²¹

The newspapers appealed.²² In a 2-1 decision issued in September 1989, the Minnesota Court of Appeals affirmed the compensatory damage award but reversed the punitive damage award.²³ In an opinion by Judge Short, the appeals court first agreed with the trial court that the case did not involve state action and thus did not implicate the First Amendment.²⁴ In reaching this conclusion, the appeals court reasoned that the neutral application of state contract law to private parties is not state action.²⁵ Further, it ruled that even if Cohen's lawsuit did constitute state action and implicate the First Amendment, the newspapers' First Amendment rights were outweighed by the state's interest in protecting contract rights;²⁶ that failure to enforce the promise of confidentiality to Cohen could lead news sources to dry up, causing a decrease in newsworthy information being published;²⁷ and that in any event, the newspapers had

20. *Cohen*, 445 N.W.2d at 254; *Cohen*, 457 N.W.2d at 200.

21. *Cohen*, 445 N.W.2d at 254.

22. *Id.*

23. *Id.* at 262.

24. *Id.* at 254-56.

25. *Id.* at 254.

26. *Id.* at 256-57.

27. *Id.* at 257. In this regard, the appeals court stated that enforcing the promise of confidentiality to Cohen would promote the state interests expressed in the Minnesota Free Flow of Information Act, MINN. STAT. ANN. 595.021 - 595.025 (West 1988). The purpose section of that Act (595.022) provides that:

In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of [this Act] is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

The Act generally provides that the state of Minnesota (and its political subdivisions) may not compel anyone "gathering, procuring, compiling, editing, or publishing" information for the purpose of transmission to the public, to disclose in any proceeding the person or means through which his information was acquired. *See* 595.023. The Act provides an exception for criminal cases where 1) there is probable cause to believe that the source has information relevant to the commission of a felony, and 2) the informa-

waived any First Amendment rights they may have had to publish Cohen's name.²⁸ Thus, the First Amendment did not bar Cohen's claim. Second, the appeals court ruled that the information provided by Cohen constituted consideration; that the contract did not involve a wrongful manipulation of the electoral process and so the contract was not void as against public policy; and that the contract, though oral, was enforceable under the Minnesota statute of frauds.²⁹ Thus, the compensatory damage award for breach of contract was valid.³⁰ Third, the appeals court ruled that Cohen had failed to prove fraudulent misrepresentation because the reporters had intended to perform their promises of confidentiality.³¹ Thus, the newspapers had committed no tort, and the punitive damage award was invalid.³²

Dissenting as to the contract claim, Judge Crippen argued that awarding Cohen damages on that claim implicated the First Amendment; that this award was not neutral to press freedom; that this award unjustifiably intruded on the editorial process because the state's interest in enforcing the promise of confidentiality was not compelling; and that the newspapers had not waived their First Amendment rights.³³ He asserted that "the [F]irst [A]mendment guarantees that the press has special immunity from officials willing to restrict its freedom,"³⁴ because the press keeps government power in check by criticizing government and providing information to the public. "In sum," he said, "the publication conduct of the press cannot be governed by the courts in the same manner as other conduct is judged."³⁵

tion cannot be obtained by any means less destructive of first amendment rights, and 3) there is a compelling interest in disclosure and disclosure is needed to prevent injustice. See 595.024. The Act also provides an exception for defamation cases where 1) there is probable cause to believe that the source has information relevant to the issue of defamation and 2) the information cannot be obtained by any means less destructive of first amendment rights. See 595.025.

State statutes of this type are often called "reporter's shield" laws. A synonym in earlier days was "newsman's privilege" laws. See Romualdo P. Eclavea, Annotation, *Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information*, 99 A.L.R. 3D 37 (1992).

28. *Cohen*, 445 N.W.2d at 258.

29. *Id.* at 262.

30. *Id.*

31. *Id.* at 259-60.

32. *Cohen*, 445 N.W.2d at 260.

33. *Id.* at 262-68.

34. *Id.* at 268.

35. *Id.* at 268.

The newspapers again appealed. In a 4-2 decision issued in July 1990, the Minnesota Supreme Court reversed the compensatory damage award.³⁶ In an opinion by Justice Simonett, the court first agreed with the appeals court that Cohen had failed to prove fraudulent misrepresentation and thus that the punitive damage award was invalid.³⁷ Second, the court ruled that a source and a reporter do not ordinarily believe that a promise of confidentiality is a legally binding contract; rather, both parties understand that such a promise is given as a moral commitment.³⁸ Thus, the reporters' promises of confidentiality to Cohen did not constitute contracts. Third, the court addressed whether Cohen might have a promissory estoppel claim.³⁹ The court found that the reporters made a promise of confidentiality to Cohen; that the reporters expected that promise to induce Cohen to provide the Johnson records; and that he had provided those records to his detriment.⁴⁰ However, the court found troublesome promissory estoppel's requirement that injustice can be avoided only by enforcing the promise.⁴¹ The court stated that resolving that issue inevitably implicated the First Amendment, because "[i]n deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated."⁴² This would require the court to balance the newspapers' First Amendment right to publish against Cohen's common law interest in enforcing the promise of confidentiality. The court reasoned that a newspaper's process of choosing what to publish is a process that is critical to press freedom; that the promises of confidentiality to Cohen arose in "the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source

36. *Cohen*, 457 N.W.2d 199 (Minn. 1990).

37. *Id.* at 202.

38. *Id.* at 203.

39. *Id.* at 203-04; RESTATEMENT (SECOND) OF CONTRACTS 90(1) (1981) provides in relevant part that "[a] promise which the promisor should reasonably expect to induce action . . . on the part of the promisee . . . and which does induce such action . . . is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

The promissory estoppel theory apparently had not been addressed in the trial court or the appellate briefs; a state Supreme Court Justice raised the issue during oral argument. *Cohen*, 457 N.W.2d at 204 n.5.

40. *Id.* at 204.

41. *Id.*

42. *Id.* at 205.

involved in a political campaign”;⁴³ and that awarding damages for breach of the promise of confidentiality to Cohen would chill public debate and violate the newspapers’ First Amendment rights. The court noted that cases may exist where the government’s interest in enforcing a promise of confidentiality outweighs the press’ First Amendment rights, but that this was not such a case.

Justice Yetka’s dissent argued that the court majority had “carve[d] out yet another special privilege in favor of the press that is denied other citizens.”⁴⁴ He asserted that the press should be required, like anyone else, to keep its promises.⁴⁵ He asserted further that the newspapers here should have either not promised confidentiality to Cohen, or having promised confidentiality, either not published the Johnson story at all or published it without disclosing Cohen’s identity.⁴⁶ He argued that failing to enforce the promise to Cohen had two negative effects. First, it would dry up sources, thus denying the public information far more important than the information about Johnson’s minor offenses.⁴⁷ Second, it violated the rule of equality under the law.⁴⁸ Finally, he suggested that the press had been hypocritical, by demanding confidentiality when it does not want to reveal confidential sources, yet violating confidentiality agreements when doing so would make a story more sensational and profitable.⁴⁹

Justice Kelley’s dissent agreed with Justice Yetka’s that the court majority had given the press unjustified special treatment, and likewise suggested that the press was being hypocritical.⁵⁰

43. *Id.*

44. *Cohen*, 457 N.W.2d at 205.

45. *Id.*

46. *Id.* at 205-06.

47. *Id.* at 206.

48. *Id.*

49. *Cohen*, 457 N.W.2d at 206.

50. *Id.* at 206-07. In a footnote, Justice Kelley stated in part that:

These media defendants now advance a First Amendment argument based upon the “public’s right to know.” I suggest to do so is indeed ironical when considered in the light of the extensive efforts of each to promote enactment of Minnesota Statutes Sections 595.021 to 595.025, the Minnesota Free Flow of Information Act, sometimes popularly referred to as the Reporter’s Shield Act.

Cohen, 457 N.W.2d at 207 n.1. The provisions of the Minnesota Free Flow of Information Act are summarized at *supra* note 27.

Justice Kelley argued that the First Amendment had nothing to do with the case, and agreed with Justice Yetka that the majority's decision would dry up sources, thus inhibiting rather than promoting the First Amendment's goals.⁵¹

The United States Supreme Court granted Cohen's request for certiorari. In June 1991, the court ruled 5-4 in an opinion by Justice White that the First Amendment did not bar Cohen from proceeding against the newspapers on a promissory estoppel theory, and thus reversed the Minnesota Supreme Court's decision.⁵² First, the court ruled that the application of state rules of law in state courts in a way that allegedly restricts First Amendment rights constitutes state action.⁵³ Therefore, Cohen's promissory estoppel claim involved state action implicating the First Amendment. Second, the court asserted that two alternative lines of cases involving press freedom exist.⁵⁴ The first line of cases holds that if the press lawfully acquires truthful information about a matter of public importance, then under the First Amendment, the government may not punish publication of that information unless such punishment is "need[ed] to further a state interest of the highest order."⁵⁵ The second line of

51. *Cohen*, 457 N.W.2d at 206-207.

52. *Cohen*, 111 S. Ct. 2513 (1991).

53. *Id.* at 2517-18.

54. *Id.* at 2518.

55. *Id.* at 2518 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). After stating this rule, the court identified three decisions as being in this first line of cases: *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The court described these as cases that held insufficient the asserted government interest in preventing publication of truthful, lawfully acquired information.

In *Smith*, a West Virginia statute made it a crime for a newspaper to publish, without juvenile court approval, the name of any youth charged as a juvenile offender. Two local newspapers obtained the name of a juvenile homicide defendant by listening to the police band radio frequency and interviewing eyewitnesses. The newspapers published the juvenile's name without juvenile court approval, and were indicted for violating the statute. The U.S. Supreme Court held the statute unconstitutional, ruling that the First Amendment barred the government from punishing a newspaper for truthful publication of an alleged juvenile offender's name, lawfully acquired, because press freedom outweighed the state's interest in protecting the anonymity of juvenile defendants. The court suggested that since the statute applied only to newspapers, it was underinclusive. Further, the court noted that many states had found ways to achieve anonymity of juvenile defendants without imposing criminal penalties on the press (such as cooperation between juvenile courts and newspaper editors), suggesting that the statutory purposes could be achieved with means other than criminal liability that were less restrictive of press freedom. *Smith*, 443 U.S. at 103.

In *Florida Star*, a Florida statute made it a crime for any instrument of mass com-

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cases holds that a generally applicable law does not violate the First Amendment if its enforcement against the press has merely incidental effects on the press' ability to gather and report news.⁵⁶ The court ruled that this case was controlled by the second line of cases. The court reasoned that state promissory estoppel law is a law of general applicability that does not target the press; that imposing liability on the newspapers here for breach of promise would not punish them for publishing lawfully obtained truthful information because compensatory damages

munication to publish or broadcast the name of a sexual offense victim. A local newspaper obtained the name of a rape victim by reading a publicly available police report. The newspaper published the rape victim's name, and she sued the newspaper in a state court, alleging that the newspaper had negligently violated the statute. The U.S. Supreme Court, relying on *Smith*, ruled that the First Amendment barred the imposition of damages on the newspaper. The court stated that since the statute applied only to instruments of mass communication, it was underinclusive. Further, the court suggested that the statutory purposes could be achieved with means other than civil liability that were less restrictive of press freedom. *Florida Star*, 491 U.S. at 524.

In *Landmark Communications*, a Virginia statute made it a crime to divulge information regarding proceedings before a state judicial review commission that was authorized to hear complaints about state judges' disability or misconduct. A local newspaper published an article that reported on a pending inquiry by the commission and identified the judge whose conduct was being investigated. The newspaper was convicted of violating the statute. The U.S. Supreme Court held the statute unconstitutional, ruling that the First Amendment barred the government from punishing third persons who were strangers to confidential commission proceedings for divulging truthful information regarding such proceedings, because freedom of speech outweighed the state's interest in protecting the reputation of judges or the institutional reputation of courts. *Landmark Communications*, 435 U.S. at 829.

