



COMMITTEE REPORT

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**REPORTER'S PRIVILEGE  
MODEL ABSOLUTE SHIELD LAW  
&  
MODEL QUALIFIED SHIELD LAW**

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Prepared by the  
**Model Shield Law Task Force  
MLRC Defense Counsel Section**

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# **REPORTER'S PRIVILEGE MODEL ABSOLUTE SHIELD LAW**

## **SECTION 1. ABSOLUTE PROTECTION FOR NEWS AND SOURCES<sup>1</sup>**

No judicial, legislative, administrative, or other body may hold in contempt or otherwise sanction any Covered Person in connection with any civil, criminal, grand jury, or other proceeding, for refusing to disclose any confidential or nonconfidential information, or the identity of the source of any such information, obtained or received by any Covered Person in the course of gathering or obtaining news for publication, whether or not the information is ultimately published.

## **SECTION 2. PROCEDURAL PROVISION**

- A. In rendering a decision as to whether the protection described in Section 1 is applicable, the specific findings of fact and conclusions of law shall be set forth in writing or on the record.<sup>2</sup>
- B. This decision as to whether the protection described in Section 1 is applicable may be appealed as of right on an interlocutory basis to the state trial court, or, if rendered by the trial court, to the next highest court of appeals. Such interlocutory appeal shall automatically act as a stay of any order requiring disclosure,<sup>3</sup> and nondisclosure of the information sought shall remain in full force and effect while any appeal is pending.<sup>4</sup> Either party may request that such appeal be heard and considered on an expedited basis.<sup>5</sup> The reviewing court shall review the matter de novo, without presumption in favor of the findings below.<sup>6</sup>

## **SECTION 3. COMPELLED DISCLOSURE FROM THIRD PARTIES.**

- A. The protection from compelled disclosure contained in Section 1 shall also apply to any subpoena issued to, or other compulsory process against, a third party that seeks records, information or other communications relating to business transactions between such third party and the Covered Person for the purpose of discovering the identity of a source or obtaining news or information described in Section 1.
  - 1. Whenever a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks records, information or other communications on business transactions with the Covered Person, the affected Covered Person shall be given reasonable and timely notice of the subpoena or compulsory process before the third party is required to comply therewith, and an opportunity to be heard.
  - 2. In the event that the subpoena to, or other compulsory process against, the third party is in connection with a criminal investigation in which the Covered Person is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena

or compulsory process shall be given to the affected Covered Person as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

- B. If a Covered Person learns that any documents or information were produced pursuant to subpoena or other compulsory process issued to a third party seeking records, information or other communications relating to business transactions between such third party and the Covered Person for the purpose of discovering the identity of a source or obtaining news or information described in Section 1 and that the provisions of this Section were not followed, the injured Covered Person is entitled to recover statutory damages of \$[10,000.00], plus attorneys' fees from both the party who issued the subpoena and the third party who complied with the subpoena.

#### **SECTION 4. NON-WAIVER.**

Publication or dissemination of news or information described in Section 1, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in Section 1.

#### **SECTION 5. INADMISSIBILITY.**

The source of any news or information or any news or information obtained in violation of the provisions hereunder shall be inadmissible in any action, proceeding, or hearing before any judicial, legislative, administrative or other body.

#### **SECTION 6. DEFINITIONS**

##### **1. Covered Person:**

- i. Any person engaged in Journalism.
- ii. Any supervisor, employer, parent company, subsidiary, or affiliate of a person described in subparagraph (i).
- iii. Any person assisting a Covered Person described in subparagraph (i) in gathering, preparing, or distributing news or information.
- iv. Any person that should receive the protection of this statute in the interest of justice, or to protect lawful and legitimate newsgathering activities under the specific circumstances of the case.

##### **2. Journalism:**

The gathering, preparing, or distributing of news or information with the primary intent to investigate events and procure material for public dissemination, whether or not the information is ultimately published.

