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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
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| COUNTY OF LEXINGTON | ) | CIVIL ACTION NO.: 2015-CP-32-1764 |
| Kenneth A. Bingham, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | RETURN TO MOTION FOR CIVIL CONTEMPT AND SANCTIONS |
| | ) | |
| William R. Folks, III, and FitsNews, LLC, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

TO: JOHN E. PARKER, ATTORNEY FOR THE PLAINTIFF ABOVE NAMED:

The Defendants hereby submit the within Return to the Plaintiff's Motion for Civil Contempt and Sanctions Pursuant to Rule 37, SCRCP.

**Background**

The Plaintiff's motion for civil contempt and sanctions concerns the Defendant Folks' noncompliance with a discovery order issued by Judge R. Keith Kelly on October 27, 2016, directing the Defendant Folks to disclose confidential sources in the following three instances (with each instance cited below quoted directly from Judge Kelly's order):

> 1. "Mr. Folks' sources for his article entitled "The Revenge of Bobby Harrell … (Folks Dep. 108.)."
>
> 2. "Mr. Folks' "other sources" mentioned in Paragraph 14 of the Answer … This includes the identities of any of Mr. Folks' sources related to the publishing of the defamatory material in question, any sources stating that the complaints were not being handled in a timely manner, and any "insiders" believing indictments would be issued imminently against Bingham, White, Sandifer, and others."
>
> 3. "The source he [Mr. Folks] referenced in regard to Mr. Bingham being indicted that he learned of within the last couple of weeks (Folks Dep. 56:21 – 57:13.)."

The Defendant Folks avers in the affidavit attached hereto as Exhibit A that, in exercising his role as a member of the press, he occasionally makes promises of confidentiality to sources to secure information for publication that might otherwise be unattainable, and that the reliability of his promises rests in the professional ethics expected of reporters. In each instance that Judge Kelley has ordered disclosure, the Defendant Folks made such a promise of confidentiality to the source. Subsequent to the issuance of Judge Kelley's order, the Defendant Folks asked those

sources if they would release him from this promise of confidentiality, explaining the judge had ordered him to disclose their identities. Notwithstanding these efforts, however, the sources declined to release the Defendant Folks from his promise.

## I. In failing to disclose confidential sources as ordered by Judge Kelly, the Defendant Folks has not acted "with bad purpose either to disobey or disregard the law."

The Supreme Court of South Carolina in In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998), held that only willful disobedience of an order of the Court may result in contempt, and defined a willful act as "one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, ***with bad purpose either to disobey or disregard the law.***" Id. at 420-21, S.E.2d at 355 (internal quotation omitted and emphasis provided). Moreover, the Court has also held that "civil contempt must be proven by clear and convincing evidence." Poston v. Poston, 331 S.C. 106, 115, 502 S.E.2d 86, 91 (1998). As argued herein, the Plaintiff has not shown by clear and convincing evidence that the Defendant Folks has acted "with bad purpose."

The United States Supreme Court, in Cohen v. Cowles Media Co., 501 U.S. 663,111 S. Ct. 2513 (1991), held that the First Amendment does ***not*** prohibit a source from recovering damages under state promissory estoppel law for a journalist's breach of a promise of confidentiality given in exchange for information. The Defendant Folks provided assurances of confidentiality to sources in return for their information and, despite requests by the Defendant Folks, these sources have declined to release him from those promises. This bears upon the Defendant Folks' state of mind and is relevant to the court's inquiry into whether he has acted "with bad purpose."

Also material to this court's inquiry into whether the Defendant Folks has acted with the requisite "bad purpose" is the fact that a serious issue of journalistic ethics is involved; in this regard, attention is craved to the following portion of the lower-court decision that was reviewed by the United States Supreme Court in Cohen and neither contradicted nor qualified on appeal:

> "The 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. Only in dire circumstances might a promise of confidentiality possibly be ethically broken, and instances were cited where a reporter has gone to jail rather than reveal a source. The keeping of promises is professionally important for at least two reasons. First, to break a promise of confidentiality which has induced a source to give information is dishonorable. Secondly, if it is known that promises will not be kept, sources may dry up. The media depend on confidential sources for much of their news; significantly, at least up to now, it appears that journalistic ethics have adequately protected confidential sources."
>
> Cohen v. Cowles Media Co., 457 N.W.2d 199, 202 (1990).



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As noted, it is a "sacred tenet" of journalistic ethics that reporters "[r]ecognize the need to protect confidential sources" and "promise confidentiality only with the intention of keeping that promise."[a] The point here is that the Defendant Folks is not acting on a whim by failing to obey Judge Kelly's order compelling the disclosure of confidential sources, but conforming to an accepted and respected code of journalistic ethics; he is not acting "with bad purpose," that is, with the requisite state of mind, proven by clear and convincing evidence, for a finding of contempt.

If the Defendant Folks reveals the confidential sources, he would: 1) subject himself to liability for breach of contract and 2) violate the professional ethics expected of reporters, thereby irreparably damaging his ability to obtain and report information of importance to the public; accordingly, the Defendant Folks' noncompliance with Judge Kelley's order was not done "with bad purpose," but to avoid a breach of journalistic ethics and liability for breach of contract.

The Court of Appeals of South Carolina in Smith-Cooper v. Cooper Eyeglasses, 344 S.C. 289, 543 S.E.2d 271 (2001) dealt with this issue of "willful disobedience." There, as here, the putative contemnor had not complied with the terms of the court's order; however, the appellate court reversed the lower court's contempt order, ruling that "the facts and circumstances of this case do not support a finding of contempt." Id. at 301, S.E.2d at 277. The appellate court explained:

> "Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt. Hicks v. Hicks, 280 S.C. 378, 381, 312 S.E.2d 598, 599 (Ct.App.1984); see also Moseley v. Mosier, 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983) (parent who is unable to make child support payments as ordered is not in contempt).
>
> "We find Husband's failure to comply with the agreement was not willful. The testimony at trial reveals Husband's failure to comply with his support obligations under the agreement was due to his financial inability." Id. at 301, S.E.2d at 277.

Similarly, in this instance, the Defendant Folks "is unable, without fault on his part, to obey an order of the court," and therefore should not be held in contempt.

## II. If the Defendant Folks is held in contempt, the sanctions should not be punitive, but specifically targeted to mitigate the resulting harm to the Plaintiff's case.

