2A:84A-21.1 to 2A:84A:21.8

LEGISLATIVE HISTORY CHECKLIST

NJSA 2A:84A-21.1 to 2A:84A-21.8 (Newsperson--Confidential information--conflict)

LAWS OF 1979 CHAPTER 479

Bill No. A3062

Sponsor(s) Herman and others

Date Introduced Feb. 13, 1979

Committee: Assembly Judiciary, Law, Public Safety and Defense

Senate Judiciary

Amended during passage Yes xx Amendments during passage denoted by asterisks

Date of Passage: Assembly June 18, 1979

Senate Dec. 10, 1979

Date of approval Feb. 27, 1980

Following statements are attached if available:

Sponsor statement		Yes	~~No~~
Committee Statement:	Assembly	Yes	~~No~~
	Senate	~~Yes~~	No
Fiscal Note		~~Yes~~	No
Veto message		~~Yes~~	No
Message on signing		~~Yes~~	No

Following were printed.

Reports	~~Yes~~	No
Hearings	Yes	~~No~~

N.J. Legislature. Assembly. Judiciary, Law, Public Safety and Defense Committee.
Public hearing on newspaperman's privilege law, held 10-12-78. Trenton, 1978.

NJ Commission on Individual Liberty and Personal Privacy.
Public hearing, held 5-30-79. Trenton, 1979.

8/1/78

(over)

Hearing was transcribed, but not printed.
Contact: Steven Robbins, 292-5526.

479 79

2-21-80

[OFFICIAL COPY REPRINT]

ASSEMBLY, No. 3062

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 13, 1979

By Assemblymen HERMAN, FLYNN, MAYS, Assemblywoman McCONNELL, Assemblymen DOWD, MARTIN, RAND and KERN

Referred to Committee on Judiciary, Law, Public Safety and Defense

A SUPPLEMENT to "The Evidence Act, 1960," approved June 20, 1960 (P. L. 1960, c. 52; C. 2A:84A-1 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

[1. The provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege under Rule 27 (C. 2A:84-21) in certain criminal proceedings, other than proceedings before administrative or investigative bodies, grand juries, or legislative committees or commissions, where the newsperson is required to disclose information pursuant to a subpena issued by or on behalf of a defendant in a criminal proceeding.]

1. Where a newsperson is required to disclose information pursuant to a subpena issued by or on behalf of a defendant in a criminal proceeding, not including proceedings before administrative or investigative bodies, grand juries, or legislative committees or commissions, the provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege under Rule 27 (C. 2A:84A-21).

2. Proceedings pursuant to this act shall take place before the trial *[or preliminary hearing]*, except that the court may allow a motion to institute proceedings pursuant to this act to be made during trial if the court determines that the evidence sought is newly discovered and could not have been discovered earlier through the exercise of due diligence.

3. a. To sustain a claim of the newsperson's privilege under Rule 27 the claimant shall make a prima facie showing that he is engaged in, connected with, or employed by a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

news is so gathered, procured, transmitted, compiled, edited or disseminated, and that the subpenaed materials were obtained in the course of pursuing his professional activities.

b. To overcome a finding by the court that the claimant has made a prima facie showing under a. above, the party seeking enforcement of the subpena shall show by clear and convincing evidence that the privilege has been waived under Rule 37 (C. 2A:84A-29) or by a preponderance of the evidence that there is a reasonable probability that the subpenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issues of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. **Publication shall constitute a waiver only as to the specific materials published.***

c. The determinations to be made by the court pursuant to this section shall be made only after a hearing in which the party claiming the privilege and the party seeking enforcement of the subpena shall have a full opportunity to present evidence and argument with respect to each of the materials or items sought to be subpenaed.*

[4. Upon a finding by the court that the party seeking the subpena has made a prima facie showing pursuant to 3. above, the judge shall order the production of these materials for in camera inspection and determination as to its probable admissability in the trial. If the judge finds that the moving party has not made a prima facie showing pursuant to 3. above, the judge shall order the subpena quashed in whole or in part. In connection with the in camera inspection the party claiming the privilege and the party seeking enforcement of the subpena shall be given an opportunity to be heard as to whether all or any part of the material is relevant, material and necessary to the defense.]