### 3. All Other Terms

All other terms are to be interpreted broadly to maximize protection of the gathering, preparation, and dissemination of news to the public.

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<sup>1</sup> See, e.g., Cal. Const. art. I, § 2(b).

<sup>2</sup> California Code of Civil Procedure 1986.1. (c) (“[T]he court shall set forth findings, either in writing or on the record, stating at a minimum, why the information will be of material assistance to the party seeking the evidence, and why alternate sources of the information are not sufficient to satisfy the defendant’s right to a fair trial under the sixth amendment to the United States Constitution and Section 15 of Article I of the California Constitution.”); New Jersey 2A:84A-21.5 (“After any hearing conducted by the court pursuant to section 3 or 4. . . hereof, the court shall make specific findings of fact and conclusions of law with respect to its rulings, which findings shall be in writing or set forth on the record.” ); Minnesota 595.024 (3) (“The court shall make its appropriate order after making findings of fact.”).

<sup>3</sup> New Jersey 2A:84A-21.6 (“An interlocutory appeal taken from a decision to uphold or quash a subpoena shall act as a stay of all penalties which may have been imposed for failure to comply with the court’s order. The record on appeal shall be kept under seal until such time as appeals are exhausted. In the event that all material or any part thereof is found to be privileged, the record as to that privileged material shall remain permanently sealed. Any subpoenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged, shall be returned to the party claiming the privilege.”); Tennessee 24-1-208(c)(3)(B) (“The execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure, and the appeal shall be expedited upon the docket of the court of appeals upon the application of either party.”).

<sup>4</sup> Minnesota 595.024 (3) (“The order may be appealed directly to the Court of Appeals according to the Rules of Appellate Procedure. The order is stayed and nondisclosure shall remain in full force and effect during the pendency of the appeal.”). See also, Alaska 09.25.330 (“During the pendency of the appeal, the privilege shall remain in full force and effect.”); Louisiana 45:1453 (“In the case of any such appeal, the privilege set forth in R.S. 45:1452 shall remain in full force and effect during pendency of any such appeal.”).

<sup>5</sup> Minnesota 595.024 (3) (“Either party may request expedited consideration.”); Tennessee 24-1-208(c)(3)(B) (quoted above).

<sup>6</sup> Tennessee 24-1-208 (c)(3)(A) (“Any order of the trial court may be appealed to the court of appeals in the same manner as other civil cases. The court of appeals shall make an independent determination of the applicability of the standards in this subsection to the facts in the record and shall not accord a presumption of correctness to the trial court’s findings.”).

## **REPORTER'S PRIVILEGE MODEL QUALIFIED SHIELD LAW**

### **SECTION 1. QUALIFIED PROTECTION FOR NONCONFIDENTIAL NEWS AND SOURCES**

No judicial, legislative, administrative, or other body may hold in contempt or otherwise sanction any Covered Person in connection with any civil, criminal, grand jury, or other proceeding, for refusing to disclose any unpublished information, or the identity of the source of any such information, obtained or received by any Covered Person in the course of gathering or obtaining news for publication, unless the party seeking such information has made a clear and convincing showing that:

- a) in a criminal investigation or prosecution, based on information obtained from other than the Covered Person, that there are reasonable grounds to believe that a crime has occurred; or
- b) in a civil action or proceeding, based on information obtained from other than the Covered Person, that there is a plausible claim;<sup>1</sup> and
- c) in all matters, whether criminal or civil, that:
  - i. the information sought is highly material and relevant;
  - ii. the information sought is critical and necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;
  - iii. the information sought is not obtainable from any alternative source;<sup>2</sup> and
  - iv. the public interest in non-disclosure of the information sought is clearly outweighed by the public interest in the disclosure of that information.<sup>3</sup> The court or adjudicating body must evaluate the public interest independently and cannot base its decision to order disclosure solely upon a party's establishment of entitlement to relief under the first three factors.

Disclosure shall only be ordered for the portion, or portions, of the information sought as to which the above-described showing has been made, and any order shall be supported with clear and specific findings as to each finding concerning (a) through (c) above.