If this court determines there is clear and convincing evidence that the Defendant Folks acted "with bad purpose," the sanctions imposed should not be punitive, but specifically targeted to mitigate the resulting harm to the Plaintiff's case. This is required by Rule 37(b) of SCRCP, which requires sanctions to be "just," and is the nature of civil (as opposed to criminal) orders of contempt. "Whereas civil contempt is either coercive or remedial in nature, criminal contempt is purely punitive." DiMarco v. DiMarco, 393 S.C. 604, 713 S.E.2d 631 (2011).

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[a] Radio-Television News Directors Association, Code of Broadcast Ethics 4 (1987), reprinted in Jay Black, et al., Doing Ethics in Journalism 10-11 (2d ed. 1995).

As a threshold matter, it is noted that this court need not impose any sanctions against the Defendant Folks even if it determines he is in contempt; there is precedent for a finding of contempt to ***not*** to be accompanied by sanctions in cases where the putative contemnor is a member of the press. In Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009), the Supreme Court of South Carolina held the trial court's refusal to impose sanctions on newspaper that chose to be held in contempt for refusing to comply with discovery order was ***not*** an abuse of discretion:

> "Petitioner maintains the Court of Appeals erred in failing to address his argument that Judge Dennis improperly declined to impose sanctions on Newspapers for its contempt. We disagree.
>
> "The Court of Appeals, having upheld the grant of summary judgment, declined to address the merits of the contempt cross-appeals citing Jarrell v. Petoseed Co., 331 S.C. 207, 209–10, 500 S.E.2d 793, 794 (Ct.App.1998) ("Civil contempt proceedings designed to coerce compliance generally terminate along with the termination of the main action."). Regardless, where a party chooses to be held in contempt in order to immediately appeal a discovery order, it is within the discretion of the trial court to forego sanctions. E.g., Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct.App.1997) ("Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion."). Clearly, under the circumstances of the instant case, it was within Judge Dennis's discretion to not impose contempt sanctions on Newspapers."
>
> Id., at 500, 682 S.E.2d at 818.

In the event, however, this court finds the Defendant Folks is in contempt and determines that sanctions of some sort are appropriate, then the sanctions – in order to be "just" as required by Rule 37(b) – must be specifically targeted to mitigate the resulting harm to the Plaintiff's case. The Supreme Court of South Carolina, in Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014) discussed the lower-court's equitable obligations in this regard:

> "[W]hen the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct.App.1999) (citing Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996)). Thus, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Id. at 198–199, 511 S.E.2d at 718–19 (citing Baughman v. AT & T Co., 306 S.C. 101, 410 S.E.2d 537 (1991)); *see also* Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997) (stating when deciding the severity of sanctions "for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the

discovery posture of the case, willfulness, and the degree of prejudice") (citations omitted)."

Id., at 282-283, 762 S.E.2d at 544.

Clearly, in assessing appropriate sanctions, the particular circumstances involved must be carefully considered; in other words, "the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Id. at 283, 762 S.E.2d at 544. In regard to this inquiry, counsel for the Defendants respectfully submit that an article by Professor Achal Mehra, published in Journalism Quarterly and titled "Sanctions for Reporters Who Refuse to Disclose Sources in Libel Cases,"[b] a copy of which is attached hereto, provides guidance on what would constitute a just order in the present case.

Professor Mehra's article reviews case law regarding sanctions imposed by judges pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, in cases where (as here) reporters refused to disclose sources in a defamation case; although those cases apply the federal civil rule, they are nonetheless instructive here since SCRCP Rule 37(b) is materially similar (with the Notes to the state civil rule noting only minor exceptions which are immaterial to the issue at hand).

As a threshold matter, Professor Mehra notes, citing cases in which a reporter refused to disclose a confidential source, that jailing for contempt is "the harshest remedy available to the court" and that "imprisonment for contempt as a means of coercion for civil purposes cannot be resorted to until all other means fail." Id. at 442. Further, she notes that:

"Courts do not have the power to select arbitrarily the sanctions they impose, but the sanctions should be suitable and necessary to enable the party seeking discovery to obtain the objects of discovery. The rule has been recognized as making available to courts the means to prevent injustice when one party by his conduct has placed the other party at an unfair disadvantage."

Id. at 443.

The Plaintiff's allegations of defamation against the Defendants in the Complaint are set forth in seven paragraphs, numbered 7 through 13; five of those seven paragraphs – the ones numbered 7 through 11 – pertain to whether the Defendants acted with reckless disregard in publishing stories stating that an ethics complaint had been filed against the Plaintiff by Colin Ross. The Defendant Folks testified at his deposition that Mr. Ross was the only person who provided him with information as to the matters complained of by the Plaintiff in paragraphs 7 through 11 of the Complaint (See: Folks Dep. 17:14 – 18:21); the confidential sources Judge Kelly ordered the Defendant Folks to disclose are unrelated to the alleged instances of defamation set forth in those paragraphs and, accordingly, the Plaintiff's ability to prove defamation in those instances is in no way prejudiced by the Defendant Folks' nondisclosure of the confidential sources.

[b] Mehra, Achal; *Journalism Quarterly*; Volume 60, Issue 3, Pp 437-444; Autumn 1983.

Admittedly, on the other hand, the Plaintiff's defamation allegations set forth in paragraphs 12 and 13 in the Complaint – i.e., that the Defendants acted with reckless disregard in publishing stories stating (in paragraph 12) that the Plaintiff through his committee ignored filed ethics complaints and (in paragraph 13) that many insiders at the South Carolina State House believed indictments against the Plaintiff and others were imminent – are based, in part, upon information provided to the Defendant Folks by the confidential sources he has refused to disclose.

As noted above, the court's objective in imposing sanctions for civil contempt is "to prevent injustice when one party by his conduct has placed the other party at an unfair disadvantage." The Defendant Folks' failure to disclose the identities of the confidential sources who provided information relative to the allegations of defamation set forth in paragraphs 12 and 13 of the Complaint hinders the Plaintiff's ability to call them as witnesses, impeach their credibility and demonstrate to the trier of fact that the Defendants' reliance on what they said was unwarranted.