56. *Cohen*, 111 S.Ct. at 2518. After stating this rule, the court identified eight decisions as being in this second line of cases: *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that the First Amendment does not relieve a reporter of the citizen's obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (holding that the First Amendment does not immunize the press from the application of the copyright laws); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (holding that the the First Amendment does not immunize the press from the application of the National Labor Relations Act); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (holding that the First Amendment does not immunize the press from the application of the Fair Labor Standards Act); *Associated Press v. U.S.*, 326 U.S. 1 (1945) and *Citizen Publishing Co. v. U.S.*, 394 U.S. 131 (1969) (holding that the First Amendment does not immunize the press from the application of the antitrust laws); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding that a city ordinance imposing a license tax on people distributing religious material door-to-door violated the First Amendment, but stating in dictum that the press is not "free from all financial burdens of government") and *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (holding that a use tax on the cost of paper and ink products used in producing publications violated the First Amendment, but stating in dictum that the government can subject newspapers to generally applicable economic regulations).

are not punishment; and that cases like *The Florida Star v. B.J.F.*⁵⁷ and *Smith v. Daily Mail Publishing Co.*⁵⁸ are distinguishable. In those cases, said the Court, the state itself defined the content of publications that would trigger liability, whereas here, Minnesota law merely required a promisor to perform his promise, the parties themselves had determined their legal obligations, and any limits which the Minnesota courts might place on the newspapers' publication of truthful information were imposed by the newspapers themselves.⁵⁹ Further, the court reasoned that it was not even clear that the newspapers had obtained Cohen's name lawfully (at least for purposes of publishing it) because the newspapers obtained his name only by making a promise which they did not honor.⁶⁰ In short, "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law."⁶¹ Having decided that the second line of cases controlled, the First Amendment did not bar Cohen's lawsuit. Finally, the court declined Cohen's request to reinstate the jury's compensatory damage award.⁶² Instead, the court ruled that the Minnesota Supreme Court's false conclusion that the First Amendment barred Cohen's lawsuit may have limited its consideration of whether Cohen had otherwise proved a promissory estoppel claim sufficient to support the jury's compensatory damage award. The court further ruled that the Minnesota Constitution might be construed to bar Cohen's promissory estoppel claim against the newspapers. Thus the court remanded the case to the Minnesota Supreme Court for reconsideration of the promissory estoppel claim under state law.⁶³

Justice Blackmun, joined by Justices Marshall and Souter, argued in dissent that Cohen's lawsuit should be controlled by the first line of cases. Under that line of cases, imposing liability against the newspapers here for breach of promise did constitute punishment for the publication of lawfully obtained, truthful information, without a compelling government interest.⁶⁴ Justice

57. 491 U.S. 524 (1989); see *supra* note 55 and accompanying text.

58. 443 U.S. 97 (1979); see *supra* note 55 and accompanying text.

59. *Cohen*, 111 S.Ct. at 2519.

60. *Id.* at 2519.

61. *Id.*

62. *Id.*

63. *Id.* at 2520.

64. *Cohen*, 111 S.Ct. at 2520-22.

Souter's separate dissent largely paralleled that of Justice Blackmun. Justices Marshall, Blackmun, and O'Connor joined Justice Souter's dissent.⁶⁵

In January 1992, on remand, the Minnesota Supreme Court unanimously ruled in an opinion by Justice Simonett that the jury's compensatory damage award was sustainable on a promissory estoppel theory and affirmed that award.⁶⁶ In reaching its conclusion, the court found that Cohen's failure to plead promissory estoppel before or during the trial did not bar him from pursuing that theory now; that under the Minnesota Constitution's free speech provision and Minnesota public policy, the newsworthiness of Cohen's identity was not so important as to require the invalidation of the promise of confidentiality; that Cohen had proved the elements of promissory estoppel; and that the evidence presented at trial, combined with the trial court's jury instructions, were sufficient to sustain the jury's compensatory damage award.⁶⁷

IV. THE SURVEY⁶⁸

A. SURVEY PURPOSES AND SUMMARY OF RESULTS

The survey had three purposes. They were to identify practices in the newspaper industry and attitudes of newspaper editors regarding promises of confidentiality after *Cohen*, to compare those practices and attitudes with those referred to in the various *Cohen* decisions, and to ascertain whether the *Cohen* case has had any impact on newspaper policies.

Subjects to be interviewed by telephone were identified by using a random number table to select fifty newspapers from a directory.⁶⁹ Preliminary investigation revealed there are approximately 1600 daily newspapers and 3600 weekly newspapers in the United States, about twice as many weekly newspapers as

65. *Id.* at 2522-23. For further discussion of Justice Blackmun's dissent and Justice Souter's dissent, see *infra* text accompanying notes 113-117.

66. *Cohen*, 479 N.W.2d 387 (Minn. 1992).

67. *Id.* at 390-92.

68. The complete results of the survey are reported in Appendix A. The survey questions are set forth in Appendix C.

69. 1992 GALE DIRECTORY OF PUBLICATIONS AND BROADCAST MEDIA (Julie Winklepleck ed., 124th ed. 1991.)

dailies. The initial selection process produced a sample of thirty-eight weeklies, eight dailies, and four others (one bi-monthly, one daily Monday through Friday, one bi-weekly and one tri-weekly), and only one newspaper with a circulation over 100,000. To obtain a sample that was more representative of the two-to-one ratio of weeklies to dailies in the United States, additional random number tables were used to select six (of ninety-one) dailies with circulation 100,000-500,000, two (of fifteen) dailies with circulation 500,000-1,000,000 and one daily (of five) with circulation greater than 1,000,000.⁷⁰ The final sample consisted of seventeen dailies, thirty-eight weeklies, and four others, a total of fifty-nine newspapers.⁷¹

Attempts were made to contact all fifty-nine by telephone. Three publications (all from the West) had gone out of business. Despite obviously demanding schedules, fifty-one editors participated in the telephone survey, a response rate of eighty-six percent. As a whole the editors were thoughtful, sincere and articulate, and showed genuine interest and concern for the issues.

The survey results reveal that for most respondents,⁷² few sources ask for confidentiality (Table VII). About twenty percent of the interviewees said that less than one percent of their newspaper's sources ask for confidentiality. About forty-two percent of the interviewees said that less than five percent of their newspaper's sources ask for confidentiality. And about eighteen percent of the interviewees said that less than ten percent of their newspaper's sources ask for confidentiality (Table VII). Those sources who ask are promised confidentiality a relatively small percent of the time (Table IX). Some respondents almost routinely deny such requests and others treat requests on a case by case basis (Table IX). While there is general agreement on what a promise of confidentiality means, that meaning is rather

70. From the "Top 100 U.S. Daily Newspapers" list in *THE WORLD ALMANAC & BOOK OF FACTS 1992* (Mark S. Hoffman ed. 1991).

71. The final sample included publications representing many facets of society: the *GREENWOOD DEMOCRAT* (Greenwood, Arkansas) and the *WAPELLO REPUBLICAN* (Wapello, Iowa); the *WEST TEXAS CATHOLIC*; the *MOBILE BEACON* (Mobile, Alabama) (a black community newspaper); and *ADVERTISING AGE*. Publications located in the East, South, Midwest and West were represented.

72. Hereafter, the term "respondent" means respondent newspaper. When appropriate, we shall use the term "interviewee" to refer to the individual editors whom we interviewed.

vague and unsophisticated (Table VIII). Over sixty percent of respondents have a policy for reporters about making promises of confidentiality (Table X). Only two such policies are written (Table XI). Fifty percent of respondents require reporters to get an editor's approval before making a promise of confidentiality, while twenty-five percent of respondents give reporters authority to make promises of confidentiality (Table XII). About fifty-three percent of respondents had reviewed their policy for reporters within the past five years, while about forty-one percent had not (Table XIII). About one-fourth of respondents (27.5%) had a policy about editors overriding a reporter's promise of confidentiality (Table XIV). None of such policies are written (Table XV). Only one policy gave editors authority and permission to override a reporter's promise of confidentiality (Table XVI). Six respondents reviewed this policy within the last five years, while seven did not (Table XVII). Six respondents had reviewed their reporter and/or editor policies on confidentiality because of the *Cohen* case, while five respondents had conducted such reviews for other reasons (Table XVIII). Only seventeen interviewees (one-third) knew about the *Cohen* case (Table XX). Of those seventeen, three said their newspapers had become informed of the *Cohen* case through a professional journal, and four said their newspapers had become informed of the case from their attorney. Ten interviewees did not respond to this question (Table XIX). The interviewees had a variety of opinions about the likely effect (if any) of the *Cohen* case on the newspaper industry. About a fifth of the interviewees thought more reporters would be required to get their editor's approval before making a promise of confidentiality, and about a fifth thought the case would have very little effect (Table XXI). Almost three-fourths of the interviewees did not think sources would dry up even if Cohen had lost his case (Table XXII). And a little over seventy percent of the interviewees thought that the *Cohen* case's effect on editors' First Amendment freedom was either not serious or somewhat serious. Only about eight percent of the interviewees thought the case's effect on such freedom was very serious (Table XXIII).

B. COMPARISON OF SURVEY RESULTS WITH VIEWS EXPRESSED BY THE JUDGES IN THE VARIOUS COHEN DECISIONS⁷³

While the United States Supreme Court decision did not directly address confidentiality practices of the newspaper industry or speculate on the likely effects of its decision on such practices, both the Minnesota Court of Appeals decision⁷⁴ and the 1990 Minnesota Supreme Court decision did.⁷⁵ In addition, all three court decisions addressed the First Amendment implications of the *Cohen* case.

1. The View that Not Enforcing the Newspapers' Promises of Confidentiality to Cohen Would Cause Sources to Dry Up

Judge Short, writing for the majority of the state court of appeals, stated that if the court did not enforce the newspapers' promises of confidentiality to Cohen, then "confidential sources would have no legal recourse against unscrupulous reporters or editors. Ultimately, news sources could dry up, resulting in less newsworthy information to publish."⁷⁶ Justice Simonett, writing for the majority of the state supreme court in that court's 1990 decision, discussed this idea as well, stating that "if it is known that promises will not be kept, sources may dry up."⁷⁷ The dissents of both Justice Yetka and Justice Kelley likewise expressed this idea.⁷⁸ It would seem logical that if the case was decided in favor of the newspapers, this would send a message to sources that newspapers have nothing to fear from breaking promises of confidentiality. And if newspapers may break their promises of confidentiality with impunity they may break them more often. However, the Minnesota Supreme Court's 1990 decision did find for the newspapers and thus the fear of sources drying up obviously was not an overriding concern.

The survey data do not support the view that if Cohen had

73. The term "judges" here includes the Justices of the Minnesota and U.S. Supreme Courts.

74. *Cohen*, 445 N.W.2d 248 (Minn. App. 1989).

75. *Cohen*, 457 N.W.2d 199 (Minn. 1990).

76. *Cohen*, 445 N.W.2d at 257.

77. *Cohen*, 457 N.W.2d at 203.

78. *Id.* at 205-07.

lost the case, confidential sources would dry up.⁷⁹ Only seven interviewees (13.7%) thought that had the newspapers won, their confidential sources would dry up. Thirty-seven interviewees (72.5%) thought there would be no drying up, and five interviewees (9.8%) thought that drying up was possible but not likely (Table XXII). Justice Simonett's observation in the Minnesota Supreme Court's 1990 *Cohen* decision that "[t]he source, for whatever reasons, wants certain information published"⁸⁰ was also expressed by many interviewees. The interviewees seemed to think that a court decision for the newspapers in the *Cohen* case would not be an overriding concern to a source who was intent on getting information printed, even if such a court decision were generally known. And the interviewees thought that their sources, most of whom are neither lawyers nor journalists, would not be aware of the *Cohen* case anyway. So it would seem that a concern that "the consequences of this decision [are] deplorable . . . potential news sources will now be reluctant to give information to reporters"⁸¹ is unwarranted.

2. *The View that Breaking the Newspapers' Promises of Confidentiality to Cohen Would Be Unethical*

In support of the Minnesota Supreme Court's 1990 holding that a reporter's promise of confidentiality to a source is not a contract, Justice Simonett noted that "[t]he record is replete with the unanimous testimony of reporters, editors and journalism experts that protecting a confidential source of a news story is a sacred trust, a matter of 'honor', of 'morality', and required by professional ethics."⁸² Justice Simonett then distinguished a

79. See *infra* Appendix A, Table XXII.

80. *Cohen*, 457 N.W.2d at 203.