4. Upon a finding by the court that there has been a waiver as to any of the materials sought or that any of the materials sought meet the criteria set forth in subsection 3.b., the court shall order the production of such materials, and such materials only, for in camera inspection and determination as to its probable admissibility in the trial. The party claiming the privilege and the party seeking enforcement of the subpena shall be entitled to a hearing in

*connection with the in camera inspection of such materials by the court, during which hearing each party shall have a full opportunity to be heard. If the court, after its in camera review of the materials, determines that such materials are admissible according to the standards set forth in subsection 3.b., the court shall direct production of such materials, and such materials only.**

5. After any hearing conducted by the court pursuant to sections 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.

[5.]* **6. An interlocutory appeal taken from a decision to uphold or quash a subpena 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 subpenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged, shall be returned to the party claiming the privilege.**

7. Where proceedings are instituted hereunder by one of several co-defendants in a criminal trial, notice shall be provided to all of the co-defendants. Any co-defendant shall have the right to intervene if the co-defendant can demonstrate, pursuant to section 3, that the materials sought by the issuance of the subpena bear upon his guilt or innocence. Where such intervention is sought by a co-defendant, that co-defendant shall be required, prior to being permitted to participate in any in camera proceeding, to make that showing required of a defendant in section 3.

[6.]* **8. If the court finds no reasonable basis for requesting the information has been shown, costs, including counsel fee, may be assessed against the party seeking enforcement of the subpena. Where an application for costs or counsel fee is made, the judge shall set forth his reasons for awarding or denying same.

[7.]* **9. This act shall take effect immediately.

and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issues of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source.

4. Upon a finding by the court that the party seeking the subpena has made a prima facie showing pursuant to 3. above, the judge shall order the production of these materials for in camera inspection and determination as to its probable admissability in the trial. If the judge finds that the moving party has not made a prima facie showing pursuant to 3. above, the judge shall order the subpena quashed in whole or in part. In connection with the in camera inspection the party claiming the privilege and the party seeking enforcement of the subpena shall be given an opportunity to be heard as to whether all or any part of the material is relevant, material and necessary to the defense.

5. An interlocutory appeal taken from a decision to uphold or quash a subpena 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.

6. If the court finds no reasonable basis for requesting the information has been shown, costs, including counsel fee, may be assessed against the party seeking enforcement of the subpena. Where an application for costs or counsel fee is made, the judge shall set forth his reasons for awarding or denying same.

7. This act shall take effect immediately.

STATEMENT

The purpose of this bill is to provide a procedural framework for the orderly resolution of conflicts between a newsperson claiming a privilege not to disclose confidential information, and a criminal defendant who seeks to obtain this information in order to defend himself. The bill balances the defendant's Sixth Amendment right to a trial, with the newsperson's privilege not to disclose confidential sources. The provisions of the bill are only applicable when a criminal defense is involved at the trial level.

A3062 (1979)

ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY AND DEFENSE COMMITTEE

STATEMENT TO

ASSEMBLY, No. 3062

with Assembly committee amendments

STATE OF NEW JERSEY

DATED: MAY 3, 1979

The purpose of this bill is to provide a procedural framework for the orderly resolution of conflicts between a newsperson claiming a privilege not to disclose confidential information, and a criminal defendant who seeks to obtain this information in order to defend himself. The bill balances the defendant's Sixth Amendment right to a trial, with the newsperson's privilege not to disclose confidential sources. The provisions of the bill are only applicable when a criminal defense is involved at the trial level. These procedures could not, for example, be used by the prosecution in a criminal trial, or at a grand jury proceeding.