Professor Mehra cites cases where judges, confronted with similar instances of a reporter placing the plaintiff at an unfair disadvantage, ordered just sanctions. One such order was considered by the New Hampshire Supreme Court in Downing v. Monitor Publishing Co., 120 N.H. 383 (1980); there, a newspaper being sued for libel refused to disclose its sources of information, and the lower court was found to have acted justly to protect the rights of the libel plaintiff:

> "Therefore, we hold that when a defendant in a libel action brought by a plaintiff who is required to prove actual malice under New York Times, refuses to declare his sources of information upon a valid order of the court, ***there shall arise a presumption that the defendant had no source. The presumption may be removed by a disclosure of the sources a reasonable time before trial.***"
>
> Id. at 386 (emphasis provided).

Professor Mehra explains how and why this specific sanction – again, in circumstances materially similar to the one here – was just: "In so ruling, the court attempted to aid the libel plaintiff by giving him the benefit of the doubt, and also tried to defuse the constant confrontation between the press and courts. This presumption leaves the reporter-defendant with a choice of either submitting to discovery or risking liability at trial."[c]

A second case cited by Professor Mehra, which is also instructive as to what a just sanction is in cases like this, was decided by the California Superior Court; there, the court held that if a defendant in a libel action persisted in his refusal to disclose a confidential source, then "***the jury will be instructed as a matter of law, there was no source for the publication (other than the sources, if any, previously disclosed).***" Rancho La Costa v. Penthouse, 106 F. 2nd 646 (3rd Cir. 1981) (emphasis provided). Significantly, the California court, in determining whether the sanction imposed was just, cited a rule materially similar to SCRCP Rule 37(b).

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[c] Mehra, Achal; *Journalism Quarterly*; Volume 60, Issue 3, Page 439; Autumn 1983.

Therefore, a sanction by this court that imposed a presumption the Defendant Folks had no individual sources for the allegedly defamatory matters published in the stories referenced in paragraphs 12 and 13 of the Complaint, with the caveat that such could be removed by a disclosure of the sources a reasonable time before trial, would be a just way of resolving this matter. Any potential prejudice to the Plaintiff caused by the Defendant Folks' failure to disclose the confidential sources as ordered by Judge Kelly would thereby be completely mitigated, but in a way that did not do unnecessary violence to the aforementioned "sacred tenet" of journalistic ethics regarding confidential sources.

## III. Any sanctions imposed as a consequence of the Defendant Folks' refusal to disclose confidential sources as ordered by Judge Kelley should be stayed pending an appeal.

In the event this court issues an order declaring that: 1) the Defendant Folks is in contempt of court for refusing to disclose confidential sources as ordered by Judge Kelley and 2) he should be sanctioned for such contempt, then such sanctions, since they touch upon matters implicating the rights protected by the First Amendment, should be stayed pending an appeal of that order by the Defendant Folks. The decision by the Supreme Court of South Carolina in the Matter of Decker, 322 S.C. 212, 471 S.E.2d 459 (1995), is authority for the proposition that, in circumstances where First Amendment rights are involved, a stay in regard to sanctions is appropriate.

In Matter of Decker, the Court considered a situation in which a reporter for *The State* newspaper was held in contempt by the lower court for refusing to divulge the identity of a source; the reporter there – as does the Defendant Folks here – asserted a qualified privilege under the First Amendment to the United States Constitution. Noting it had been presented with "the opportunity to consider if a qualified privilege exists under the First Amendment to the United States Constitution, and if so, how such a privilege is to be applied," the Court held that, in a matter of such public importance, "it would be inappropriate to incarcerate appellant during the pendency of this appeal." Id. at 214, S.E.2d at 461.

This court has broad discretion to do equity in fashioning sanctions and, given the public importance of the Defendant Folks' assertion of a qualified privilege and applying the reasoning of the Court in Matter of Decker, any imposed sanctions should be stayed pending the adjudication of the matter on appeal. Moreover, no prejudice would thereby be occasioned to the Plaintiff, notwithstanding this allegation in the pending motion:

> "As a result of Folks' willful noncompliance, Bingham has been precluded from learning the identity to a potential defendant that informed Folks in September 2015, [sic] that Bingham was about to be indicted."

The Plaintiff is asserting that a proper purpose of discovery is to identify other individuals who he might have a defamation claim against; however, discovery does ***not*** provide the plaintiff with "the opportunity to go upon a "fishing expedition," but requires that the examination be confined to facts which assist the plaintiff in establishing his cause of action." Mahaffey v. Southern Ry. Co., 175 S.C. 198, 178 S.E. 838.

## Conclusion

For the reasons stated herein, the Defendants respectfully request that this court deny the Plaintiff's motion in that he has not proved by clear and convincing evidence that the Defendant Folks, in failing to disclose confidential sources as ordered by Judge Kelley, has acted "with bad purpose either to disobey or disregard the law."

In the event this court finds the Defendant Folks is in contempt, the Defendants respectfully request the sanctions not be punitive, but specifically targeted to mitigate the resulting harm to the Plaintiff's case by imposing a presumption that the Defendant Folks had no individual sources for the allegedly defamatory matters published in the stories referenced in paragraphs 12 and 13 of the Complaint, with the caveat that such a presumption could be removed by a disclosure of the sources a reasonable time before trial.

Finally, if this court imposes sanctions against the Defendant Folks, the Defendants respectfully request that the sanctions be stayed during the pendency of any appeal of the contempt order.

Respectfully submitted:

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June 26, 2017

By Achal Mehra

# Sanctions for Reporters Who Refuse To Disclose Sources in Libel Cases

*The courts have specific sanctions under the* Federal Rules of Civil Procedure *to ensure discovery in libel and invasion of privacy.*

►Traditionally, reporters who have refused to disclose confidential sources when directed to do so by a court have been held in civil contempt of court and have been sentenced to jail or fined for their refusal to disclose.[1] In some cases, reporters have been held in criminal contempt of court.[2] Contempt sanctions have been employed against reporters for failure to disclose sources both in civil[3] and criminal[4] cases.

But in a civil case to which a reporter is a party, courts have available to them a wide range of alternative sanctions to impose against the reporter who refuses to disclose his confidential sources.[5] The choices are somewhat limited in a criminal case and in a civil litigation in which the reporter is not a party. But in a civil case in which the reporter is a party (for instance libel and invasion of privacy litigation) courts not only have a body of case law, but also specific sanctions under the Federal Rules of Civil Procedure. In addition, they have broad discretion to fashion remedies to compensate a litigant who is unable to ensure discovery when the reporter refuses to disclose his sources of information.[6]

Without going into the merits, or the lack of them, of the various arguments about reporter's privilege — the right of a reporter to keep his sources of information confidential, this article will enumerate the alternative legal sanctions available to courts in dealing with a reporter who refuses to disclose under the Federal Rules of Civil Procedure. The study will then examine media-related cases in which these sanctions have been employed. It will relate these cases to non-media cases to examine the authorities on the subject. Finally, it will examine the consequences of the use of sanctions other than jailing in claims of reporter's privilege in libel cases in which the reporter is a party.