81. *Id.* at 206 (Yetka, J. dissenting).

82. *Id.* at 202. At least two codes of ethics for journalists exist. The American Society of Newspaper Editors ("ASNE"), founded in 1922, adopted the *Canons of Journalism* that same year. This code was replaced by a *Statement of Principles* in 1975. The Society of Professional Journalists ("SPJ"), founded in 1909 as Sigma Delta Chi and operating under its current name since 1988, adopted a *Code of Ethics* in 1926; the latest revision was adopted in 1987. Compliance with both the ASNE and SPJ ethics codes is voluntary.

The ASNE ethics code's provision on confidentiality states that, "Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified." ASNE Statement of Principles, Article VI, captioned "Fair Play."

moral and ethical obligation from a contract, and characterized a promise of confidentiality as an “‘I’ll-scratch-your-back-if-you’ll-scratch-mine’ accommodation” where “[t]he durability and duration of the confidence is usually left unsaid, dependent on unfolding developments . . . [where] [e]ach party . . . assumes the risks of what might happen, protected only by the good faith of the other party.”⁸³

The survey results agree with the testimony of people from the industry mentioned by Justice Simonett.⁸⁴ Of the fourteen respondents that had policies about editor overrides, only one such policy gave the editor the final say, that is, sanctioned an editor override. All other responses (editor must honor the reporter’s promise; editor has authority to override but would either honor the promise or not print the story; editor would either honor the promise or print a story but not use the information supplied by the confidential source) reflect the attitude that breaking the promise would be unethical. The main reason so few respondents had editor policies in the first place was that most of the respondents’ policies for reporters required reporters to obtain the editor’s approval before making a promise of confidentiality; therefore, a separate policy for editors was considered unnecessary.

3. *The View that the Newspapers had Alternatives to Printing Cohen’s Name and the Meaning of a Reporter’s Promise of Confidentiality to a Source*

In the Minnesota Supreme Court’s 1990 *Cohen* decision, a factor mentioned by Justice Simonett in discussing the contract and promissory estoppel aspects of the case and an important consideration in Justice Yetka’s dissent was that alternatives to printing Cohen’s name were available to the editors.⁸⁵ For instance, the Star Tribune and Pioneer Press could have described Cohen’s job more or less obliquely, known as “background.” Al-

The SPJ ethics code’s provision on confidentiality states that, “Journalists acknowledge the newsman’s ethic of protecting confidential sources of information.” SPJ Code of Ethics, [section] III, captioned “Ethics.” CODES OF PROFESSIONAL RESPONSIBILITY (Rena A. Gorlin ed., second ed. 1990).

83. *Cohen*, 457 N.W.2d at 203.

84. See *infra* Appendix A, Table XVI.

85. *Cohen*, 457 N.W.2d at 205-06.

ternatively, the newspapers could have indicated merely that the Johnson information came from someone supporting the opposing candidate. Justice Simonett alluded to the fact that since the newspapers in the *Cohen* case had options available to them which they chose not to use, it could be argued that they were not altogether blameless. He implied that the newspapers' behavior would have to be considered in applying promissory estoppel since this legal theory requires that granting a remedy be the only way to avoid injustice.⁸⁶ Justice Yetka saw the newspapers' breaking the promise rather than using an available alternative as irresponsible and the decision for the newspapers as endorsing, perhaps even encouraging, an irresponsible press.⁸⁷

This issue ultimately relates to the question of what a promise of confidentiality means. A case addressing the ambiguity involved when journalists make promises of confidentiality to sources is *Ruzicka v. Conde Nast Publications, Inc.*⁸⁸

86. *Id.* at 204-05. Since promissory estoppel is an equitable remedy, equitable maxims apply. Such maxims include the requirements that one seeking an equitable remedy must himself "do equity" and must have "clean hands." In the words of a 1929 Minnesota Supreme Court decision:

The equity rules, that he who seeks equity must do equity and that he who comes into equity must come with clean hands, are recognized and followed by all the courts. . . . These rules or maxims operate to deny relief to or from conduct which is fraudulent, illegal or unconscionable. The misconduct need not be of such a nature as to be actually fraudulent or constitute a basis for legal action. The plaintiff may be denied relief where his conduct has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable either in the benefit to himself or the injury to others.

Johnson v. Freberg, 228 N.W. 159, 160 (Minn. 1929). See generally DAN B. DOBBS, *LAW OF REMEDIES* 2.3(4) at 83 and 2.4(2) (2d ed. 1993).

87. *Cohen*, 457 N.W.2d at 205-06.

88. *Ruzicka v. Conde Nast Publications*, 733 F. Supp. 1289 (D. Minn. 1990); *Ruzicka*, 939 F. 2d 578 (8th Cir. 1991); *Ruzicka*, 794 F. Supp. 303 (D. Minn. 1992); *Ruzicka*, 999 F. 2d 1319 (8th Cir. 1993). Both the *Cohen* and *Ruzicka* cases arose from events that happened in Minnesota in the 1980s, and involved a news source suing a publisher for breach of a promise of confidentiality. The *Cohen* case proceeded through the Minnesota state courts at the same time that the *Ruzicka* case (a diversity action) was proceeding through the federal courts. Both cases involved Minnesota and First Amendment law. Both cases had several appeals. The federal courts' *Ruzicka* decisions relied extensively on the *Cohen* decisions, with each *Ruzicka* decision citing the latest *Cohen* decision. In addition, the Minnesota Supreme Courts' July 1990 and January 1992 *Cohen* decisions briefly mentioned the latest *Ruzicka* decision.

In 1981, Jill Ruzicka sued her psychiatrist, charging him with sexually abusing her during therapy. She also sued the Minnesota Board of Medical Examiners for its alleged failure to supervise the psychiatrist properly. In 1987, writer Claudia Dreifus contracted with Conde Nast, publisher of *Glamour* magazine, to write an article about therapist-patient sexual abuse. In preparing the article, Dreifus contacted a Minneapolis counseling center and asked to interview patients who had been sexually abused by their therapists. Ruzicka, a patient at the center, told Dreifus she would agree to be interviewed only if she was not "identified or identifiable" in the article.⁸⁹ Dreifus promised to mask Ruzicka's identity. Before publication, Dreifus called Ruzicka and read her a draft of the article. The draft did not attribute Ruzicka's story to anyone by name, but attributed the story to someone in "a midwestern city." The draft also did not mention Ruzicka's service on a Minnesota task force on therapist-patient sexual abuse. Dreifus told her the draft would be edited before publication.

Dreifus' article was published in the September 1988 issue of *Glamour*. The article referred to Ruzicka as "Jill Lundquist," described her experience of abuse, mentioned her lawsuits against her psychiatrist and the state medical board, said she was a Minneapolis attorney, and mentioned her membership on the state task force on sexual abuse. The article said that the real names of the patients and abusing doctors had been changed.

In October 1988, Ruzicka filed a diversity action against Conde Nast in the federal district court for the district of Minnesota, alleging breach of contract and other state law claims. During discovery, Ruzicka stated that she did not know anyone

89. *Ruzicka*, 733 F. Supp. at 1291. Ruzicka's name had been publicized earlier in connection with the alleged sexual abuse. A 1981 *Star Tribune* article reported Ruzicka's lawsuits against her psychiatrist and the state medical board. The article included her name, her age, her employment with the County Attorney's office, and her allegations against the psychiatrist. A 1982 *Star Tribune* article also named Ruzicka and described her allegations. In 1984, Ruzicka was appointed to a Minnesota task force on therapist-patient sexual abuse, and the *Star Tribune* reported the appointment. A 1984 *Pioneer Press* article named Ruzicka as a victim of therapist abuse. Also in 1984, Ruzicka testified at a public hearing before the Minnesota legislature about her abuse. In 1986, Ruzicka discussed her abuse at a national conference on sexual exploitation. The *Star Tribune* did not name her but reported her comments at the conference. *Ruzicka*, 939 F. 2d at 580 n.3.

who identified her from the *Glamour* article, except for two of her former therapists, both of whom had extensive prior knowledge of her history of abuse.⁹⁰ In March 1990, the district court granted summary judgment to Conde Nast on all of Ruzicka's claims.⁹¹ The district court, applying Minnesota law, observed that the Minnesota Court of Appeals' *Cohen* decision⁹² had upheld a source's claim for breach of promise of confidentiality. However, the district court concluded that it was not bound by state court decisions on federal constitutional issues and that it was required to make an independent examination of the First Amendment issues raised by Ruzicka's claims. The district court found that Dreifus "is alleged to have agreed not to identify [Ruzicka] or make her 'identifiable' "; that "[Ruzicka] was not identified"; and therefore that "[Ruzicka] can only claim that the information published in the article made her 'identifiable' ".⁹³ The court observed that "reporter-source agreements tend to be oral and indefinite," and that "[t]he vagueness of [reporter-source] agreements may often leave uncertainty as to what the terms of the agreement require."⁹⁴ The district court held that when a source sues to enforce a reporter-source agreement, the First Amendment requires the source, "at a minimum . . . to prove specific, unambiguous terms and to provide clear and convincing proof that the agreement was breached."⁹⁵ The district court found that Ruzicka had not met this burden, reasoning that "[w]here the agreement between a reporter and a source requires that the source not be made identifiable, with no further particulars or specific facts about what information would identify the source to the relevant audience, the agreement is too ambiguous to be enforced."⁹⁶ The district court therefore granted summary judgment to Conde Nast on Ruzicka's contract claim, as well as her other claims.⁹⁷

90. *Ruzicka*, 733 F. Supp. 1289, 1292 (D. Minn. 1990).

91. *Id.* at 1301-02.

92. In March 1990, the Minnesota Court of Appeals' *Cohen* decision, 445 N.W.2d 248 (Minn. App. 1989), was the only reported decision in the *Cohen* case. The federal district court noted that a petition for review had been granted in *Cohen* in October 1989. *Ruzicka*, 733 F. Supp. at 1294.

93. *Ruzicka*, 733 F. Supp. at 1298.

94. *Id.* at 1300.

95. *Id.*

96. *Id.* at 1300-01.

97. *Id.* at 1301-02. With respect to Ruzicka's contract claim, the court contrasted *Cohen* by describing the reporters' promise to Cohen as clear. "In *Cohen*, the terms of the [Star Tribune's and Pioneer Press'] purported waiver [of First Amendment rights]

Ruzicka appealed.⁹⁸ In July 1991, the federal appeals court, following the reasoning of the state supreme court's first *Cohen* decision and the U.S. Supreme Court's *Cohen* decision,⁹⁹ affirmed the district court's decision that Minnesota law barred Ruzicka's contract claim, but remanded Ruzicka's case to the district court for consideration of her promissory estoppel claim.¹⁰⁰ The federal appeals court also affirmed the district court's decision granting summary judgment to Conde Nast on Ruzicka's other state law claims.¹⁰¹

After the remand order, the Minnesota Supreme Court issued its January 1992 *Cohen* decision, which ruled that the jury's damage award to Cohen was sustainable on a promissory estoppel theory. In May 1992, on remand in *Ruzicka*, the federal district court applied promissory estoppel theory in light of the state supreme court's January 1992 *Cohen* decision and granted summary judgment to Conde Nast on the promissory estoppel claim.¹⁰² In granting summary judgment, the district court found that Dreifus's promise not to make Ruzicka identifiable was insufficiently clear and definite to support recovery under promissory estoppel, and that "[f]ar from preventing injustice, enforcing such an ambiguous promise could create injustice by placing on editors and reporters the impossible burden of guessing at what steps such a promise requires."¹⁰³ Therefore Ruzicka could not establish a promissory estoppel claim.¹⁰⁴

Ruzicka again appealed. In August 1993, the federal appeals court reversed the district court's grant of summary judgment to

seem clear. The reporters agreed not to publish the fact that Cohen was the source of the information concerning the candidate for lieutenant governor." *Id.* at 1298.

98. While Ruzicka's appeal was pending before the federal appeals court, the Minnesota Supreme Court issued its first *Cohen* decision and the U.S. Supreme Court issued its *Cohen* decision, remanding the *Cohen* case to the state supreme court for further consideration of Cohen's promissory estoppel theory.

99. *Cohen*, 111 S.Ct. 2513.