A newsperson claiming a privilege under Rule 27 of the Rules of Evidence, when subpenaed by a criminal defendant, would first have to show that he is, in fact, a newsperson and that the subpenaed materials were obtained in the course of his professional activities. The defendant may rebut this evidence, or may show by clear and convincing evidence that the privilege has been waived pursuant to Rule 37 of the Rules of Evidence. If the judge finds that the privilege is applicable, the defense must show by a preponderance of the evidence that the materials are relevant, material and necessary to the defense, and that they cannot be obtained from any less intrusive source. The defense must also show that the subpena is not overbroad, but requests only those materials which are necessary. The newsperson has the opportunity to show that the material is not necessary to the defense, and could be secured from another source.

If the judge finds that the defense has made a showing that the materials are necessary to the defense and cannot be obtained from another source, he orders the materials produced for his private inspection; if he finds that the defense has not made a sufficient showing, the subpena is quashed. If the judge finds that any portion of the material is relevant, material and necessary to the defense and that the material probably would be admissible at trial, he orders that the

subpena be upheld. Both the subpenaed party and the party issuing the subpena have an opportunity to be heard by the judge. The record remains sealed with regard to any material found to be privileged.

Section 5 authorizes the taking of an appeal from the judge's decision. Any appeal taken from the judge's decision to quash or uphold the subpena acts as a stay of any penalties which may have been imposed for failure to comply with the court's order.

Section 6 provides that the party issuing the subpena may be assessed costs, including counsel fees, if the judge finds that no reasonable basis for requesting the information has been shown. The judge must set forth his reasons for awarding or denying costs.

The Assembly Judiciary, Law, Public Safety and Defense Committee amendments require that the initial determination by the judge, under section 3, be made after a full hearing, and that all judicial findings shall be in writing or in the record. They also provide that publication shall constitute a waiver only as to the specific materials published, and that any materials found to be privileged shall be returned to the newsperson.

P U B L I C H E A R I N G

New Jersey Legislature. before

ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY & DEFENSE COMMITTEE.

on

NEWSPAPERMAN'S PRIVILEGE LAW.

Held:
October 12, 1978
Senate Majority Conference Room
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Martin A. Herman (Chairman)
Assemblyman William J. Bate
Assemblyman Charles Mays
Assemblyman Eugene H. Thompson
Assemblyman Walter M. D. Kern, Jr.

ALSO:

Gayl R. Mazuco, Research Associate
Legislative Services Agency
Aide, Assembly Judiciary, Law, Public Safety & Defense Committee

James Seeley, Professor
Rutgers University
Special Counsel and Consultant to Committee

* * * * *

I N D E X

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ASSEMBLYMAN MARTIN A. HERMAN (Chairman): I think the purpose of this hearing today has been well stated. It is sort of prophetic in many ways - the hearing being called on a date when Myron Farber is being requested to go back to jail.

The purpose of the hearing is to take and solicit testimony from the public, members of the newspaper industry, and members of bench and bar regarding the present New Jersey shield law, the First and Sixth Amendment and the applicability of the Shield Law and what we can do to improve it in light of the Farber situation, if such improvements can be made. We will ask questions from time to time after the presentation of formal statements. The members of the Committee and special counsel may have some questions which we may wish to direct to the witnesses in order to aid us in this regard.

This is a public hearing. I am pleased to announce that I have with me Professor James Seeley of Rutgers University, who has graciously accepted our invitation to act as special counsel to this Committee and special consultant. We appreciate his time and his effort.

Assemblyman Thompson just joined us and we also have with us Gayl Mazuco, who is on the Committee staff.

Although it is not on the formal agenda, I had a request from Assemblyman Bill Gormley, from Atlantic County, to address the Committee concerning the problem that was raised in the Stanford/Daily case, which I believe is somewhat related to the question at issue. Although his bill has been referred non-reference and awaits third and final reading in the Assembly, Assemblyman Gormley believes that this Committee might be able to add its expertise in discussion of that bill and Professor Seeley has graciously agreed that after Assemblyman Gormley makes his comments, he will critique the issue for the benefit of the Committee. This may not necessarily be done today.

ASSEMBLYMAN GORMLEY: It seems like the Bar exam.

ASSEMBLYMAN HERMAN: The chances of passing are a lot higher.

We will proceed from there. I want to thank you for coming, Bill. The floor is yours.