## *Rules of Discovery*

The conduct of civil trials in federal courts is governed by the Federal Rules of Civil Procedure, last updated in August 1980.[7] In civil cases, after the commencement of action, parties move for discovery, a term applied to pre-trial procedures in which one party tries to secure facts, documents or other materials from the opposing party.

Rules 26 through 37 provide an elaborate system of pre-trial discovery. The rules

[1] *Garland v. Torre*, 259 F.2nd 545(2d. Cir. 1958); *U.S. v. Criden*, 648 F.2nd 814(3rd Cir. 1981); *Massachusetts v. McDonald*, 6 Media L. Rep. 2230 (Mass. Super. Ct. 1980); *Caldero v. Tribune Publishing Co.*, 562 P.2nd 791 (Idaho 1977); *Farr v. Pitchers*, 522 F.2nd 464(9th Cir. 1975).

[2] *Taylor v. Miskovski*, 7 Media L. Rep. 2408(Okla. Sup. Ct. 1981).

[3] *Garland*, 259 F.2nd 545; *Caldero*, 562 P.2nd 791; *Taylor*, 7 Media L. Rep. 2408.

[4] *Branzburg v. Hayes*, 408 U.S.655(1972); *New York Times Co. v. Jascalevich*, 439 U.S. 1317 (1978).

[5] Remedies, for example, are available under the *Federal Rules of Civil Procedure*, Rule 37(b).

[6] *Ibid.*

[7] James Wm. Moore and Jo Desha Lucas, *Moore's Federal Practice*, Vol. 4A, (New York: Matthew Binder, 1981), pp. 18-37.

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delineate the scope for requiring disclosure and protection from overreaching.

If a deponent fails to answer questions submitted, or a party fails to answer interrogatories, the party seeking discovery is required to ask the court for an order under Rule 37(a) to compel the other party to submit to such discovery.[8] Under the rule, the court may either direct the deponent to submit to the discovery, or it may issue a protective order. If a deponent directed to submit to discovery fails to do so, the party seeking discovery may move for sanctions under Rule 37(b).[9] Sanctions are also provided for under Rules 37(c), (d) and (g), but they usually don't involve reporters if they refuse to disclose sources.[10]

Courts have available eight sanctions against disobedient parties. They may enter orders: 1) establishing certain facts; 2) precluding litigation of a claim or defense; 3) prohibiting introduction of certain evidence; 4) striking all or part of the pleadings; 5) staying the proceedings; 6) dismissing all or part of the proceedings with prejudice; 7) punishing or coercing compliance through contempt sanctions, and 8) "as are just."[11]

Under contempt power, too, the court has wide discretion. It has the power to impose a penalty reasonably commensurate with the gravity of the offense.[12] It may pass orders to compensate the complaintant for losses sustained.[13] It may also order imprisonment of the disobedient party, but the imprisonment is only coercive, not punitive, and the party may discharge himself by compliance.[14] When the acts constituting the contempt impinge upon the rights or remedies of the injured party, compensatory fines may be imposed which must be paid to the party injured by the contumacious act.[15] A court may also rule that a litigant who is in contempt has no standing in court and may refuse to hear him until he is no longer in contempt.[16] The litigant's pleadings may also be stricken.[17] Under the contempt power, therefore, courts have many of the same sanctions as are available under Rule 37(b).

Discovery sanctions in media-related cases in which claims of reporter's privilege have been used, have largely been derived from Rule 37(b) (2) (D), under which they

[8] Rule 37(a) provides the procedure for seeking a motion for order compelling discovery.

[9] Rule 37(b), as amended in 1980, reads in full:

1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders as are just, and among others the following:

A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

D) In lieu of any of the foregoing orders or in addition thereto, an order treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the part failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[10] *Federal Rule of Civil Procedure* 37(c) covers expenses on failure to admit the genuineness of a document or truth of a matter; 37(d) covers the failure of a party to attend at its own deposition or serve answers to interrogatories or respond to request for inspection and 37(g) failure of a party to participate in the framing of a discovery plan.

[11] *Federal Rule of Civil Procedure* 37(b), see note 9, *supra*.

[12] *Shotkin v. Atchishon T & S.F.R. Co.*, 235 P. 2nd 990(Colo. 1951), *cert. denied*, 343 U.S. 906, *reh. denied*, 343 U.S. 970(1952).

[13] *Beach v. Beach*, 74 N.E. 2nd 130(Ohio 1946); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187(1947); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399(1923).

[14] *Lathrop v. Lathrop*, 50 N.J. Super. 525(1958); *Swanson v. Swanson*, 10 N.J. Super. 513(1950); *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418(1911).

[15] *U.S. v. United Mine Workers of America*, 330 U.S. 258(1977).

[16] *Skirven v. Skirven*, 140 A. 205(Md. 1928); *Du Pont v. Du Pont*, 103 A.2d 234(Del. 1954); Wilkinson V. McCall, 23 So. 2nd 577(Ala. 1945).

[17] *Bradshaw v. Bradshaw*, 133 S.W. 2nd. 617(Tenn. 1939).

have been held in contempt of court. Further, courts with the broad powers and sanctions available to them under contempt power, have committed reporters to jail and/or imposed fines upon them. This is true for even libel cases.[18] Even in the landmark *Garland v. Torre* case, the district court sentenced the reporter, Torre, to jail until she disclosed her sources of information.[19]

On only rare occasions have alternative sanctions been explored by courts in reporter's privilege claims. These cases are examined below.

### *Sanctions in Reporter's Privilege Claims in Libel Cases*

In 1980, the New Hampshire Supreme Court handed down a ruling in the case of *Downing v. Monitor Publishing Co.*,[20] which could have profound implications on substantive law in libel proceedings. Already, a law journal has predicted, "*Downing* may become the model by which courts attempt to eliminate the effects of a press defendants's refusal to disclose its sources because it so clearly reflects the contemporary predominate interest in individual reputation."[21]

The *Downing* ruling marked a dramatic switch in the use of traditional discovery sanctions by courts in cases involving the media.