100. *Ruzicka*, 939 F. 2d 578 (8th Cir. 1991). Ruzicka, like Dan Cohen, had not originally pled a promissory estoppel theory. However, apparently based on developments in the *Cohen* case, she raised that theory on appeal. The federal appeals court ruled that although it normally does not consider new claims advanced on appeal, it would allow Ruzicka's promissory estoppel claim to proceed because that claim was in the same posture as Cohen's promissory estoppel claim. *Id.* at 582.

101. *Id.* at 583.

102. *Ruzicka*, 794 F. Supp. 303 (D. Minn. 1992).

103. *Id.* at 311.

104. *Id.* at 309-11.

Conde Nast and remanded the case for trial on a promissory estoppel theory.¹⁰⁵ The appeals court first noted that the parties disagreed about what Dreifus had promised: "Ruzicka contends that Dreifus promised that she would not be 'identified or identifiable' in the article. Dreifus, however, claims that she vaguely promised only to do some masking."¹⁰⁶ Second, the appeals court ruled that under summary judgment rules, it was required to review the evidence of the alleged promise in the light most favorable to the non-moving party (Ruzicka), and thus it assumed that Dreifus had promised not to make Ruzicka identified or identifiable.¹⁰⁷ Third, the appeals court agreed with the district court that since the article had changed Ruzicka's surname to Lundquist, Dreifus had performed her promise not to identify Ruzicka. Finally, however, the appeals court ruled that the district court had erred in holding the term "identifiable" to be vague; instead, the appeals court found that Dreifus's promise not to make Ruzicka identifiable was sufficiently clear to raise a factual question as to whether Ruzicka could recover under promissory estoppel.¹⁰⁸

The survey results indicate that promises of confidentiality are potentially vague in that several promises could be meant: a promise simply not to divulge the source's name in a newspaper article; a promise not to divulge the source's name to anyone; a promise not to divulge the source's name even in court; a promise not to use the source's name but a reservation of the right to describe the source's position (background).¹⁰⁹ In response to the question, "If you give a promise of confidentiality, what does that mean you can/cannot do?," almost seventy-four percent of the interviewees said such a promise constituted either a promise simply not to divulge the source's name in a newspaper article, or a promise not to divulge the source's name to anyone (Table VIII). Only two of the respondents actively negotiate with sources about whether the newspaper may disclose the source's name in court despite the fact that there have been numerous criminal and libel cases involving this issue. Only interviewees

105. *Ruzicka*, 999 F. 2d 1319 (8th Cir. 1993).

106. *Id.* at 1320.

107. *Id.*

108. *Id.* at 1320-23.

109. As the *Ruzicka* case, discussed *supra*, demonstrated, even further ambiguities are possible in reporter-source agreements involving confidentiality.

who had worked in Washington, D.C. immediately talked about the possible alternative types of confidentiality: off the record (the newspaper will only print the information obtained from the source if that information is obtained from an independent source), deep background (the newspaper will print such information but without any attribution, as if within the reporter's own personal knowledge), background (the newspaper will print such information with veiled attribution, such as a description of the source's position, but will not print the source's name), and on the record (the newspaper will print the information along with the source's name).¹¹⁰

The *Ruzicka* case and the survey are evidence that promises of confidentiality are often vague. But the Eighth Circuit's *Ruzicka* decision shows that vagueness may not prevent enforceability under promissory estoppel.

4. *The View that Imposing Damages on the Newspapers in the Cohen Case Would Violate the Press' First Amendment Rights and Chill the Newsgathering Process*

The dissenting judge in the Minnesota Court of Appeals' decision, and the 1990 Minnesota Supreme Court majority, expressed the opinion that imposing damages on the newspapers under the *Cohen* facts would infringe their First Amendment freedom and have a chilling effect. The state supreme court's 1990 opinion stated that "[t]he potentiality for civil damages for promises made in this context chills public debate. . . ."¹¹¹ That court went on to say that under different circumstances damages might be allowable under a promissory estoppel theory, but the

110. In *Broken Promises*, Monica Langley, a Wall Street Journal reporter and adjunct professor at Georgetown Law School and Lee Levine, an attorney practicing media law in Washington, D.C., described a Wall Street Journal ("WSJ") memo from managing editor Norman Pearlstine. Monica Langley & Lee Levine, *Broken Promises*, 1988 COLUM. JOURNALISM REV. 21, 23 (1988). The memo differentiated between "anonymous" sources (WSJ agrees not to publish the source's name but reserves the right to disclose the source's name if necessary, such as in a libel suit, to show that WSJ had good reason for printing the source's information) and "confidential" sources (WSJ promises not to publish the source's name and promises to keep his identity secret, even if that means losing a lawsuit or going to jail). According to Langley and Levine, NBC had prepared a similar memorandum, and Harry Johnston of Time, Inc. considered the distinction sensible. *Id.* However, none of the interviewees in our survey used this language to make such a distinction.

111. *Cohen*, 457 N.W.2d at 205.

court was concerned that this case dealt with information in a political campaign. "Of critical significance in this case, we think, is the fact that the promise of confidentiality arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign."¹¹² The fact that this case dealt with a political campaign was also considered key by Justices Blackmun and Souter in their dissenting opinions.¹¹³

However, Justice White writing for the majority found the controlling line of decisions to be those "holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."¹¹⁴ Thus the United States Supreme Court majority thought that awarding damages to Cohen would have only an "incidental" effect on newspapers' ability to report the news.

112. *Id.* at 205.

113. Justice Blackmun's dissent (joined by Marshall and Souter) said:

I do not read the decision of the Supreme Court of Minnesota to create any exception to or immunity from the laws of that State for members of the press. In my view, the court's decision is premised, not on the identity of the speaker, but on the speech itself. Thus, the [Minnesota Supreme] court found it to be of 'critical significance,' that 'the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign.' *Cohen*, 457 N.W.2d 199, 205 (1990).

Cohen, 111 S.Ct. at 2520.

Justice Souter's dissent (joined by Marshall, Blackmun and O'Connor) said:

The importance of [the] public interest is integral to the balance that should be struck in this case. There can be no doubt that the fact of Cohen's identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election, the publication of which was thus of the sort quintessentially subject to strict First Amendment protection. (Citations omitted.) The propriety of his leak to respondents could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him as an adviser. An election could turn on just such a factor; if it should, I am ready to assume that it would be to the greater public good, at least over the long run.

Cohen, 111 S.Ct. at 2523.

114. *Cohen*, 111 S.Ct. at 2518.

The United States Supreme Court majority's view is largely confirmed by the survey (Table XXI). Only about eighteen percent of interviewees expressed the view that the courts' ultimate decision to award damages to Cohen would have a chilling effect on newsgathering, resulting in fewer stories. Almost twenty percent said the effect would be minimal. Many interviewees thought the major effect would be that newspaper managers would change their supervision practices, an incidental effect. A total of about seventy percent of the interviewees thought the courts' ultimate decision in *Cohen* was not a serious infringement (35.3%) or was a somewhat serious infringement (35.3%) on newspapers' First Amendment freedom, while only four interviewees (7.8%) thought the decision was a very serious infringement (Table XXIII).¹¹⁵

Justices Blackmun and Souter were sensitive to the fact that the source of the Marlene Johnson information was relevant to a voter weighing the impact of the last minute revelations, and sensitive to the dilemma faced by the Star Tribune and Pioneer Press editors who chose to report Cohen's name. The Gelfand and Finnegan columns¹¹⁶ appear to be an honest explanation of the editors' decision-making processes. The columns show that the editors made a rare exception to a policy of honoring reporters' promises of confidentiality because the editors thought the electorate had a right to know the source's identity. The fact that these two columns appeared eleven days after the original publication of the Cohen/Johnson story is evidence of the editors' good faith. The columns show that the editors believed from the start that Cohen's name was newsworthy and that the editors did not raise this argument for the first time in court.

In the Minnesota Supreme Court's 1990 *Cohen* decision, Justice Simonett noted that breaking a reporter's promise of confidentiality was extremely rare.¹¹⁷ Although no question on

115. In *Broken Promises*, Langley and Levine weighed arguments for and against imposing liability for breaking promises of confidentiality. They said that imposing liability would encourage the consistent honoring of promises of confidentiality, while not imposing liability would protect the constitutional principle of removing from government the power to regulate news. Langley and Levine contended that the argument against liability was stronger. Langley & Levine, *supra* note 110, at 24.

116. See *supra* Appendix B, Exhibits 5 and 7.

117. *Cohen*, 457 N.W.2d at 201. Langley and Levine, *supra* note 110 at 21-22, had

the survey asked interviewees whether they knew of any such incidents, no interviewees mentioned that they did and several interviewees commented that such breaches were rare. It was "astonishing that the [Star Tribune and Pioneer Press] did it," one interviewee remarked. Had the view of the Minnesota Supreme Court majority in the 1990 *Cohen* decision and Justices Blackmun and Souter prevailed, perhaps the interviewees' opinions about the seriousness of the infringement would have been different. Greater emphasis might have been placed on the circumstances — a source close to the campaign of a gubernatorial candidate supplying negative information about an opposing candidate to the press in the eleventh hour — rather than predominantly on the fact that there was a breach of a promise of confidentiality which is almost universally viewed as dishonorable.

C. HAS *COHEN* HAD AN EFFECT ON NEWSPAPER POLICIES?

Thirty-two respondents (about sixty-three percent) had a policy for reporters about making promises of confidentiality (Table X). Only fourteen respondents (about twenty-eight percent) had a policy for editors about overriding a reporter's promise of confidentiality (Table XIV). Of the thirty-two respondents that had a policy for reporters, seventeen (about fifty-three percent) had reviewed it within the past five years (Table XIII). Of the fourteen respondents that had a policy for editors, six (about forty-three percent) had reviewed it within the past five years (Table XVII).

Eleven interviewees answered a question about whether the *Cohen* case had prompted such review(s) at their newspaper (Table XVIII). A majority of those answering this question answered affirmatively. Only one respondent had changed a reporter policy or editor policy because of the *Cohen* case.¹¹⁸ The

predicted more frequent breaches. They cited the following reasons why newspapers had revealed confidential sources: 1) to set the record straight; 2) to avoid paying large damages in libel actions; 3) where a person giving information about a crime turns out to be involved in the crime; and 4) where the source gives bad information. *Id.*

Perhaps fewer promises are being made because of policy changes, but for whatever reason, testimony in the *Cohen* case, paralleled by data from this survey, seems to indicate that breaking promises of confidentiality is still perceived to be rare.

118. There are many possible reasons for this phenomenon. Only one respondent

fact that almost two-thirds of interviewees were not aware of the *Cohen* case (Table XX) means that the full potential effect of *Cohen* is not yet realized.¹¹⁹

D. COHEN FROM A LABOR-MANAGEMENT PERSPECTIVE

Two interviewees took a labor-management perspective. If this perspective were adopted, a "scale of reporter power" could be constructed where one represents the reporter having no autonomy regarding confidentiality and ten represents the reporter having complete autonomy. On this scale, the policies of over half of the respondents with policies would be closer to one than ten (fifty percent of respondents require editor approval, about six percent require publisher approval, and about six percent do not authorize reporters to promise confidentiality)(Table XII). Only eight respondents (twenty-five percent) authorize a reporter to promise confidentiality on his or her own. Of those

newspaper had an editor policy giving editors the final say. Therefore, all other newspapers would not feel threatened by the *Cohen* decision, and would not feel a need to change their policy. However, while this explains why newspapers would not change their editor policy, it does not fully explain why newspapers would not change their reporter policy. The interviewer noted that when asked to predict a likely result of the *Cohen* case, eight interviewees predicted that other newspapers would adopt their newspaper's policy. This could mean these interviewees believed that their publication already had the soundest, safest, and best policy. And in fact only 25% of respondents give reporters authority to make promises of confidentiality. *See also infra* note 121.