A S S E M B L Y M A N W I L L I A M L. G O R M L E Y: Specifically, for those who might be unaware of what this bill deals with, it is Assembly Bill No. 1535. And, Marty, I would like to thank you for the opportunity to appear before the Committee today and give testimony on this bill.

What we are addressing in this bill is not what many people in New Jersey relate to the Farber situation. This specifically relates to another case, a U.S. Supreme Court case, which was called Zurcher v. Stanford-Daily. What occurred in that case - and I will just fill you in for the record - is, the police in the State of California wanted certain photographs which were the property of a newspaper located at Stanford University. To shorten the scenario, what happened was they were issued a search warrant for those photograhps. This brought about a long chain of events in which the newspaper claimed that their constitutional rights were violated.

The case went first to the U. S. District Court and the U.S. District Court on that level ruled that it would be violative of the constitutional right to freedom of the press were the search warrant to be -- it was improper to have the search warrant under that circumstance.

It went all the way to the U. S. Supreme Court and the U. S. Supreme

Court ruled that there was no constitutional protection in a case of this nature. Consequently, they ruled that the search warrant was valid. However, in the body of the case - and I have handed out copies of the case to the members of the Committee - there was particular reference to the fact that they acknowledged this does not limit future legislative action in the area of search warrant. That, I think, is something. In many cases we have either the State Supreme Court or the U. S. Supreme Court seemingly feeling as though there should be something but they don't feel as though the Constitution gives those safeguards and they specifically cite the fact that legislative action would be permissible if it was thought to be necessary.

Some important points: Obviously, this deals with a search warrant; it doesn't touch on the question of subpoena. There was a feeling by some of the justices that the fact that a subpoena could be issued would suffice to protect the rights of the public when certain information would be sought.

In addition to that, there were certain other safeguards proposed. I will specifically address the District Court level. At the District Court level they felt that the search warrant should not have been issued. They felt that in the body of the affidavit that issued the search warrant, there should have been a showing in the affidavit that the material would not have been destroyed and that, in addition to that, a restraining order could not have been issued until such time as a subpoena could have been issued. Now, these are, I would imagine a couple of safeguards that you might want to consider, in addition to my bill.

So, what I am providing for in the bill is that there could not be a search warrant issued if, in fact, the purpose of the warrant was to go through the materials which have been compiled by the media or were obtained by a member of the media in pursuing his professional activities. Obviously, we put that line in in case a member of the media be involved in any criminal activity. I would not then want this safeguard to be provided to him.

But, this is an issue that has been addressed, and I think appropriately so, by the Attorney General of the State of New Jersey. I have a news release here which I have not had a chance to fully review, but he issued it on September 19th. In this he agreed with the County Prosecutors that there would be a limitation; that there would be a policy on searches of newspaper offices. So, it is a question that is being addressed also by the Attorney General.

My reason for thinking it should be in bill form is quite obvious. If we lose this particular Attorney General, another Attorney General might have a difference of opinion with what I think would be correct. This is only their present policy. So, even though this does not - as I have stressed - relate to Farber, I think immediate action could be taken in this particular area because we are not dealing with subpoena.

I would say in reading the case, the U. S. Supreme Court in dealing with this case does still feel the need for subpoena in certain circumstances. There has to be a procedure or method available - they feel, I believe - in order to gain materials under certain circumstances. But, this is the extreme circumstance where you would have a search warrant and where there would not be a chance for a hearing, or there would not be a chance to limit what you could go through or what you could seek out - where there would be no warning in advance. But, and I would stress again, this only relates to when it is permitted professional activity. So, if there are any questions, I would be more than happy to answer them.

ASSEMBLYMAN THOMPSON: I have just one basic question to ask. How does your proposal measure up in a criminal matter when you have a question on the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment versus the Newspaperman's Privilege? How does that measure up? You say we are not talking about Farber, but I think everything said in this room, by inference, has some bearing on the Farber case.

ASSEMBLYMAN GORMLEY: Well, the reason I said we are not talking about Farber is because I am talking strictly to the question of a search warrant and not to a subpoena.

