

# Witness for the prosecution?

*The case of St. Louis Public Radio and the need for a shield law*

All of us have watched on television as the sheriff or a deputy walks in and hands someone papers. We know what that means. He or she is not bringing a birthday present!

The folks at St. Louis Public Radio, in fact, know this feeling well. Twice in the last year they have been subpoenaed. The St. Louis Circuit Attorney wants interviews conducted by reporters from the station. The first time the subpoena sought records relating to a fight that broke out at a hearing involving local aldermen last January. This time, in October, the subpoena was related to a police shooting of an African American who officers said pointed a gun at them first.

The subpoena sought “all raw and aired video and audio footage.” But this time it indicated that, while all interviews were to be included, interviews of confidential informants were not included. That was different than the original subpoena from earlier this year, which did not include that exclusion. It also, oddly enough, excluded “items protected by the 1st Amendment.” That phrase is what I find most interesting.

Law enforcement claims it needs information like this to do its job. It’s just standard procedure for a prosecuting attorney to believe the easiest way to present evidence in a criminal case is to locate witnesses to the incident and subpoena them to testify in court, regardless of who they might be.

Reporters also, in a similar fashion, gather information from witnesses to use for their purposes – to write a story and to cover an ongoing event. When a reporter goes to an event and identifies participants to gather the necessary information, the reporter wants to be clear that he or she doesn’t represent any interested party. The reporter is not on one side or the other. The reporter is just there to gather information for news purposes.

This is critical for the reporter’s safety. If the reporter is seen as representing one side or the other, the reporter can find himself or herself in physical jeopardy. This was one of the largest concerns of journalists



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covering actions last year in Ferguson, Mo. There were cases in August 2014, where television reporters found themselves bombarded by teargas missiles, despite clearly operating in an area where bright lights illuminated them as they gave “on the spot” reports. In other situations, reporters felt concerns about their personal safety when they were in areas where the crowds were out of control.

Missouri has never joined the ranks of newspapers giving reporters a “shield law” privilege. Many states that have no shield law statute give reporters certain reporting rights under case law. *Forbes* magazine in 2014, without giving its source for this information, noted that 48 states had some kind of shield law. Montana just passed a shield law Oct. 1 of this year, if the Poynter Institute is correct. That would seem to leave Missouri as “outstanding in its field” in every way.

We do have one case that touched briefly on this issue. Media lawyers know it as the “Classic III” case. It recognized that a privilege was available in libel lawsuits to learn the reporter’s source of an alleged defamatory statement under certain circumstances (based on principles it found in case law in other states). Before making the reporter reveal the source, the

court required the balancing of four principles: 1) Are alternative sources available? 2) How important is protecting confidentiality of the source? 3) Is the information critical to the plaintiff’s case? and 4) Has the plaintiff set out a basic cause of action for libel?

There is case law across the country that makes it clear that a reporter who is an eyewitness to a crime or other situation and whose testimony is needed in regard to that matter cannot claim an exemption to giving testimony just because the reporter happened to be on the scene while doing his job as a reporter.

So, with all that information, let’s go back to the St. Louis Public Radio situation. Asking a reporter to testify about the interviews he or she recorded

puts the reporter in a dangerous situation. There is no evidence this information can’t be obtained by the prosecutors from other sources. Why should the journalist be the first source a prosecutor turns to in this situation?

The prosecutor, in commenting about other matters related to this, peripherally referred to the public radio station as “becoming hysterical and screaming that the subpoena tears at the very fabric of the constitution.”

Well, it does. The safety of our reporters depends absolutely on it being clear that we are not there to represent law enforcement. We cannot do our job if sources do not trust us to serve independently as the watchdog of government.

Wouldn’t it be wonderful if 2016 became the year Missouri joined as the 50th state to adopt a shield law?

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