119. We were somewhat surprised by how few respondents were aware of the *Cohen* case. However, the author of a 1978 survey regarding the effects of products liability law on California manufacturers found that "even though a manufacturer has a vested interest in learning of a particular legal doctrine, there can be a substantial time lag before the manufacturer becomes aware of the policy." Patrick S. McInturff, Jr., *Products Liability: The Impact on California Manufacturers*, 19 AM. BUS. L. J. 343, 353 (1981). McInturff surveyed California manufacturers of farm implements and out-of-state companies that held themselves out as doing a substantial farm implement business in California. He used the California Supreme Court's decision in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963) as the referent for determining how long it had taken for manufacturers to become aware of products liability law (though he recognized that the judicial policy of products liability had preceded the *Greenman* decision by many years). McInturff asked the manufacturers when they first became aware of products liability law. He found that 44% of small firms and 56% of large firms first became aware of products liability law between 1970 and 1978. Thus, there was a time lag of between seven and fifteen years before these firms became aware of products liability law (using *Greenman* as the time referent). He also found that at the time of his survey (1978, fifteen years after *Greenman*), 18% of small firms and 11% of large firms still did not know about products liability law. McInturff at 352. In light of McInturff's survey results, our survey results regarding the newspaper editors' lack of knowledge about the *Cohen* case are less surprising.

eight, most encouraged reporters to consult with their editor. Eleven interviewees (about twenty-two percent) predicted that the *Cohen* case would probably cause more newspapers to require editor approval (thus reducing reporters' autonomy)(Table XXI).

Any manager's dilemma is to encourage employee creativity and growth, while knowing that the enterprise often bears responsibility for employee actions. To newspaper management, the dilemma involves giving a reporter authority to gather news and write articles, while knowing that the newspaper bears responsibility for the news it prints and is bound by its reporters' authorized promises to third parties. If existing policies about promises of confidentiality are an indication, and if the trend predicted by the interviewees materializes, then encouraging creativity and growth will lose ground to more protective policies about confidentiality.

Two interviewees predicted that the *Cohen* case would probably have a negative effect on reporter morale (Table XXI). One interviewee even suggested that reporters should start a movement to unionize as a response to the decision. Telling a reporter that he is not trusted to decide whether to promise confidentiality may certainly be demoralizing. However, situations involving promises of confidentiality are relatively rare and have consequences for the source, the reporter and the newspaper. Most reporters know that every word they write is subject to being edited. So the adoption of a policy requiring an editor's approval for promises of confidentiality might not be perceived as arbitrary or unjust.

One respondent's policy is that the reporter is not to disclose the source's name even to the editor. At first glance this may seem to be the most empowering of policies for reporters. However, it might also be seen as a shirking of responsibility by management. The rationale is that the fewer people who know the source's identity, the more protected the information — but shouldn't an editor trust him or herself with the knowledge of the source's identity? Further, it is the editor's responsibility to decide whether a story should be run. Certainly the identity of a source is relevant, even necessary, to properly making this decision.

One respondent, a major newspaper, gives its reporters authority to make promises of confidentiality but encourages them to consult with their editor. The interviewee commented that this newspaper only hired seasoned reporters, and implied that it would be demoralizing for these reporters to be told they could not make promises of confidentiality. This team concept is a very mature position.

Perhaps the authority to make promises of confidentiality could be an earned privilege. Under such a policy, some reporters would be authorized to promise confidentiality while others would not. No respondent had such a policy. Perhaps none have considered it. Naturally such a policy could cause conflict between reporters who are authorized to promise confidentiality and those who are not.

E. OBSERVATIONS AND IMPLICATIONS FOR NEWSPAPER POLICIES

The interviewees' views mirrored the complexity of the views of the judges who wrote the majority and dissenting opinions in the *Cohen* case. Some interviewees thought the case would have little impact but that it was a serious intrusion on First Amendment freedom. Other interviewees thought the case would have negative effects but that it was not a serious intrusion.¹²⁰ Yet others felt the decision would have positive effects. While a few interviewees expressed sympathy for the Star Tribune's and Pioneer Press' decision to print Cohen's name, many more expressed the view that a reporter's promise of confidentiality should be honored. Yet even among these interviewees, some believed the court's imposition of damages was a serious hindrance on newsgathering while others did not.

Respondents' confidentiality policies were quite diverse as well. Only two respondents had a written policy for reporters, and none had a written policy for editors. Most policies dealt only with who has authority to make a promise of confidentiality. Some policies were simple: reporters *are* authorized to make promises of confidentiality, or reporters are *not* so authorized.

120. These views may seem inconsistent. They may, on the other hand, not be mutually exclusive but rather reflect sophisticated beliefs about the philosophical importance of the First Amendment as opposed to the real-life effects of the Cohen decision.

Some policies were complex, some open-ended, some specific: one policy required approval of an executive editor for conditional promises (promises of confidentiality to the point of litigation) and approval of the publisher for an absolute promise. While seventeen interviewees (one-third) had heard about the *Cohen* case, only seven respondents had reviewed their policies regarding their reporters' authority to make promises of confidentiality as a result of this knowledge. While one respondent changed its policy because it had personally been involved in litigation, only one significantly changed its policy because of the *Cohen* case.¹²¹ Some may have already changed their policies about who in the organization is authorized to make a promise of confidentiality because of earlier cases involving confidentiality,¹²² including the 1980-81 Janet Cooke incident at the Washington Post.¹²³ So, while about thirty-one percent of interviewees predicted a likely effect of the *Cohen* case would be that newspapers would take authority away from reporters (Table XXI), the *Cohen* case seems to have had little effect in this area at this time.

121. One newspaper adopted a confidentiality policy requiring reporters to get an editor's approval. The decision to adopt a reporter policy was prompted by a change in structure resulting from growth in the department, but the decision to adopt a reporter policy requiring an editor's approval was prompted by the *Cohen* case. This newspaper is not counted as having substantially changed its policy, because it is possible that had the newspaper adopted a policy at an earlier time, it may have adopted the policy requiring an editor's approval. A second newspaper modified its policy; the original policy required an editor's approval, and the modified policy requires a written approval. This newspaper is not counted as a change because of the *Cohen* case, since the *Cohen* decisions did not discuss written approval.

122. In a criminal case, a reporter may have to choose between disclosing a confidential source or going to jail for contempt of court. See *Branzburg v. Hayes*, 408 U.S. 665 (1972). In a libel case, a reporter may have to choose between disclosing a confidential source and rendering his newspaper liable for a large damage award. See also *supra* note 117 and accompanying text.

123. On Sept. 28, 1980, the Washington Post printed a story by Post reporter Janet Cooke about an eight-year-old heroin addict named "Jimmy." Cooke had fabricated the story. Cooke's story won her a Pulitzer prize, which the prize committee withdrew after Cooke acknowledged the fabrication to Post editors in April 1981. See Patrick E. Tyler & Lewis M. Simons, "Jimmy" Episode Evokes Outrage, Sadness; Media Wondering How Reporter's Fabrication Could Get Past Editors, WASH. POST, April 17, 1981, at A3. Langley and Levine, *supra* note 110 at 22, commented that Cooke "was nearly able to substitute fiction for news reporting precisely because she was not required to disclose her sources to her editors." Langley and Levine also noted that "[t]he American Society of Newspaper Editors found that, after the Janet Cooke episode, it became a general rule for a reporter to share with an editor the identity of a confidential source." Langley & Levine, *supra* note 78 at 22.

Few policies dealt with what promise(s) could or should be made. Few policies were specific or differentiated between the possible meanings of a promise of confidentiality. This lack of specificity naturally leaves the door open for subsequent disputes over what was meant, but is perhaps understandable in the context of a reporter trying to get a story. In the Minnesota Supreme Court's 1990 *Cohen* decision, Justice Simonett characterized a transaction between a reporter and a source who seeks confidentiality not as a contract negotiation, but as an "I'll scratch-your-back-if-you'll-scratch-mine" situation,¹²⁴ where sophisticated negotiating would feel out of place. The one respondent that turns the process into a negotiation and contract through its policy¹²⁵ requires approval of an executive editor and reviewed its policies because of various cases, including *Cohen*. It does not have in-house counsel but engages four law firms, one for corporate matters, one for personnel matters, one for libel and one specializing in First Amendment issues. The interviewee representing this respondent, who conjectured that a likely effect of the *Cohen* case would be larger legal bills, probably envisioned a trend toward an environment where transactions between reporters and sources seeking confidentiality would become formal contractual negotiations. However, this interviewee was alone in that prediction. Thus, *Cohen* and earlier cases caused only one of fifty-one respondents to formalize/"legalize" the promise of confidentiality situation. Therefore, we believe that a formalization trend is not likely to develop at this time.

Whatever the respondents' policies are about who makes the decision to promise confidentiality (a reporter alone, a reporter and editor together, or a publisher) or about what the promise(s) should be, the considerations concerning whether to promise confidentiality seemed universally to entail complex questions. These questions include how important the story is; whether the story could be developed through other sources; whether the source came to the newspaper as opposed to the newspaper going to the source; and the source's reasons for requesting confidentiality (was the source making charges to be spiteful? was he seeking to avoid losing his job, avoid public hu-

124. *Cohen*, 457 N.W.2d at 203.

125. This was one of the two respondents that had written reporter policies.

miliation, or avoid physical danger?). Many interviewees said they encourage reporters to do everything possible to avoid making promises of confidentiality. While very few respondents had a policy of not printing any story based on a confidential source, several interviewees thought this policy was becoming more common and predicted this as a likely effect of the *Cohen* case (Table XXI). Some interviewees described this as a “chilling effect,” while others saw it as a healthy trend.

The primary factor that affected how frequently respondents made promises of confidentiality was the respondent’s coverage and audience. Respondents covering general news tended to treat each case on its own merits or had a general hostility to making promises of confidentiality. But respondents with a special focus, such as business, had a higher rate of granting confidentiality. As the editor of one of these publications said, his newspaper did not deal with “public stuff;” he was constantly “dealing with interested parties” and would not have any stories to print if he could not use confidential sources.

V. SUMMARY AND CONCLUSION

The survey revealed that almost two-thirds of respondents have a policy for reporters about promises of confidentiality. Of the respondents with such policies, only twenty-five percent authorize reporters to promise confidentiality without at least consulting with and usually getting the permission of their editor.

Just over a fourth of the respondents have a policy about editors overriding a reporter’s promise of confidentiality. Only one respondent authorizes editors to override such a promise.

The meaning of a promise of confidentiality varies across respondents and is relatively vague in about three-quarters of responses. The *Cohen* case does not seem to have caused newspapers to move to more concrete bargaining regarding confidentiality.

A third of the interviewees were aware of the *Cohen* case. Of the respondents who had policies for reporters concerning confidentiality, about fifty-three percent had reviewed this policy within the past five years. Of the respondents who had policies

concerning an editor overriding a reporter's promise of confidentiality, about forty-three percent had reviewed this policy within the past five years. Most such reviews were not prompted by the *Cohen* case. Only one respondent had substantively changed its confidentiality policies because of the *Cohen* case. The interviewees predicted that newspapers would require greater supervision of reporters as a result of the *Cohen* case, though no such trend is clearly evident so far. A small but serious concern was expressed that reporters' morale could be adversely affected by a trend toward greater supervision.

Few interviewees thought that if Cohen had lost, then confidential sources would dry up. This was a fear that had been expressed by several judges in the various *Cohen* decisions.

About thirty-five percent of interviewees thought that the *Cohen* case was not a serious infringement on editors' First Amendment freedom; the same percentage thought it was a somewhat serious infringement. About twenty-two percent thought it was a serious infringement, and about eight percent thought it was a very serious infringement. Thus, despite the potential for a new source of liability, about seventy percent of interviewees accepted the *Cohen* result as fair and not a particularly serious infringement on editors' rights.

The views of the interviewees matched the complexity of the views expressed by the judges in the various *Cohen* decisions. Finally, the survey indicates that the courts' ultimate decision to award damages to Dan Cohen has not yet had any substantial effect on newspaper policies regarding promises of confidentiality.