The U. S. Supreme Court - and as we all know, that is it; that is the top level - has said there is no constitutional protection. That is what was argued with regard to search warrants - that there was a constitutional protection. But, they indicated that legislative action could be taken in this area. That is not to say they endorsed this particular bill, but they said if the legislatures of the states felt, in their wisdom, that certain action should be taken also if they felt a safeguard was necessary, it would be a constitutional safeguard. They have already ruled on this. There is no constitutional safeguard. So, I am saying they left the door open for statutory action. That is what I am proposing.

ASSEMBLYMAN HERMAN: Do any of the other members of the Committee have any questions? (no response)

I would like to acknowledge the presence of the Vice Chairman, Assemblyman Bate.

If there are no further questions, I would like to thank you very much, Bill. We will have some comments back, hopefully, at the same time we wind up our suggestions on the Farber matter, because I think they ought to be handled together.

ASSEMBLYMAN GORMLEY: There is nothing like an honest disagreement.

ASSEMBLYMAN HERMAN: Thank you for coming.

Our next witness will be William Neubeck, Editor of the New Jersey Herald and President of the New Jersey Associated Press Managing Editors.

W I L L I A M N E U B E C K: Thank you, Mr. Chairman. Before I handle any questions that you may have, I have a prepared statement that I would like to read. I have made copies available to the Committee and I have copies for any of the members of the press who are here.

The most disturbing element of the Farber case may be that the New Jersey "shield" law has been found worthless.

In a five-to-two decision on September 21st, the New Jersey Supreme Court ruled that the shield law violated a defendant's right to a fair trial under the Sixth Amendment.

Yet, in Branzbury v. Hays in 1972, the U. S. Supreme Court said that the First Amendment was not sufficient to protect journalists from being forced to disclose confidential information and sources. The court stressed, however, that legislatures could enact shield laws to plug this loophole.

The New Jersey Legislature responded, commendably, but what has happened to Myron Farber and the New York Times suggests that the efforts of you and your colleagues have been all for naught.

Senator James H. Wallwork declared in August when reporter Farber first went to jail: "Either there is a loophole in the New Jersey law guaranteeing media people the right to confidentiality about sources, or the judiciary has become a law unto itself."

It is the latter that increasingly seems to be the case. As Wall Street Journal writer, Jonathan Kwitny observed in an editorial page essay, also in August:

"The judiciary - certainly not all of it, but enough of it to lay down the law - has for all practical purposes declared war against the press."

As a mewsman, I must ask: Why are we the object of such an attack? For being uppity? For pursuing the truth?

Kwitny went on to detail just how far the federal courts have gone to restrain the free exercise of traditional press privileges.

"In recent months," he wrote, "the federal courts have ruled that the government may (a) examine the records of all telephone calls into and out of a newspaper office - or T.V. station, magazine, or book publisher - without telling the newspaper; (b) obtain a secret search warrant to burst into newspaper offices, examining anything that looks interesting; and (c) throw a reporter into jail for failing to round up and turn over every note he ever wrote to himself, every scrap of paper that ever passed through his hands, and, by implication, every thought he ever had about a given subject. None of this requires the least shred of evidence of any wrongdoing by the reporters or the newspaper, or anyone the reporter has talked to."

Mr. Farber has been maligned - if not libeled - by a sitting federal judge to the extent that the public might well assume him to be a common criminal, rather than a journalist trying to defend an important principle.

He was denied a hearing by the Supreme Court of this State - though the court ruled that such a hearing must be conducted in all subsequent cases before an order may be issued requiring that notes or other confidential information be turned over to any judge or lawyer.

And, in what can only be regarded as a heavyhanded attempt at coercion from the bench, the U. S. Supreme Court has advised that it will consider hearing arguments from Mr. Farber and the New York Times, but, in the meantime, Mr. Farber either must surrender his notes to the judge in the Jascalevich case or go back to jail.

Two weeks ago, I was in Portland, Oregon, for a meeting of managing editors. While there, I had dinner with an editor whose newspaper, that very week, had to go to a state appeals court to ask it to overturn an order by a lower court judge that barred the newspaper's reporter from covering a trial which the public was allowed to attend. This is just one example to too many actions clearly aimed at preventing the press from doing its job.