### **SECTION 2. PROCEDURAL PROVISION**

- A. In rendering a decision as to whether the protections described in Sections 1 and 2 are applicable, the specific findings of fact and conclusions of law shall be set forth in writing or on the record.<sup>4</sup>
- B. This decision may be appealed on an interlocutory basis to the state trial court, or, if rendered by the trial court, to the next highest court of appeals. Such interlocutory appeal shall automatically act as a stay,<sup>5</sup> and nondisclosure shall remain in full force and effect

while any appeal is pending.<sup>6</sup> Either party may request that such appeal be heard and considered on an expedited basis.<sup>7</sup> The reviewing court shall review the matter de novo, without presumption in favor of the findings below.<sup>8</sup>

### **SECTION 3. REQUIREMENTS FOR SUBPOENA OF COVERED PERSON<sup>9</sup>**

- A. A subpoena for the attendance of a witness or for production of documentary evidence directed to any Covered Person, and which relates to any information, or the identity of the source of any such information, obtained or received by any Covered Person in the course of gathering or obtaining news for publication, shall have attached to it an affidavit of a person with a direct interest in the matters sought that states all of the following:
1. Each item of documentary and evidentiary information sought from the Covered Person;
  2. That the affiant or his representative has attempted to obtain each item of information from all other available sources, specifying which items the affiant has been unable to obtain;
  3. The identity of the other sources from which the affiant or his representative has attempted to obtain the information;
  4. That the information sought is highly material and relevant;
  5. That the information sought is critical and necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;
  6. That the information sought is not protected by any lawful privilege;
  7. That the subpoena is not overbroad, oppressive, or unduly burdensome;
  8. That the subpoena is not intended to interfere with the gathering, writing, editing, publishing, broadcasting and disseminating of news to the public as protected by the First Amendment, Constitution of the United States, or [any state constitutional provisions protecting the freedom of the press]; and
  9. That the public interest in the nondisclosure of the information sought is clearly outweighed by the public interest in the disclosure of that information.
- B. A subpoena served on a person described in subsection A without the required affidavit attached to it has no effect.
- C. If the affidavit is controverted or a motion to quash the subpoena or for a protective order is filed by the person subpoenaed, the command of the subpoena shall be postponed until an order is entered by the court. The command of the subpoena shall be carried out in accordance with the order of the court.

Grand jury material or other classified information may be redacted from the affidavit served with the subpoena, provided that a complete and unredacted copy remains preserved for consideration by the court in connection with any motion practice related to the subpoena.

#### **SECTION 4. COMPELLED DISCLOSURE FROM THIRD PARTIES.**

- A. The protection from compelled disclosure contained in Sections 1 and 2 shall also apply to any subpoena issued to, or other compulsory process against, a third party that seeks records, information or other communications relating to business transactions between such third party and the Covered Person for the purpose of discovering the identity of a source or obtaining news or information described in Sections 1 or 2.
1. Whenever a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks records, information or other communications on business transactions with the Covered Person, the affected Covered Person shall be given reasonable and timely notice of the subpoena or compulsory process before the third party is required to comply therewith, and an opportunity to be heard.
  2. In the event that the subpoena to, or other compulsory process against, the third party is in connection with a criminal investigation in which the Covered Person is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected Covered Person as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.
- B. If a Covered Person learns that any documents or information were produced pursuant to subpoena or other compulsory process issued to a third party seeking records, information or other communications relating to business transactions between such third party and the Covered Person for the purpose of discovering the identity of a source or obtaining news or information described in Sections 1 or 2 and that the provisions of this Section were not followed, the injured the Covered Person is entitled to recover statutory damages of \$[10,000.00], plus attorneys' fees from both the party who issued the subpoena and the third party who complied with the subpoena.

#### **SECTION 5. NON-WAIVER.**

Publication or dissemination of news or information described in Sections 1 or 2, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in Sections 1 and 2.