In October 1975, Clayton Downing, chief of the Boscawen Police Department, instituted a libel suit against the Concord *Monitor* after the newspaper published 13 allegedly libelous articles involving him. During the trial, Downing sought to compel the *Monitor* to disclose its sources of information. The trial court upheld Downing's request and directed the *Monitor* to disclose its sources. The New Hampshire Supreme Court affirmed on appeal.[22] It also addressed the issue of sanctions should the *Monitor* fail to disclose, noting that "most media personnel have refused to obey orders to disclose, electing to go to jail instead."[23] The court felt the discovery process thereby had been frustrated, and that "something more is required to protect the rights of a libel plaintiff."[24]

> Therefore, we hold that when a defendant in a libel action brought by a plaintiff who is required to prove actual malice under *New York Times*, refuses to declare his sources of information upon a valid order of the court, there shall arise a presumption that the defendant had no source. The presumption may be removed by a disclosure of the sources a reasonable time before trial.[25]

In so ruling, the court attempted to aid the libel plaintiff by giving him the benefit of the doubt, and also tried to defuse the constant confrontation between the press and courts. This presumption leaves the reporter-defendant with a choice of either submitting to discovery or risking liability at trial.

The court did not spell out its rationale for arriving at the ruling, and neither party had addressed the issue in their briefs.[26] As New Hampshire does not have discovery rules comparable to the Federal Rules of Civil Procedure, the court apparently exercised its discretionary powers under Rule 41 which empowers the court to take such action as "justice may require."[27] Under the Federal Rules of Civil Procedure, the sanction it proposed is available under Rule 37(b) (2) (A).

While imposing the sanction, the court left open the contempt option to the lower court, "Of course, the trial court is free to exercise its contempt power to enforce its order . . . we do not say that the contempt power should not be exercised."[28]

Since *Downing*, at least three similar rulings have been handed down. In one such case, *Downing* was specifically cited. In *DeRoburt v. Gannett*, a district court

[18] See note 1, *supra*.

[19] 259 F. 2nd 545.

[20] 120 N.H. 383(1980).

[21] Michael L. Rair, "*Downing v. Monitor Publishing Co.*: The Use of a Presumption to Compel Disclosure of Sources in Libel Cases," *New Hampshire Bar Journal*, Vol. 22, 1981, p. 83.

[22] 120 N.H. 323 p. 386.

[23] *Ibid.*, p. 387.

[24] *Ibid.*

[25] *Ibid.*

[26] Rair, "The Use of Presumption," p. 89.

[27] Rule 41 of the New Hampshire rules reads, *Inter alia*, "Upon motion, the Court may order the filing of depositions, and, upon failure to comply with such order, the Court may take such action as justice may require."

[28] 120 N.H. p. 387.

judge wrote, "This court is persuaded by the approach taken by the New Hampshire Supreme Court in *Downing v. Monitor Publishing Co.*, . . . a case with facts similar to those in the instant case."[29]

Entering an order similar to that of the *Downing* court, the *DeRoburt* court said that it considered "such action within its discretion under Rule 37 and elects this method of enforcement as the one most likely to serve the interests of justice in this case."[30]

In the second case, the California Superior Court said if a defendant in a libel action persisted in his refusal to disclose a confidential source at the trial, "the jury will be instructed as a matter of law, there was no source for the publication (other than those sources, if any, previously disclosed to defendants)."[31] The court cited Section 2034(b) (2) of the California Code,[32] a rule similar to Rule 37, in justification of its order.

In the third libel case, an Idaho trial court in a case on remand, ruled in *Caldero v. Tribune Publishing Co.*, that if a newspaper refused to identify a confidential police expert quoted in an allegedly defamatory article, the "failure to identify the 'police expert' . . . shall be treated as an admission by the defendant Shelledy that no such 'police expert' exists, and the jury shall be so instructed."[33]

Although these presumptions have been exercised in relatively recent cases, this sanction was enunciated by the Washington Supreme Court as early as 1961. In *Mitchell v. Watson*, an appellate court directed a trial court that due to a reporter's failure to produce his alleged informer, the court was "free to indulge the presumption that defendant Watson admits there was no such person or that the unidentified person did not make the statement."[34]

Presumptions that sources do not exist if a reporter refuses to identify them may "serve the interests of justice"[35] in some cases. But, they may not be adequate to compensate libel plaintiffs in others. In such cases, courts have fashioned alternative remedies, including dismissal of a newspaper's defenses bases on its claim of reporter's privilege.

The *Mitchell* court directed, *"[T]he trial court is free to reject any and all evidence of mitigation of damages or other proffered defenses which are relevant to or have any connection with the existence of the alleged informer."*[36] (emphasis in original).

In *Brown v. Traub*, a New Mexico trial court struck all of a magazine's objections based on the claim of privilege by a reporter who refused to divulge his confidential sources during discovery in a libel suit which involved the magazine.[37]

In yet another libel case, *Resorts International v. New Jersey Monthly*, the New Jersey Superior Court ruled that statutory privilege is waived once a newspaper uses it as a defense.[38] Citing *Beecroft v. Point Pleasant Print & Pub. Co.*,[39] and *Brogan v. The Passaic Daily News*,[40] the rationale of which "provide ample authority"[41] in the instant case, the court said:

> [A]lthough the Shield Law would normally protect the defendant from being compelled to supply the information requested, the pleading of such defenses as fair comment, good faith and reasonable belief as to the truth of the subject matter constituted a waiver of the statutory privilege and accordingly the defendant was required to answer the interrogatories. One of the underlying theories of *Beecroft* and *Brogan* was that the privilege conferred on the news media is permissive not mandatory, and thus the newspaper, or in this case the magazine, makes a choice when it will or will not invoke privilege.[42]

[29] 507 F. Supp. 880, 886(Hawaii 1981).

[30] *Ibid.*, p. 887.

[31] *Rancho La Costa v. Penthouse*, 106 F. 2nd 646(3rd Cir. 1981).

[32] Section 2034 (b) (2) of the California Code is almost a verbatim copy of the *Federal Rules of Civil Procedure*, Rule 37(b) (2).

[33] "No Defense Sanction for Shielding Sources Reversed," *News Media and the Law*, Vol. 4, Oct/Nov 1980, p. 11, reporting the *Caldero*, 562 P. 2nd 791 case on remand.

[34] 361 P. 2nd 744, 750 (Wash. 1961).

[35] *DeRoburt*, 507 F. Supp., p. 887.