Committee members, I urge you to pursue every possible course open to you to offset the excesses of lawyers and judges more bent on having the law applied as they see fit than in serving everyone by searching for the truth and ruling without rancor or malice. Thank you.

ASSEMBLYMAN HERMAN: Let me ask you a question: What do you think we ought to do?

MR. NEUBECK: That is the $64 question, isn't it? Mr. Chairman, I think the problem at this point, for those of us who are supposed to be editors or reporters and working members, is that we have had very little time since the ruling of the State Supreme Court to study the possible implications because I think you and I are at the same point.

When we took Branzburg, the Supreme Court said: "Okay, go back and write a shield law because the First Amendment is not enough protection for a newsman."

All right, you went back and wrote your shield law. Now the State Supreme Court has told you that this violates the Sixth Amendment, so you are

literally back at ground zero. Now, where do you go?

I, myself, have not had time to study Assemblyman Gormley's proposed legislation, so I can't comment intelligently on that. What I heard this morning suggests to me that perhaps he is on the right course. Plainly, I would like to have more advice from those members of the legal profession who work with us. I understand, of course, that you are to have Floyd Abrahms here from the New York York Times this morning

ASSEMBLYMAN HERMAN: Just for the record, Mr. Abrahms cannot be here and will submit a written statement.

MR. NEUBECK: Fine. But, I think that those of us who make our living ostensibly editing the news and who are not qualified lawyers want very much, of course, to hear from the members of the legal profession who advise us about what we can do now, or what we should ask you, as members of the Assembly or the Senate, to do in the wake of the State Supreme Court decision.

Frankly, as a working newsman, I am a little bit at sea right now and very worried.

ASSEMBLYMAN HERMAN: From your comments, do you view the search warrant issue as a separate and distinct issue from the Sixth Amendment issue that has been raised in the Farber case? Do you see, as a legal layman, any similarity? Or, as a journalist, do you see any difference? That is what I am trying to ask.

MR. NEUBECK: Yes. I think there are differences. I think there are important legal differences. I think that as far as newsmen are concerned, there is a link and that link is the judiciary and, along with the judiciary, members of law enforcement agencies who are asked by the courts to pursue certain investigations, they have gone too far. The fact that people can come in and search newsrooms, looking for anything, to us in the business, is frightening.

ASSEMBLYMAN HERMAN: If I put that on a scale of one to ten of things that are disconcerting to your profession, do you see that as a more disconcerting problem than the Sixth Amendment-Farber issue?

MR. NEUBECK: I think that the Sixth Amendment-First Amendment issue is the overriding issue right now. I don't think there is any question about that. And, I don't think that is going to go away. If you pass a new shield law or if you amend the shield law, whatever you do, I think that First and Sixth Amendment issue will always have to be considered in individual cases.

My feeling is, however, that the courts and some attorneys have gone much too far now in allowing lawyers freedom to "go fishing" in newsrooms and to "go fishing" among reporter's notes. Again, I am not a lawyer, but the few times that I have had the opportunity to cover cases in court - and those of you who are present and who are lawyers may be able to help me with this - it has been my understand that lawyers are advised, perhaps if not by the cannons of law at least by good legal practice, to go after what is called "best evidence." That is, they are supposed to seeking evidence from the source - from the primary source of information. Evidence from someone else who may have been privy to talk about that evidence or who may have seen it second-hand is not as good as getting the evidence from the first-hand source

I think that in a number of these cases, where the press has had to fight to protect what it sees as a very important principle, there have been violations of this best evidence rule. In fact, lawyers have come after the press and those of us who are working members of the press feel that they have come after us unnecessarily.

ASSEMBLYMAN HERMAN: Let me ask you one last question. I will save some

of my other questions for a few of our witnesses that are attorneys and who are here today. Maybe it would be unfair to direct these questions to you.