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APPENDIX A — SURVEY RESULTS

*I - Job Title of Survey*Participants

	Frequency	Percent	Valid Percent ¹	Cumulative Percent
Editor	26	51.0	51.0	51.0
Managing Editor	7	13.7	13.7	64.7
Editor & Publisher	4	7.8	7.8	72.5
Executive Editor	3	5.9	5.9	78.4
City Editor	3	5.9	5.9	84.3
News Editor	2	3.9	3.9	88.2
Editor-in-Chief	1	2.0	2.0	90.2
Other	5	9.8	9.8	100.0
	<hr/> 51			

II - Type of Publication

	Frequency	Percent	Valid Percent	Cumulative Percent
Daily	17	33.3	33.3	33.3
Weekly	31	60.8	60.8	94.1
Other	3	5.9	5.9	100.0
	<hr/> 51			

III - Location of Publication

	Frequency	Percent	Valid Percent	Cumulative Percent
East	7	13.7	13.7	13.7
South	12	23.5	23.5	37.2
Midwest	21	41.2	41.2	78.4
West	11	21.6	21.6	100.0
	<hr/> 51			

*IV - Circulation of
Publication*

	Frequency	Percent	Valid Percent	Cumulative Percent
100 - 1,000	1	2.0	2.0	2.0
1,001 - 10,000	23	45.1	45.1	47.1
10,001 - 100,000	18	35.3	35.3	82.4
100,001 - 500,000	7	13.7	13.7	96.1
500,001 - 1,000,000	1	2.0	2.0	98.0
>1,000,000	1	2.0	2.0	100.0
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¹ Valid percent is the percent of those who gave an answer other than "no response" whereas percent is calculated including those who answered "no response."

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V - Publications Using In-house Counsel²

	Frequency	Percent	Valid Percent	Cumulative Percent
For all legal work	5	9.8	62.5	62.5
For corporate work only	3	5.9	37.5	100.0
	8			

VI - Publications Using Counsel other than In-house Counsel³

	Frequency	Percent	Valid Percent	Cumulative Percent
Single outside firm	18	35.3	40.9	40.9
Two outside firms	7	13.7	15.9	56.8
More than two outside firms	3	5.9	6.8	63.6
Hotline	6	11.8	13.6	77.3
Hotline & local counsel	3	5.9	6.8	84.1
Parent company attorney	3	5.9	6.8	90.9
Parent company attorney & local counsel	4	7.8	9.1	100.0
No response	7	3.7		
	51			

VII - Percent of Sources Who Seek Confidentiality from Respondent Publication

	Frequency	Percent	Valid Percent	Cumulative Percent
Less than 1%	10	19.6	20.8	20.8
Less than 5%	21	41.2	43.8	64.6
Less than 10%	9	17.6	18.8	83.3
20%	4	7.8	8.3	91.7
25-30%	4	7.8	8.3	100.0
No response	3	5.9		
	51			

² Not surprisingly, only some of the larger newspapers employ in-house counsel. Of those that did, however, over one-third use in-house counsel for corporate matters only and turn to specialty firms for libel, First Amendment, criminal and even commercial matters.

³ While many newspapers that don't employ in-house counsel refer all legal work to a single firm (41% of those who responded), many (22.7% of those who responded) use specialty firms. Appreciation for the existence of hotlines was expressed by a number of respondents. And the degree of integration of the industry is reflected by the number of respondents (7, or 13.7% of the sample) who use a parent company's attorney for some or all of their legal work.

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VIII - What a Promise of Confidentiality Means to Respondent Publication

	Frequency	Percent	Valid Percent	Cumulative Percent
Won't divulge source to public	25	49.0	54.3	54.3
Won't divulge source to anyone	9	17.6	19.6	73.9
Won't divulge even in court	2	3.9	4.3	78.3
Background (use description)	5	9.8	10.9	89.1
Whatever is negotiated	5	9.8	10.9	100.0
No response	5	9.8		
	<u>51</u>			

IX - Publication's Response to Source's Request for Confidentiality

	Frequency	Percent	Valid Percent	Cumulative Percent
Treat on case by case basis	21	41.2	43.7	43.7
Request denied >90% of time	14	27.5	29.2	72.9
Waive confidentiality or won't publish	4	7.8	8.3	81.2
Request agreed to about 50% of time	2	3.9	4.2	85.4
Other [Request agreed to 25%, 85%, & 95% of time; either agree or don't proceed; insist on at least background; depends on whether story was generated by respondent newspaper (then agree 100%) or by source (then agree 0%)]	7	13.7	14.6	100.0
No response	3	5.9		
	<u>51</u>			

X - Publication Has a Promise of Confidentiality Policy for Reporters

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	32	62.7	62.7	62.7
No	19	37.3	37.3	100.0
	<u>51</u>			

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XI - Publication Has a
Written Promise of
Confidentiality Policy for
Reporters

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	2	3.9	6.7	6.7
No	28	54.9	93.3	100.0
No response	21	41.2		
	51			

XII - Nature of
Publication's Promise of
Confidentiality Policy for
Reporters

	Frequency	Percent	Valid Percent	Cumulative Percent
Editor approval required	16	50.0	50.0	50.0
Publisher approval required	2	6.3	6.3	56.3
Reporter authorized to make promise	8	25.0	25.0	81.3
Reporter not authorized to make promise	2	6.3	6.3	87.5
Other (Background; Prefer no confidential sources; Must be discussed with editor)	4	12.5	12.5	100.0
	32			

XIII - Publication's Promise
of Confidentiality Policy for
Reporters was Reviewed
within Past Five Years

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	17	53.1	56.7	56.7
No	13	40.6	43.3	100.0
No response	2	6.3		
	32			

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XIV - Publication Has a Policy for Editors about Overriding a Reporter's Promise of Confidentiality

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	14	27.5	28.0	28.0
No	36	70.6	72.0	100.0
No response	1	1.9		
	51			

XV - Publication Has a Written Policy for Editors about Overriding a Reporter's Promise of Confidentiality

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	0	0	0	0
No	12	85.7	100.0	100.0
No response	2	14.3		
	14			

XVI - Nature of Publication's Policy for Editors about Overriding a Reporter's Promise of Confidentiality

	Frequency	Percent	Valid Percent	Cumulative Percent
Honor reporter's promise	9	64.3	64.3	64.3
Editors have authority to override but would either honor promise or not publish	1	7.1	7.1	71.4
Honor promise or not use information in story	3	21.4	21.4	92.8
Editor has final say	1	7.1	7.1	100.0
	14			

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XVII - Publication's Policy
for Editors about Overriding
a Reporter's Promise of
Confidentiality was Reviewed
within Past Five Years

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	6	42.9	46.2	46.2
No	7	50.0	53.8	100.0
No response	1	0.1		
	14			

XVIII - Review(s) were
Prompted by Knowledge of
Cohen Case

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	6	31.6	54.5	54.5
No	5	26.3	45.5	100.0
No response	8	42.1		
	19			

XIX - How Publication
Became Aware of Cohen
Case

	Frequency	Percent	Valid Percent	Cumulative Percent
Professional journal(s)	3	17.6	42.9	42.9
Professional journal(s) and contacted by attorney	4	23.5	57.1	100.0
No response	10	58.8		
	17			

XX - Interviewee Was
Aware of Cohen Case

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	17	33.3	34.0	34.0
No	33	64.7	66.0	100.0
No response	1	2.0		
	51			

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XXI - Interviewee's Opinion
about Likely Effect of Cohen
Case on Newspaper Industry

	Frequency	Percent	Valid Percent	Cumulative Percent
Change of policies to require editor's approval	11	21.6	22.4	22.4
Increased supervision of reporters	4	7.8	8.2	30.6
Chilling effect - fewer stories	9	17.6	18.4	49.0
Negative effect on reporter morale	2	3.9	4.1	53.1
Editors will honor promises of confidentiality	5	9.8	10.2	63.3
Minimal effect	10	19.6	20.4	83.7
Other (could lose basic freedom of speech; reporters won't even tell source's name to editor; increased stress; more lawyer bills)	8	15.7	16.3	100.0
No response	2	3.9		
	51			

XXII - Interviewee Thought
If Cohen had Lost Then
Anonymous Sources Would
Likely Dry Up

	Frequency	Percent	Valid Percent	Cumulative Percent
Yes	7	13.7	14.3	14.3
No	37	72.5	75.5	89.8
Possibly but not likely	5	9.8	10.2	100.0
No response	2	3.9		
	51			

XXIII - Interviewee
Thought Effect of Cohen
Case on Editors' First
Amendment Freedom Was:

	Frequency	Percent	Valid Percent	Cumulative Percent
Not serious	18	35.3	35.3	35.3
Somewhat serious	18	35.3	35.3	70.6
Serious	11	21.6	21.6	92.2
Very serious	4	7.8	7.8	100.0
	51			

APPENDIX B**EXHIBIT 1****Minneapolis Star and Tribune¹****Thursday, October 28, 1982****Page 1A****MARLENE JOHNSON ARRESTS DISCLOSED BY WHITNEY ALLY****By Staff Writer**

Court records showing that DFL lieutenant governor candidate Marlene Johnson was convicted more than 12 years ago on a misdemeanor charge of shoplifting were given to reporters Wednesday by Dan Cohen, a friend and political associate of gubernatorial candidate Wheelock Whitney.

The conviction, which Johnson said stemmed from her forgetting to pay for \$6 worth of sewing items, was later vacated.

Cohen took copies of the court records to several news organizations, along with records showing that Johnson had been arrested for unlawful assembly shortly before the shoplifting charge. That case was later dropped.

Both Whitney and his campaign manager, Jann Olsten, said Cohen had acted without knowledge or permission of the candidate or his staff. Both said such information about a candidate's past ought to be available to the public before an election.

Olsten acknowledged that he learned Tuesday about Johnson's conviction. Whitney, on a campaign tour in northern Minnesota, said last night from Moorhead that "the first time I heard about it was this afternoon on the bus."

He added, "I don't recall talking to Dan Cohen in the last two months. I don't know how Cohen got the information about Johnson — he must have looked it up in the records."

Johnson, 36, said former Gov. Rudy Perpich knew about the incident when he chose her as his running mate, and that "we both agreed it didn't have any bearing on my qualifications to-

1. Reprinted with permission of the Star Tribune, Minneapolis.

day to be lieutenant governor.”

DFLers, including Perpich, were quick to accuse Whitney’s campaign of 11th hour muckraking.

“This is an indication of the absolute desperation of the other side,” said Perpich campaign manager Eldon Brustuen. “They’re trying to find more to attack us on — their attacks so far haven’t worked.”

Perpich said he is proud of his running mate and has “absolute confidence” in her. “In the last 12 years, she’s been in business, a taxpayer, a good citizen, a very meaningful contributor to society . . . I just feel Minnesotans judge people on those things,” he said.

He said he didn’t know whether the revelations will harm the Perpich-Johnson campaign. Of its potential impact on this campaign, Whitney said, “I don’t care if it could or couldn’t backfire on my campaign . . . but I certainly think it’s legitimate information.” Johnson’s first arrest occurred in September 1969, when she and a half-dozen other Urban League protesters were arrested at a sewer construction site on Dayton Av. in St. Paul for refusing to leave a construction ditch. They were protesting the city’s alleged failure to hire minority workers on construction projects.

The three counts of unlawful assembly against Johnson were dismissed on April 27, 1970, the day her father, Buford Johnson of Braham, Minn., died.

The death of her father, whom she refers to in campaign speeches as a major influence in her life, left her “very upset,” she said yesterday.

“I wasn’t myself for quite a while. Within a month, I lost 20 pounds, I got my first-ever speeding ticket, and when I forgot to pay for \$6 worth of buttons and sewing materials at the Sears store on Rice St., I was arrested.”

The records indicate that she was arrested on May 25 and convicted on June 3, 1970. Sentencing was deferred until Feb. 6, 1971, when the conviction was vacated — a common practice in

cases involving first offenders.

“The judge concluded that the situation did not reflect my past or what was expected to be my future,” Johnson said. Because the conviction was vacated, she has no criminal record, she said.

Johnson heads the St. Paul advertising agency Split Infinite, Inc., which she founded in 1970. Her campaign for lieutenant governor is her first bid for elective office.

Johnson has been a leader in small business and women’s organizations in recent years heading the National Association of Women Business Owners, the DFL Small Business Task Force, the Minnesota delegation to the 1980 White House Conference on Small Business and the Minnesota Women’s Political Caucus. In 1980, she won the St. Paul Jaycees’ Distinguished Service Award for Community Service.

Cohen said the issue he hoped to raise by releasing the records “isn’t whether Ms. Johnson has been convicted, but whether she tried to conceal it from the public.”

Cohen, a former Independent-Republican alderman in Minneapolis who this year ran unsuccessfully for the Hennepin County Board, noted that when he was arrested for scalping a ticket at the Kentucky Derby three years ago, he publicized the incident immediately.