[36] 361 P. 2nd p. 751.

[37] 5 Media L. Rep. 2041, 2042(N.M. Sup. Ct., 1979).

[38] 7 Media L. Rep. 2025, 2027(N.J. Sup. Ct. 1981).

[39] 82 N.J. Super. 269(1964).

[40] 22 N.J. 139(1956).

[41] 7 Media L. Rep. p. 2027.

[42] *Ibid.*, p. 2026.

In essence, the court was suggesting that a libel defendant has a choice of either foregoing all defenses based on confidential sources or disclosing those sources.

The choice by implication in *Resorts*, was more plainly spelled out in *Greenberg v. CBS.*[43] Noting the defendants "rely on undisclosed sources and information for verification and offer this verification as proof of their responsibility" in a libel case, the court said that by seeking protection under the New York Shield Law, they were using the law as a "sword to prevent challenge by the plaintiff."[44]

The court said, "Such exploitation of the statute vitiates the limited right of recovery that the plaintiff has as a private individual, and should not be permitted.[45] The court resolved the problem by ruling, "At trial, if the defendants opt to rely on their statutory privilege, they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility. On the other hand, if they choose to fully disclose their investigation no limitation on defense will occur."[46]

A distinction between *Resorts* and *Greenberg* needs to be drawn. In the former case, the court was ruling that once a reporter asserts a defense based on confidential sources and the privilege is overruled, the libel plaintiff may move for sanctions immediately. In *Greenberg*, on the other hand, the court was willing to allow the reporter another chance to testify. It did not:

> [D]eem their actions in asserting a defense of responsibility based on confidential sources and information a waiver, since the effect of a waiver would be unjustly harsh in view of the defendants' lack of awareness of the implications present in their assertion of a defense based on the confidentiality statute. Thus the fair solution, one which does not attentuate the policy consideration of the statute, is to allow defendants to elect the future course of their defense.[47]

In *Brogan*, similarly, rejecting a claim of privilege under the New Jersey Shield Law, because the newspaper was asserting a defense based on confidential sources, the court provided an option. "The defendant Smith may therefore elect to rely on his privilege at such new trial subject to rulings thereto expressed herein, or to testify fully and in detail as to the identity of the "reliable source" and the information received from him."[48]

Although the striking of pleadings directly based on confidential sources has been permitted by courts, the striking of all defenses has been ruled to be overly harsh. In *Sierra Life v. Magic Valley Newspapers,* the Idaho Supreme Court reversed a $1.9 million libel judgment imposed by a trial court, which had stricken all of the pleadings of a newspaper following the failure of its reporter to disclose his confidential sources.[49]

The Idaho Supreme Court ruled that recalcitrance on the part of the newspaper "should not take away those defenses which are not affected by his refusal to disclose."[50] The court ruled that the imposition of a default judgment for failure to obey a court order to produce evidence was a denial of due process.[51] It directed the lower court to exercise caution, because:

> [I]f there are numerous issues in case, and a discovery is sought only as to one of these issues, the striking of the answer and the taking of judgment on all the issues for failure to make discovery as to one, can only be justified on the theory that the judgment is given as a punishment for a failure to make discovery, and it may well be doubted whether such a proceeding can be sustained.[52]

In *Mitchell,* similarly, the Washington Supreme Court reversed a lower court's order striking of all the defenses of a newspaper and rendering a default judgement, because the newspaper had refused to disclose its confidential sources of informa-

[43] 5 Media L. Rep. 1470(N.Y. Sup. Ct. 1978).
[44] *Ibid.*, p.1476.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*
[48] 22 N.J., p. 145.
[49] 623 P. 2nd 103(Idaho 1980).
[50] *Ibid.*, p. 106.
[51] *Ibid.*, p. 107.
[52] *Ibid.*, p. 108.

tion. The default judgment, the court said, was unwarranted and constituted a deprivation of due process of law.[53]

Courts have distinguished cases in which media representatives are plaintiffs and those in which they are defendants. In *Anderson v. Nixon* syndicated columnist Jack Anderson sued 19 individuals for conspiracy to deprive him of his First Amendment rights.[54] During deposition, Anderson refused to disclose the sources of his information, and for his failure to do so, the court threatened to dismiss his suit:

> Here the newsman is not being obliged to disclose his sources. Plaintiff's pledge of confidentiality would have remained unchallenged had he not invoked the aid of the court seeking compensatory and punitive damages based on his claim of confidentiality. Plaintiff is attempting to use the First Amendment simultaneously as a sword and a shield.[55]

However, the court did not force Anderson to disclose his sources, but allowed him the option. "If he declines to answer, the court will entertain a motion under Rule 37(b) for default."[56]

Aside from jailing reporters who refuse to disclose their sources of information when ordered to do so, courts have fashioned several remedies under the Federal Rules of Civil Procedure and their state counterparts, often substantially similar to the federal rules.[57]

## *Limitations on Discovery Sanctions*

Courts have ruled, as seen earlier, that if a reporter refuses to disclose, it leads to the presumption that the source does not exist,[58] and he may have to forego all defenses based on the confidential source of information.[59] However, the striking of pleadings has been limited to those directly based on the confidential sources., and default judgments have been ruled to be a denial of due process.[60]

In all these cases, courts seemed to be prompted by their concern to "aid the plaintiff"[61] and to "serve the interests of justice."[62] These considerations aside, the considerable body of case law developed under Rule 37(b) suggests contempt sanctions should be the last of the alternatives imposed.[63] Jailing for contempt, the court said in *Soobzokov v. CBS*, is the harshest remedy available to court.[64] In another case it was said imprisonment for contempt as a means of coercion for civil purposes cannot be resorted to until all other means fail.[65]

Courts have ruled civil contempt is a remedial device designed to coerce compliance with the court's mandate,[66] to remedy past conduct[67] and to compensate or advance the rights of the party injured by the contemptuous act.[68] Although the courts have wide discretion to fashion remedies,[69] the sanctions have to be reasonably commensurate with the gravity of the offense.[70] Courts have also ruled the use of the most drastic sanction available is a clear violation of the remedial and beneficial purposes of sanctions.[71]

Although the use of contempt sanctions is widespread in media-related cases, it does not appear to be so in non-media cases. Rather, it has been noted that under "most circumstances orders under subdivisions (b) (2) (A) through (b) (2) (C) have proved satisfactory, and the courts have rarely employed contempt sanctions

[53] 361 P. 2nd p. 747.

