

Proposed shield law not absolute privilege



Court would consider merits of claim

Raise this issue regularly with your legislators and write frequent editorials about it to educate readers.

By JEAN MANEKE
MPA Legal Consultant



(Jean Maneke, MPA's Legal Hotline attorney, can be reached at (816) 753-9000; jmaneke@manekelaw.com.)

The 2007 legislative session will be under way soon. Bills have been pre-filed and sponsors are beginning to attempt to persuade committees to pass measures onto the house and senate floors for further action.

In the last few months, editorials in a number of the newspapers in Missouri have called for the legislature to pass a shield law bill in 2007. You know who you are. I am surprised and encouraged by the editorial support this measure received in late 2006.

This is despite the rough road this proposal had in the last session. Scheduled for one legislative committee hearing, it sat for three weeks before it finally made it before the committee due to more pressing matters. Clearly, it was not high priority. And then, after its hearing, it sat. It couldn't garner enough votes from committee members to pass it out of committee onto the floor. It was, in essence, dead at the starting gate.

In the last two years, at least two newspaper staffers in the state have been required to fight fierce and long battles over unpublished materials. In neither case did the journalists face a jail cell (although one of the reporters will tell you solemnly that he was prepared to do so, and frankly, as his attorney, I worried a little that he was looking forward to the experience). But that day will come when a Missouri journalist does face jail if attorneys continue along the path they have started taking.

The biggest roadblock to moving this bill last year was Sen. Chris Koster, R-Harrisonville. He is vocal in his opposition to this bill.

Koster told the Columbia Daily Tribune in early December, "There are five areas where privileges exist in the court system that are longstanding. They are the attorney-client privilege, the right to not be a witness against yourself, the priest-penitent relationship, the husband-wife relationship and the doctor-patient relationship.

"Each of those has a common element that exists between them. And that is, there are relationships in society where the nature of the relationship has been judged to be more important than the court's pursuit of the truth. I do not believe that a journalist's investigation of a story rises to the level of civil secrecy that would merit its addition to that list."

Koster has failed, however, to distinguish that each of the relationships he cited results in an ABSOLUTE privilege against testifying. The proposed shield law does NOT include any such absolute privilege.

It allows a privilege for unpublished materials until a court proceeding where the court considers the nature of the proceeding, the merits of the claim of the defense and adequacy of any remedy otherwise available, and the possibility of establishing the evidence by any other means. The court weighs the public interest in protecting the confidentiality of the source against the public interest in requiring disclosure.

The court has the right to require the reporter to divulge the source, but first the court must determine that this public interest tips in the favor of disclosure. Koster's analysis seems to miss this significant difference in his analogy.

Your MPA legislative committee realizes this will be a tough battle. We will not succeed without your help. Each of you reading this column needs to pledge to give the association your support between now and May.

We need editorials supporting this issue on a regular basis. We need news stories analyzing the issue (and I'll be glad to help your reporters find sources, if they need help). A great resource for you would be the Reporter's Committee for Freedom of the Press, an organization that deals with this issue regularly on the national level.

And you need to raise this issue regularly with your senators and representatives when you see them. Those who must move this issue need to hear from you, either in person or in print, on a regular basis that this bill is important to you, and, indirectly, to the right of the public to have access to information.

This bill would allow whistle-blowers a venue to get the word out about problems where they cannot otherwise take action for fear of losing their jobs.

This issue will NOT pass without a strong push from MPA members. Your association and its legislative committee are willing to work hard for you on this, realizing we will probably come out of the fray bloodied and battered.

Will you help us? This battle will be tough, but we are laying a foundation for journalists coming after us. Missouri is one of only 19 states without a shield law. With a federal shield law still on the table, this is a good time to continue this push. Will you help? Can we count on you?