Cohen is an advertising executive with Martin-Williams Inc. and assisted Whitney with production of some TV ads. He is not on the campaign payroll and does not sit on its steering committee. He and Whitney have been friends since 1957, when Cohen’s father, the late Merrill Cohen, hired Whitney at J. M. Dain Co., now Dain Bosworth, Inc., the investment firm Whitney headed during the 1960s.

“The voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie,” he said.

A check-out log of court records in the St. Paul Municipal Court archives indicates that files on the Johnson cases have

been checked out only once in 1982 — on Tuesday, by Gary Flakne, former Hennepin County attorney and a former IR legislator.

Flakne said yesterday, he heard “quite a while ago . . . through the grapevine” that Johnson had a criminal record. He said he could not say who gave him the information or why he waited until this week to obtain copies of the documents.

A clerk in the archives, Robert Granger, said he remembers one previous inquiry about Johnson’s records several months ago. It may have been a telephone inquiry, Granger said, because it does not appear on the log.

Olsten said he first became aware of Johnson’s conviction Tuesday, after Whitney’s running mate, Lauris Krenik, was interviewed by Dick Pomerantz, host of a talk show on KSTP-AM radio.

Pomerantz said yesterday that he has known for several months about the shoplifting case. He said he asked Krenik, “Suppose there was something in somebody’s background 12 or 15 years ago, a petty-theft. . . . Should that person be judged on that?”

He denied mentioning Johnson’s name to Krenik. Olsten, however, said that Krenik left the broadcast with the understanding that Johnson had been convicted of petty theft.

Whitney said that when he heard of the matter yesterday, “I said, ‘Where in the hell did that come from?’ I understood it came from Dick Pomerantz.”

Olsten said that as of yesterday afternoon, the Whitney campaign had no plans to mention Johnson’s record in speeches or advertisements in the final week of the campaign.

“Certainly, a person’s character and integrity are things people ought to look at when they vote for the second highest office in the state,” Olsten said. “I wouldn’t presume to tell voters whether I think this is relevant to the campaign — I’d leave that up to them.”

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Whitney said, "I honestly think it's a legitimate piece of information and if it happened to my running mate, well, then people ought to know. Your past is part of your history. An accumulation of facts. It's absolutely legitimate to talk about."

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EXHIBIT 2

St. Paul Pioneer Press¹
Thursday, October 28, 1982
Page D1

PERPICH RUNNING MATE ARRESTED IN PETTY THEFT CASE IN '70
By Bill Salisbury,
Staff Writer

Marlene Johnson, the DFL candidate for lieutenant governor, was convicted 12 years ago of shoplifting \$6 worth of sewing supplies.

Court records concerning the conviction — which has been expunged from her record — were given to reporters Wednesday by a prominent Independent-Republican.

Johnson confirmed the report and said it is “irrelevant” to the campaign. She said she told former Gov. Rudy Perpich about the incident before he selected her as his running mate.

“It’s a last-minute smear campaign,” Johnson said, charging that I-R gubernatorial candidate Wheelock Whitney was behind the revelation.

“Wheelock knew nothing about it,” Whitney campaign manager Jann Olsten said. “It’s a predictable response. If I were in her position, I’d try to shift the attention on someone else, too.”

Perpich gave Johnson an “absolute” vote of confidence. “She told me about it; she told me about the circumstances, and I just judged her on what I believe she can do as lieutenant governor,” he said in a telephone interview from Winona.

Asked what political damage the revelation might have, Perpich replied, “I don’t know, I just feel that Minnesotans judge people by what they do in society, and I believe that she has been a very meaningful contributor to society.”

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Johnson said the incident occurred at a time when she was distraught over the recent death of her father.

She said that on May 25, 1970, she walked out of the Sears store, 425 Rice St., with "\$6 worth of buttons and other sewing materials" without paying for it. She was arrested.

"I was very close to my father and was upset by his death," she said. "I was under stress — I had lost about 20 pounds — and I also got my first speeding ticket at about the same time."

Court records show Johnson was found guilty of petty theft on June 3, 1970, but that the conviction was vacated Feb. 6, 1971, without a sentence being imposed. Johnson said this means that "I do not have a criminal record."

She also confirmed a court record that she was arrested in 1969 for "unlawful assembly" for participating in a civil rights protest demonstration. The charge was dropped before the case went to trial.

Dan Cohen, a Minneapolis advertising and public relations consultant, gave the court records to at least three reporters, but asked that his name not be used. Cohen, a former I-R alderman who has run unsuccessfully for mayor and county commissioner, said he was delivering the records for another person, whom he declined to identify. "The issue isn't whether Miss Johnson has been convicted of a misdemeanor, but whether she concealed it," Cohen said.

". . . every day that Miss Johnson failed to reveal her conviction and Mr. Perpich knew about it, they were living a lie." Cohen is not involved in the Whitney campaign at present, but was employed by Whitney as an advertising consultant for a time early this year, according to Olsten. He insisted Whitney knew nothing of Cohen's plan to release the court records.

"We were not behind bringing this to light," Olsten said. "But regardless of how it became public, it goes to the honesty and moral character of the person involved."

Johnson said she was informed that the records were slipped to reporters by "someone close to the Whitney cam-

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paign.” She declined to identify her source.

Johnson, the first woman chosen by a major party as its lieutenant governor candidate in Minnesota, owns Split Infinite, a St. Paul advertising and public relations firm.

EXHIBIT 3

Minneapolis Star and Tribune¹
Friday, October 29, 1982
Page 1B

JIM KLOBUCHAR

Not long after rummaging in the rug pile of politics to make his revelations of Marlene Johnson's past, Dan Cohen struck a pose of shining morality.

It is not an easy role switch to bring off, standing there slipping a pair of white gloves over soiled fingernails.

Nonetheless Dan Cohen comes to us in those most improbable robes of all for the potential partisan and publicist: The Conscience of the Community.

Rudy Perpich and Marlene Johnson have been living a lie for months for not disclosing her arrest on a charge of shoplifting 12 years ago.

How do we know this constitutes living a lie?

The conscience has so defined it.

We have been spared the fool's innocence and gullibility. Knowing all the dirt there is to know about Marlene Johnson, we can go to the ballot boxes as an informed electorate, satisfied that every dark or suspicious cranny bearing on the character of every candidate on the ballot has been revealed to us.

Do you believe it has?

If you do, there is still a chance for Santa Claus and Little Red Riding Hood.

This is the sham of a partisan personality or personalities taking what everybody can understand as a piece of campaign hardball, sleazy as it is, and trying to elevate it as a public

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service.

The record says Marlene Johnson, now the Democratic-Farmer-Labor candidate for lieutenant governor, was arrested at the age of 24 on a charge of taking \$6 worth of sewing goods from a store. The charge was later vacated. She says she was emotionally overwrought because of a death in the family at the time, and forgot to pay. The record also shows she was arrested a year earlier when she and other protesters refused to leave a construction site where the city of St. Paul allegedly had failed to hire minority workers.

The ethics of this kind of under-the-log-grubbing the week before the election can be argued. Cohen — and Wheelock Whitney — may be right in calling Marlene Johnson's two misdemeanor arrests legitimate information helpful to the voters in measuring her and making a judgment.

Dan Cohen then makes a higher judgment and a characterization.

Johnson and Whitney's opponent, Rudy Perpich, are liars-by-suppression.

They are more than liars. They have been living a lie every day by not revealing it. Didn't Dan Cohen come clean with the world, he asks, when he got arrested for scalping tickets at the Kentucky Derby?

He did, although the world might have muddled through without the information. Because Dan was arrested for scalping, he feels fully qualified to enter the campaign as the judge of Marlene Johnson's honesty.

But let's take this as a criterion for honesty — as enunciated by the hardball-playing publicist trying to get his candidate elected.

Every candidate who withholds any information from the voters that might bear on his or her character or integrity, professionally or personally, is living a lie.

This means that all candidates on the ballot must come for-

ward today with every marital indiscretion or act of adultery, every instance when they dragged on joint of pot or worse at a private party, or got blasted out of their skulls on booze and howled racial epithets and profanities. These and others. We will demand this kind of honesty from each candidate on each ticket from top to bottom, DFLers, IRs and the rest. And when they all have come forward with their revelations, then we can damn Marlene Johnson for not making hers.

My guess is that alongside other cases of human fallibility on the ballot, Marlene Johnson's is mild.

The irony here is that for the second time in four years, something about morality has arisen late in a campaign waged against Perpich. It is the shabbiest kind of a late-thrown kidney punch. However his performance is measured, his personal and professional ethics are recognized by all who know him, even remotely. Four years ago some zealous campaigners papered church parking lots with material suggesting that a vote for his opponent was a vote for God.

He is now supposed to be a liar by concealment. The mid-week tempest may be nothing more than a footnote to the election. Either way the chronology by which it reached the public tells us more about the quality of the politics of those who inspired it than it does about the politics of Marlene Johnson and Perpich.

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EXHIBIT 4

Minneapolis Star and Tribune¹

Sunday, November 7, 1982

Page 18A

LETTERS FROM READERS

NEWSPAPER ETHICS

Before the Nov. 2 election, your newspaper published an article concerning the shoplifting conviction of Marlene Johnson, DFL candidate for lieutenant governor. The manner in which this story was handled demonstrated a complete lack of integrity.

Dan Cohen, a former public official and former contributor to your newspaper, made available to your reporter documented court records of Johnson's arrest and conviction. That information had not previously been brought to the public's attention. Cohen felt that facts relevant to a candidate's past or present fitness should be divulged and discussed before the election.

Cohen brought these documents to your newspaper on the absolute and clearly stated condition that he remain anonymous. He trusted the traditional integrity of a reporter and a newspaper to protect sources of information at all cost, even if threatened with punishment. Cohen's trust was misplaced, a costly mistake for him.

Cohen was assured that his name would not be used. Subsequently, your newspaper published a story revealing him as the source. Cohen was fired from his job and has been subjected to public embarrassment and ridicule because his name appeared in that story. For what reason? Surely your paper did not need to breach its agreement with Cohen to confirm the truth of the information. A minimal amount of investigation by one of your

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reporters would have revealed that the information was correct without revealing a confidential source. You have given all persons fair warning that Star and Tribune assurances of source confidentiality cannot compete with expediency.

Gary Flakne, Bloomington.

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EXHIBIT 5

Minneapolis Star and Tribune¹
Sunday, November 7, 1982
Page 18A

IF YOU RAN THE NEWSPAPER . . .
By Lou Gelfand
Readers' representative

On Oct. 27, six days before last Tuesday's election, Independent-Republican activist Dan Cohen offered Star and Tribune political reporter Lori Sturdevant, and at least three other reporters, what he described as an important news tip.

He had a caveat: He insisted on confidentiality before he would reveal his information.

Sturdevant accepted the information on that basis. So did Bill Salisbury of the St. Paul Pioneer Press, Gerry Nelson of the Associated Press and Dave Nimmer of WCCO-TV. They apparently were the only ones Cohen contacted. I wanted to confirm this and other details with Cohen, but he did not return my phone calls.

At the daily conference of Star and Tribune editors Wednesday afternoon, Robert Franklin, city editor, summarized Cohen's tip. Marlene Johnson, DFL lieutenant governor candidate, had been arrested and convicted in 1970 for shoplifting. Eight months later the charge was vacated, i.e., the conviction was no longer on her record.

Franklin said he had confirmed the accuracy of the tip.

The editors argued whether Cohen's name should be used, with or without his approval. The decision was delayed pending receipt of more information on the Cohen-Sturdevant conversation, and on how widely Cohen's activity was known.

Ultimately, the decision to report Cohen's involvement was made by Mike Finney, an assistant managing editor, and re-

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viewed by Frank Wright, managing editor for news. Sturdevant called Cohen about 7:30 p.m. to advise that the agreement would not be honored. Cohen said that if he was to be identified he wanted to be quoted as saying: "The voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie." He was so quoted.

Sturdevant was not pleased with the decision to use Cohen's name. She wrote the article for the Oct. 21 issue, but requested that her by-line not appear. Instead, the article was "By Staff Writer." Finney said he "had two main reasons" for identifying Cohen. "The first was that the source of the information was no longer a secret. Although Cohen had asked us for anonymity, many people knew he had given the material to the local media. In addition, the circumstances of how we received the information were important to our readers so they could put the Johnson record into perspective."