But, as a journalist, as an editor, as President of the New Jersey Associated Press of Managing Editors, do you view the First and Sixth Amendment as equals? Are they parallels? Or, do you agree or disagree that the Sixth Amendment on occasion supersedes the First Amendment, vis-a-vis court gag rules as an example?

MR. NEUBECK: There is no question, in a defendant's right to a fair trial, we may well be talking about a person's life. I don't think there is anything more precious than that and I think that no responsible newsman or woman can deny that the right of a person to a fair trial is a fundamental right in this country, and a newsperson who practices the profession with a disregard for that is not only doing the profession a disservice, but is also being unjust and unfair. Plainly, the rights of defendants must be protected.

I think what I am saying, and what other members of my profession are saying, is, some attorneys and judges have gone too far in using the Sixth Amendment as an excuse to obtain information from the press which we do not feel they have a right to.

ASSEMBLYMAN HERMAN: So, I think if I understand what you are saying is, in certain instances the Sixth Amendment is of paramount importance in the production of evidence, vis-a-vis the First Amendment.

MR. NEUBECK: Yes.

ASSEMBLYMAN HERMAN: What you are saying here is that the courts, in your opinion, and some attorneys have gone too far in utilizing the scope of those rights under that Amendment in the request for production of evidence?

MR. NEUBECK: Yes.

ASSEMBLYMAN HERMAN: Assemblyman Thompson, do you have any questions?

ASSEMBLYMAN THOMPSON: One of the issues in the Farber case is - at least as I read it - the doctrine of preemption. Where there is a conflict between the state statute and the United States Constitution, then the doctrine of preemption comes into effect and the Constitution stands. Now, in reference to that, I am looking for a balance. In the Farber case you have a situation where the defendant's attorney, Mr. Raymond Brown, brought up the issue dealing with the Sixth Amendment, the right to fair trial, and all the other things that go with the Sixth Amendment, and you have a newspaperman, Mr. Farber, claiming privilege under the First Amendment.

I want to ask you this: How do you balance this out in reference to a fair trial when the defense counsel feels strongly that there is evidence, however received, in a newspaperman's files that would be helpful in preparing his case for his client?

MR. NEUBECK: Mr. Farber, as I am sure you are aware, Assemblyman, researched - or investigated - what seemed to him to be -- well, he investigayed deaths at a hospital which seemed to him to perhaps have occurred under suspicious circumstances. He pursued this and his newspaper pursued it. As a result, he came up with some stories on the situation at the hospital as he found it to be. Consequently, Doctor Jascalevich was indicted and brough to trial. Now, his innocence must be assumed. At the same time, along the way there was at least enough for the newspaper to go ahead and publish material that it felt it could publish with confidence. There was enough for the prosecutor in the case to obtain an indictment and go to trial. Now, we get the trial and we are in trial. I know I would like, as a newsman, to know what attorney Brown thinks may

possibly be in those notes that cannot be obtained in order to help him with the presentation of his case, through the normal processes of discovery - by obtaining information from the prosecutor; by obtaining it from copies of the New York Times, etc. The New York Times, after all, published what it felt it had and that is all it published. It did not publish all of Farber's notes.

ASSEMBLYMAN HERMAN: Are you talking about a test of relevancy?

MR. NEUBECK: I am not a lawyer, Mr. Chairman, please, and I can't get into all of that. I will get prosecuted for practicing law without a license and we have enough trouble already without getting into that.

ASSEMBLYMAN HERMAN: That is a common law principle which we accept.

MR. NEUBECK: Okay. I am willing to accept it with you.

ASSEMBLYMAN HERMAN: I am just joshing. Go ahead.

MR. NEUBECK: I am not sure I can answer your question fully, Assemblyman. But, Mr. Brown has asked for everything. He wants the whole business, literally. I don't know what is in Mr. Farber's notes and I don't know what the New York Times has. Good Lord, maybe he has a receipt from a pizza parlor. Maybe somebody who was in there working gave him a story; I don't know. But, Mr. Brown, I would think, in formulating his defense would know what area he could ask for information in in order to properly defend his client. I can't see that there would be anything in Mr. Farber's notes that the New York Times had not already published and which would be really relevant to the case at hand.