#### **SECTION 6. INADMISSIBILITY.**

The source of any news or information or any news or information obtained in violation of the provisions hereunder shall be inadmissible in any action, proceeding, or hearing before any judicial, legislative, administrative or other body.



## SECTION 7. DEFINITIONS

### 1. Covered Person:

- i. Any person engaged in Journalism.
- ii. Any supervisor, employer, parent company, subsidiary, or affiliate of a person described in subparagraph (i).
- iii. Any person assisting a Covered Person described in subparagraph (i) in gathering, preparing, or distributing news or information.
- iv. Any person that should receive the protection of this statute in the interest of justice, or to protect lawful and legitimate newsgathering activities under the specific circumstances of the case.

### 2. Journalism:

The gathering, preparing, or distributing of news or information with the primary intent to investigate events and procure material for public dissemination, whether or not the information is ultimately published.

### 3. All Other Terms

All other terms are to be interpreted broadly to maximize protection of the gathering, preparation, and dissemination of news to the public.

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<sup>1</sup> See, e.g., Conn. Gen. Stat. Ann. § 52-146t.

<sup>2</sup> See, e.g., N.Y. Civ. Rights Law § 79-h(c).

<sup>3</sup> See, e.g., N.J.S.A. 2A:84A-21.3 (requiring court finding “that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure”); see also *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1175 (D.C. Cir. 2006) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005) (concluding that, in leak cases, “the court must weigh the public interest in compelling disclosure . . . against the public interest in newsgathering . . .”).

<sup>4</sup> California Code of Civil Procedure 1986.1. (c) (“[T]he court shall set forth findings, either in writing or on the record, stating at a minimum, why the information will be of material assistance to the party seeking the evidence, and why alternate sources of the information are not sufficient to satisfy the defendant’s right to a fair trial under the sixth amendment to the United States Constitution and Section 15 of Article I of the California Constitution.”); New Jersey 2A:84A-21.5 (“After any hearing conducted by the court pursuant to section 3 or 4. . . hereof, the court shall make specific findings of fact and conclusions of law with respect to its rulings, which findings shall be in writing or set forth on the record.”); Minnesota 595.024 (3) (“The court shall make its appropriate order after making findings of fact.”).

<sup>5</sup> New Jersey 2A:84A-21.6 (“An interlocutory appeal taken from a decision to uphold or quash a subpoena shall act as a stay of all penalties which may have been imposed for failure to comply with the court’s order. The record on appeal shall be kept under seal until such time as appeals are exhausted. In the event that all material or any part thereof is found to be privileged, the record as to that privileged material shall remain permanently sealed. Any subpoenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged,

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shall be returned to the party claiming the privilege.”); Tennessee 24-1-208(c)(3)(B) (“The execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure, and the appeal shall be expedited upon the docket of the court of appeals upon the application of either party.”).

<sup>6</sup> Minnesota 595.024 (3) (“The order may be appealed directly to the Court of Appeals according to the Rules of Appellate Procedure. The order is stayed and nondisclosure shall remain in full force and effect during the pendency of the appeal.”). *See also*, Alaska 09.25.330 (“During the pendency of the appeal, the privilege shall remain in full force and effect.”); Louisiana 45:1453 (“In the case of any such appeal, the privilege set forth in R.S. 45:1452 shall remain in full force and effect during pendency of any such appeal.”).

<sup>7</sup> Minnesota 595.024 (3) (“Either party may request expedited consideration.”); Tennessee 24-1-208(c)(3)(B) (quoted above).

<sup>8</sup> Tennessee 24-1-208 (c)(3)(A) (“Any order of the trial court may be appealed to the court of appeals in the same manner as other civil cases. The court of appeals shall make an independent determination of the applicability of the standards in this subsection to the facts in the record and shall not accord a presumption of correctness to the trial court’s findings.”).

<sup>9</sup> *See, e.g.*, Arizona Statute A.R.S. § 12-2214.