Wright responded to two questions: 1. Should we have published the article? "Yes, for two reasons. First, while the substance was relatively minor and we wouldn't have turned it up on our own, it was marginally worth reporting. Second, the manner in which Whitney supporters made it public at the last minute in the campaign warranted full disclosure of their methods."

Question 2: Was it ethical to use Cohen's name? Wright said, "Under the circumstances I feel it was ethical. While a reporter originally agreed to confidentiality (which should not have happened without consultation with an editor), that agreement quickly became ludicrous. Cohen was going all over town peddling the information to every media outlet he could find. He was doing it openly. We and others saw him. The knowledge that he was the source was very widespread. Expecting confidentiality while so brazenly distributing the material was ridiculous."

The St. Paul Pioneer Press also identified Cohen under similar circumstances. Reporter Salisbury omitted Cohen's name but told his supervisors the source. Executive Editor David Hall decided Cohen's name be used.

Said Hall: "Our news room policy says pretty clearly that we discourage the use of anonymous sources. It says a reporter should check with his superior before promising confidentiality. I think when they bring up a charge like this late in the campaign it is serious, and I think readers need as much information as possible about the process . . . not only the facts but how the story came to light."

"We have a different situation where a person is going around and giving this information to a number of people. I was uncomfortable with the seriousness of the charge and I thought the readers had a right to know."

Nelson, AP correspondent at the state capitol, advised his supervisor, Larry McDermott, of the agreement with Cohen. The AP story did not refer to Cohen. After 11 o'clock that evening, when the first edition of the Star and Tribune appeared with its story identifying Cohen, the AP dispatched a new story identifying him.

Three of the four Twin Cities commercial television stations used the first AP story on their 10 p.m. news. WCCO-TV wrote its own, based on Cohen's contact with Nimmer. Nimmer gave the information to colleague Karen Boros without identifying the source, says Doug Stone, the station's assignment editor.

Before the 10 p.m. newscast, Cohen, aware that the Star and Tribune would report his involvement, called WCCO-TV to advise Nimmer his name could be used, Stone says. But Nimmer had left for the night.

The incident raises a number of issues that affect readers:

1. If tipsters cannot rely on the word of a reporter, will they quit confiding and thus erode important sources of information? That issue is raised below in a letter to the editor from Gary Flakne, former Hennepin County attorney and a former IR legislator. Flakne was identified in Sturdevant's article as the individual who checked Johnson's court file the day before Cohen talked with newspapers.

2. It is not uncommon for reporters to be told by an interviewee: "Can I tell you something off the record?" Where does

the reporter draw the line when the decision must be forwarded to a supervisor?

3. When you give the same information to more than one reporter, is it still confidential?

Comment: Which comes first? The confidential information from the tipster or the promise to honor the confidence? Sturdevant accepted Cohen's offer, assuming her editors would agree. Right or wrong, what she did is not unusual for reporters. My second guessing her would be not fair.

Editors Finney, Wright and Hall believe that if a confidence is shared by a number of people it no longer is a confidence.

Cohen weakened his stand on confidentiality when, upon being advised by Sturdevant that his name would be used, he asked to be quoted that (Rudy) Perpich and Johnson were "living a lie." While not ecstatic, he was, in effect, releasing Sturdevant from the agreement for confidentiality. Otherwise, he would have continued to hold his position.

Sturdevant's article told in detail how and by whom the information was gained from court files. That was the news, more than the facts of Johnson's arrest and conviction.

WCCO-TV editor Stone said the station did not plan to broadcast the story, but when the first Associated Press story protecting the tipster appeared in the afternoon, Stone knew the other stations would use it.

In my view, for this newspaper to have published the information without the source would have jeopardized its credibility with the reader. Publishing Cohen's name without his permission is justified by an unspoken standard of journalism that defines the substance of Cohen's tip as beneath the threshold of acceptable, unattributable information.

If the incident contributes to the cleansing of political campaigning, then it will have served a purpose.

EXHIBIT 6

St. Paul Sunday Pioneer Press¹
November 7, 1982
Page 2G

LETTERS TO THE EDITOR
A 'BREACH OF CONFIDENTIALITY' PROTESTED

On Oct. 28, your newspaper published an article concerning the shoplifting conviction of lieutenant governor candidate Marlene Johnson. The manner in which that story was handled demonstrated a complete lack of integrity. I am compelled to protest your breach of trust in revealing the identity of a confidential source.

Dan Cohen, a former public official and contributing editor to the Minneapolis Star, who understands well the integrity of a free press, made available to your reporter documented court records of Ms. Johnson's arrest history and conviction.

That information had not previously been brought to the attention of the public, although it was easily available. Mr. Cohen felt that, especially in an election year, facts relevant to a candidate's past or present fitness should be divulged and discussed before people voted on the qualifications of that person for public office. It would make little or no sense to discuss it after the election.

For reasons of his own which require no explanation or justification, and within hours of learning of this information, Mr. Cohen brought these documents to your reporter and your newspaper with the absolute and clearly stated condition that he not be revealed as the source of this information and that he remain anonymous.

He trusted and relied upon the traditional integrity of a reporter and a newspaper in similar circumstances: to protect sources of information at all cost, even if threatened with punishment. In this instance, that reliance and trust were misplaced

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and [this] was a costly mistake for him.

Mr. Cohen informed your reporter that the information given was contingent upon confidentiality. He requested and was promised anonymity. Subsequent to that promise and assurance and after he delivered the information to your reporter, he was then informed by that same reporter that your paper had decided to reveal him as the source and that the story was going to be printed with that information.

Mr. Cohen refused to negotiate on the release of your pledge of anonymity and once again informed your reporter that he had not and would not give permission to have his name used to be revealed as the source of this information. At no time was Mr. Cohen given the opportunity to withdraw the information he had given to the reporter so as to protect his anonymity.

Your paper then saw fit to violate the absolute anonymity which had been promised and proceeded to publish the article, revealing Mr. Cohen as the source of the information.

Mr. Cohen was fired from his job because his name appeared in that particular story and he has been subjected to public embarrassment and ridicule. For what reason? Surely, your paper did not need to breach its agreement with Mr. Cohen in order to confirm the veracity of the factual data which he gave to you. A minimal amount of investigation by any of your reporters would have revealed that the information was correct without breaking a confidentiality or revealing a source.

The only rational conclusion is that, somehow, this story was such that it would justify the breaking of a promise and the breach of trust. By taking this action, you have compromised journalistic integrity.

GARY W. FLAKNE

Minneapolis

Gary Flakne is a Minneapolis lawyer and former Hennepin County attorney.

EXHIBIT 7

St. Paul Sunday Pioneer Press¹
Sunday, November 7, 1982
Page 2G

Editor's Notebook/John R. Finnegan
Solving a Problem of Confidentiality

Newsmen feel strongly about protecting the confidentiality of their news sources.

And they should.

But granting confidentiality is not always a good idea or in the public interest.

Confidentiality became more than just a philosophical issue during the recent gubernatorial campaign. It became an immediate problem requiring immediate action.

A reporter granted confidentiality to a news source. An editor took it away.

It began when Bill Salisbury, one of our state government reporters, received a telephone call from Dan Cohen, a Minneapolis advertising and public relations man. Cohen said he wanted to see Bill, that he had some information Salisbury might be interested in.

They agreed to meet. Cohen came to the State Capitol. He and Salisbury met in the cafeteria. Cohen, a former Minneapolis alderman who has been active in the Independent-Republican Party, produced some court documents and said they were proof of criminal charges that had been brought against an important candidate for state office.

Salisbury said Cohen told him he could have the documents if "I promise his name would not be used."

Salisbury agreed he would not identify Cohen. "It was a

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battlefield decision,” Salisbury says. “I wanted to get the information. I felt I had it all to myself.”

He later learned that reporters from the Associated Press, the Minneapolis Tribune and at least one television station also had the same documents that showed Marlene Johnson, candidate for lieutenant governor on the DFL ticket, had been convicted in 1970 of petty theft for walking out of a Sears store with \$6 worth of sewing material. She also once had been arrested for unlawful assembly at a protest rally.

After verifying the information with Marlene Johnson, Salisbury called his city editor, Doug Hennes, to discuss how to handle the information. Both felt that the fact a candidate for major public office had a court record, even though for petty theft, was of public interest and ought to be reported.

Hennes took the story and the confidentiality of the source issue to David Hall, executive editor.

Hall agreed the information should be published. He believed, however, that the source also should be identified. Because of the nature of the charge, he felt strongly that the public should be made aware of the source.

“Anonymity in this instance was not appropriate,” Hall said.

Anyone involved in a leak of this type, Hall believes, should be willing to be identified. “At one point, I thought about telling the source that we would not use the information at all unless we could name him,” Hall said. “But this was not really an option since the information had been leaked to too many people.”

Hall also was enforcing a major news policy of these newspapers. The policy states that news sources should be identified whenever possible. “Do not overuse the unidentified source approach,” the policy states. “A reporter should check with his superior before promising anonymity or confidentiality.”

Salisbury was instructed to call Cohen and tell him of the decision. Cohen was angry, Salisbury said. Later, Cohen called the newspaper and gave a statement for publication with the

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Johnson story.

I can understand his feeling of betrayal. He felt he had an agreement of confidentiality with us.

(Please see letter on this page from Cohen's political associate, Gary Flakne.)

But our staff acted in good faith. Salisbury made a quick decision that was contrary to the newspaper's policy. The decision was reviewed by a senior editor who decided this was an exceptional case that called for overruling the reporter.

In political campaigns, newspapers should rarely accept data from sources who are unwilling to be publicly identified with charges against opposing candidates.

There are times when confidentiality must be protected at all costs.

This was not one of them.
Finnegan is vice-president/editor of the Pioneer Press and Dispatch.

APPENDIX C

SURVEY QUESTIONS

1. What is your position?
2. What is the circulation of your publication?
3. What is the population of the area you serve?
- 4a. How many employees does your publication employ full-time?
- 4b. How many reporters?
- 5a. Does your publication have in-house counsel? _____ Yes
_____ No
- 5b. If no, do you use outside counsel for:
 - _____ corporate matters
 - _____ libel
 - _____ criminal
 - _____ contract
 - _____ torts
 - _____ privacy
 - _____ employee personal legal problems
6. What percentage of your sources ask for confidentiality?
7. If you make a promise of confidentiality, what does that mean you can/cannot do?
8. What percentage of time is a promise of confidentiality denied? (What is your publication's response to a request for confidentiality?)

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9a. Does your publication have a policy regarding reporters making promises of confidentiality to sources? _____ Yes _____
No

9b. If "yes", is this policy written? _____ Yes _____ No

10. If the answer to question 9a is "yes", please describe the policy and its rationale.

11a. If the answer to question 9a is "yes", has the policy been reviewed and/or revised in the past five years? _____ Yes
_____ No

11b. If the policy been reviewed and/or revised in the past five years, when was this done?

12a. Does your publication have a policy regarding editors overriding reporters' promises of confidentiality? _____ Yes
_____ No

12b. If "yes", is this policy written? _____ Yes _____ No

13. If the answer to question 12a is "yes", please describe the policy and its rationale.

14a. If the answer to question 12a is "yes", has the policy been reviewed and/or revised in the past five years?

14b. If the policy has been reviewed and/or revised in the past five years, when was this done?

15. If the policy/ies was/were reviewed within the past two years, was the review prompted by reading or hearing about a U.S. Supreme Court decision about a promise of confidentiality?
_____ Yes _____ No

16. If the answer to question 15 is "yes", how did your publication become aware of this court decision?

17. A recent U.S. Supreme Court decision held that a newspaper can be liable for compensatory damages (no punitive damages) if an editor overrides a reporter's promise of confidentiality. What do you think is likely to happen, if anything, in the newspaper

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industry as a result of that decision?

18. Do you think if the court had NOT awarded damages to a source whose confidentiality was breached, then your sources would dry up?

19. How serious a damper on First Amendment freedom do you think this decision is?

_____ not serious

_____ somewhat serious

_____ serious

_____ very serious