[54] 444 F. Supp. 1195(D.C. 1978).

[55] *Ibid.*, p. 1199.

[56] *Ibid.*, p. 1201.

[57] For a list of states with provisions similar to the *Federal Rule of Civil Procedure* 37(b), see *American Jurisprudence 2d Desk Book*, Document 128.

[58] *Downing*, 120 N.H. 383; *Mitchell*, 361 P.2nd 744.

[59] *Greenberg*, 5 Media L. Rep. 1470.

[60] *Sierra* 623 P. 2nd 103; *Mitchell*, 361 P. 2nd 744.

[61] *Downing*, 120 N.H., p. 386.

[62] *DeRoburt*, 507 F. Supp. p. 886.

[63] See, Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, (St. Paul, Minn.: West Publishing Co., 1970), pp. 264-272.

[64] 7 Media L. Rep. 1064, 1066(2d Cir. 1981).

[65] *Atchison etc. R. Co. v. Jennison*, 27 N.W. 6(Kan. 1886).

[66] *U.S. v. United Mine Workers of America*, 330 U.S. 258(1947).

[67] *Knaus v. Knaus*, 327 Pa. 370(1956).

[68] *Louisiana Ed. Assn. v. Richland Parish School Bd.*, 585 F.2nd 518(5th Cir. 1978).

[69] *Vuitton et. Fils. S.A. v. Carousel Handbags*, 592 F.2nd 126(2d Cir. 1979); *Yanish v. Barker*, 232 F. 2nd 939(9th Cir. 1956).

[70] *Shotkin*, 235 P. 2nd 990, see note 12, *supra*.

[71] *Shillitani v. U.S.*, 384 U.S. 364(1966); *U.S. v. Wilson*, 421 U.S. 309(1975).

against the parties."[72]

Constitutional limitations are imposed not only on contempt sanctions, but also on sanctions provided under Rule 37(b). These limitations find their expression in three Supreme Court opinions examined below.

In *Hovey v. Elliott,* the Supreme Court held it was a denial of due process to punish a party for contempt by striking his answers from the files and entering a default judgment against him.[73] In *Hammond Packing Co. v. Arkansas,* the Court sustained the power of a state court to strike an answer and render a default judgment for failure of a party to secure the attendance of a witness and the failure to produce documents.[74] The Court distinguished the two cases by saying that while in *Hovey* dismissal was imposed as a punishment, due process was preserved in *Hammond* because "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."[75]

Finally, in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,* the Court asserted that a party's good faith failure to comply should be a mitigating factor in determining the severity of sanction imposed.[76]

Within these bounds, courts have shown considerable moderation and restraint in fashioning sanctions against parties failing to submit to discovery.[77] Courts have sought to make the "punishment fit the crime"[78] and have exercised their discretion in a manner intended to encourage discovery rather than simply punish for failure to make discovery.[79]

Courts do not have the power to select arbitrarily the sanctions they impose, but the sanctions should be suitable and necessary to enable the party seeking discovery to obtain the objects of discovery.[80] The rule has been recognized as making available to courts the means to prevent injustice when one party by his conduct has placed the other party at an unfair disadvantage.[81]

By and large, the rule allows a court all the flexibility it needs in framing an order appropriate to a particular situation, but the flexibility is tempered with leniency and judicial discretion, and sanctions are based on the merits of the case rather than on technicalities.[82]

Default judgments,[83] striking of pleading,[84] taking of certain facts as established,[85] presumptions,[86] prohibitions or exclusions of designated defenses,[87] staying or continuing proceedings,[88] and contempt sanctions[89] have all been upheld and reversed by courts on a case-by-case basis.

Courts have consistently ruled the purpose of the sanctions is to coerce compliance or compensate the litigants, not to punish them. Thus, an appellate court reversed a daily fine imposed against a newspaper-defendant in a libel action. The court earlier had released the reporter from jail because it felt "confinement would not achieve the purpose for which it was intended," that is make the reporter reveal his source.[90] The court said the fine became punitive. "[A]fter thus determining that imprisonment, the harshest sanction at his disposal, would not work the judge imposed the less 'Draconian' measure of a

[72] Moore, et. al., *Moore's Federal Practice*, The word "rarely" was used in the 1975 edition. But in the 1980 edition, it has been changed to "occasionally," pp. 37-87.

[73] 167 U.S. 409(1897).

[74] 212 U.S. 322(1909).

[75] *Ibid.*, p. 380.

[76] 357 U.S. 197(1945).

[77] Wright and Miller, *Federal Practice*, p. 2284.

[78] *Ibid.*

[79] *Ibid.*

[80] *Caryl Richards, Inc. v. Superior Court of Los Angeles County*, 188 Cal. App. 2nd 300(1961)

[81] *Valenstein v. Bayonne Boet Corp.*, 6 F.R.D. 363(E.D.N.Y. 1946).

[82] *Societe*, 357 U.S. 197.

[83] *Gell v. Stolow*, 240 F. 2nd 669 (2d Cir. 1959), default judgment not warranted; *Pioche Mines Consol. Inc. v. Dolman*, 333 F. 2nd 257(9th Cir. 1964), *cert denied*, 380 U.S. 956(1965), default judgement warranted.

[84] *Zimmerman v. Purex Corp.* 125 N.W. 2nd 822(Iowa 1964), striking of pleadings unwarranted; *Travelers Ins. Co. V. Kraut*, 208 F. Supp. 60 (S.D.N.Y. 1962), striking of pleadings warranted.

[85] *United States v. Reynolds*, 345 U.S. 1(1952).

[87] *Michigan Window Cleaning Co. v. Martino*, 173 F. 2nd 466(6th Cir. 1949), exclusion of defenses warranted; *Cambell v. Johnson*, 101 F. Supp. 705 (S.D.N.Y. 1951), exclusion of defenses unwarranted.

[88] *Austin Theatre Inc., v. Warner Bros. Pictures, Inc.*, 22 F.R.D. 302(S.D.N.Y. 1958).

[89] *State Farm Ins. Co. v. Roberts*, 97 Ariz. 169(1965), contempt sanctions warranted; *State ex rel Walling v. Sullivan*, 245 Wis. 180(1944), contempt sanctions unwarranted.

[90] *Soobzokov*, 7 Media L. Rep. 1066.

continuing daily fine."[91]

### *Implications in the Use of Alternative Sanctions*

What are the implications in the use of alternative sanctions for claims of reporter's privilege when used in libel cases? An examination of individual cases is not very enlightening because of the Spartan analysis offered by the courts in reaching their decisions.[92] Typically, the courts merely state the facts of the case and then proclaim a particular sanction as just or unjust and offer no explanation for their selection.[93] None of the decisions discuss the constitutional limitations, and only rare cases go beyond pure discretion in analyzing the selection of a sanction.[94]

The subsequent history of the cases is also no guide because some of the cases have not yet reached a resolution. Others which have, have not yet been reported.[95] At least one case was settled out of court, so the consequence of the court's sanction will never be determined.[96]

The presumption that a source does not exist should not, on its face, severly handicap the reporter who is a libel defendant. Practically, a reporter does not suffer grievously when such a presumption is drawn.[97] As to the actual malice issue, if the identity of the confidential source was crucial to the issue, it would be difficult to prevent a jury from drawing adverse conclusions even if the reporter were issued a protective order.

Reporters do not have as much to fear from default judgments because they will be imposed only under extreme circumstances and usually have been overturned when imposed in both reporter's privilege claims and Fifth Amendment privilege claims in civil cases.[98]

The greater danger lies in the courts if they choose to expand the provisions of the sanctions by restricting the reporters' choice in libel cases to either disclosing sources or risking liability at trial without regard to the merit of their claim to privilege. The *Resorts* court did not feel that this was a fair assumption. "Such a reading would probably mean that every defendant in a libel suit who claims to have relied on confidential sources would waive the protection of the Shield Law. No case appears to have gone that far; nor need this court do so."[99] And, in *Campbell v. Gerrans*, the court ruled a proper exercise of the Fifth Amendment precludes the imposition of sanctions under Rule 37(b).[100] In *Buzzard v. Griffin*, the court ruled that if a Fifth Amendment privilege is upheld and a motion requiring a defendant to depose is denied, there is no refusal to comply with court orders. Consequently, no sanctions can be imposed under a state counterpart of Rule 37(b) (2).[101]

Rule 37(b) relates solely to situations in which the court has made an order directing discovery.[102] Clearly, courts do not have the power to impose sanctions under Rule 37(b), if a claim of reporter's privilege has been upheld. The real danger lies in the courts which may water down the reporter's privilege rights or of reporters to deny such claims more frequently.

Other than that, both libel plaintiffs and defendants have more to gain if courts move away from jailing reporters to imposing alternative sanctions under Rule 37(b). Yet the sanctions have only rarely been litigated. In *Caldero*, for instance, the court said, the sole question to be considered was "[t]he existence and/or extent of a constitutionally based privilege."[103]

Alternative sanctions may often better serve the interests of justice. But, since they are often ignored, it has been suggested that an additional rule should be incorpo-

*(Please turn to page 508)*

[91] *Ibid.*

[92] In *Brown*, 5 Media L. Rep. 2041, for instance, the court merely directed that all objections based on the claim of privilege are denied.

[93] *Downing*, 120 N.H. 383; *Greenberg*, 5 Media L. Rep. 1470.

[94] *Ibid.*

[95] The subsequent history of *Mitchell*, 361 P. 2nd 744, for instance was never reported although the case was remanded in 1961.

[96] *Downing*, 120 N.H. 383.

[97] *Justice v. Laudermilch*, 78 F.R.D. 201 (M.D. Pa. 1978).

[98] *United States v. Costello*, 222 F. 2nd 657(2d Cir. 1955).

[99] 7 Media L. Rep. 2027.

[100] 592 F. 2nd 1054 (9th Cir. 1979).

[101] 89 Ariz. 42 (1960).

[102] *United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 313 (N.J. 1976).

[103] 562 P. 2nd at 791.

problems across society, using both black and white people as examples.

### *Conclusion*

Coverage appeared closely related to the interaction of the black American with the wider society in the years studied. This appears consistent with Click's conclusion that changes in *Ebony* appeared to correlate with changes in American society.[37]

Variations in the amount and subject of coverage seemed to be dictated by the relevance of individual news incidents or high levels of personal achievement. Thus, the social commentary category dominated during times of school integration and civil rights activities. Sports and entertainment, the two traditional entries into the white world, received coverage when the successes of black stars called attention to their talents.

While the sharp increase in coverage in 1967 and 1972 might be attributed to the increased visibility of the black American, much of the 1967 coverage continued to treat him as separate from the rest of society.

By 1972, *Life*'s last year, there appeared to be increased integration of the black American into general coverage with mixed groups, but the amount remained small. The social commentary category was less than 1967, although still one-third; coverage was more broadly distributed among the categories. The advertisements portrayed the black American in sports, as working and as a professional. Nineteen of the 29 pages of advertising showed blacks in mixed groups.

With the exception of 1937, coverage of black everyday life was markedly absent. While it could be argued that discrimination, poor schooling and economic struggle were components of everyday life, the timing of this coverage coincided with the encroachment of these problems on the broader society. They were not presented as part of a day-by-day record.

In contrast, coverage of white everyday life remained consistent. Except for a high figure of 12% in 1937, such coverage averaged 2.7% of total magazine content. Subjects ranged from farm life to debutante resort parties and from a child's first haircut in California to maple sugaring in Vermont.

Despite an increase following the Civil Rights movement, coverage of black America constituted a minute portion of *Life*'s content. The highest level of coverage, in 1972, remained at less than 3%. Of this share, all but a few pages highlighted black Americans who had achieved prominence in the areas of politics, entertainment, sports or through social protest activities.

While the increased proportion of coverage showed response to increased visibility, *Life* failed to provide its mass audience with an opportunity for exposure to the everyday life of black America.

[37] Click, p. 720.

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## SANCTIONS FOR REFUSING TO DISCLOSE SOURCES

(Continued from Page 444)

rated into the Federal Rules of Civil Procedure. Under this proposed rule, courts would be required to make detailed and explicit findings of fact as to why a particular remedy was chosen and why the others were inadequate.[104]

It is ironic that more than 100 years have passed since the earliest claims of reporter privilege were litigated, and despite the fact that the privilege issue occupies considerable attention of the courts, the sanction itself "scarely merits comment" — the status of reporter's privilege until only a few decades ago.[105]

[104] Eckhardt and McKey, "Substantive and Remedial Aspects," P. 136.

[105] The term was used to dismiss a reporter's privilege claim in *Peoples v. Durrant*, 116 Cal. 179, 220(1897).