ASSEMBLYMAN THOMPSON: All right. Let me go one step further. Let me cite from United States V. Nixon, where the court said, "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in an adversary system in both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on partial and speculative presentation of facts. The very integrity of the judicial system and public confidence in the system depends on full disclosure of all of the facts within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of the court that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

ASSEMBLYMAN HERMAN: What is the question, Assemblyman?

ASSEMBLYMAN THOMPSON: Well the question is -- it is the same question: Under the Sixth Amendment what rights are you affording to the defendant to prepare his case so that he is entitled to a fair trial?

ASSEMBLYMAN HERMAN: So that we can have some ground rule for this witness as well as other witnesses, the members of this Committee may or may not agree with the particular witness, but what I think we are here today to do is to elicit the witness' viewpoint. If you could frame that into a question, I would appreciate it. In that way, we can find out what the witness thinks about it.

ASSEMBLYMAN THOMPSON: Well, he never answered the previous question. I am still dealing with the Sixth Amendment.

ASSEMBLYMAN HERMAN: I think he tried to do the best he could. I think the witness has explained to us that he is not a member of the Bar.

ASSEMBLYMAN THOMPSON: I will frame a similar question. We have an adversary system, a prosecution and a defense in a criminal case. I want to know what protection the defendant has under the Sixth Amendment when his attorney wants to fully prepare his case, regardless of the discovery proceedings, if he

has knowledge that a newspaper reporter may possibly have some relevant information that can be used in the defense of his client?

ASSEMBLYMAN HERMAN: I assume the question was in reference to the New Jersey shield law. How does the shield law apply, or should it apply, with reference to affording the defendant the greatest access to what our courts refer to as "every man's privilege for evidence"?

MR. NEUBECK: Assemblyman, let me try and answer your question this way: No newspaper that I know of, nor radio station or television station, can broadcast information, or publish information, with a reckless disregard for the truth. We cannot simply gather information and necessarily publish all that we find. We have a responsibility to the law as well. There is a libel law and a slander law. We can be sued. We can be put in jail, as has been proven. We can be fined heavily. Our papers and the individual members of the profession can be penalized if we operate without some respect for the validity of our information. So, consequently, we may, as investigative arms of the government now do - the Attorney General's office, the F.B.I., and various other bodies - investigate and produce much information that can never be used in a court of law. Just as they could not use much of their information in a court of law, we may not use it in our newspapers, on our radios, or on our television stations. Consequently, I think there is a reason why -- Let's say Mr. Brown was looking for more information in a case and instead of having a newspaper pursue this information, the Attorney General's office pursues it. Is he empowered to order into the court every scrap of paper from the Attorney General's office that has to do with that case? Can he order in every last document, every note from one member of the Attorney General's office to another concerning the conduct of the case perhaps? Can you do this? I don't know; I am not a lawyer. Perhaps some lawyer here can tell me the answer to that question.

ASSEMBLYMAN HERMAN: Assemblyman Mays?

ASSEMBLYMAN MAYS: Concerning the question of Mr. Brown, don't you think he has a right, just like a doctor has the right to keep secrets about his patients? When a man's life is at stake, don't you think his lawyer has the right to go as far as he wants to save this man's life, as long as it is not illegal?

MR. NEUBECK: No, I don't think so. I think we have an important issue here. The point is, I think - my judgment is - that attorney Brown can properly defend his client without violating an important right granted to the press under our system of government, and that is that the press will be free - free to pursue information and fee to publish that information within the normal restraints of liability.

ASSEMBLYMAN MAYS: The Supreme Court and the State Court said that this man must show his papers. Now, you are trying to say that the courts are wrong.

MR. NEUBECK: Well, I am going to say two things about that. First of all, of course, we are waiting for a final U. S. Supreme Court decision of whether or not to review the salient issues in this case. Mr. Farber, in the meantime, appears headed for jail again. But, we are waiting for that.

My feeling is, and I think the members of my profession share this, that it is absolutely vital that the press be free to pursue the news and to publish it whether an attorney, or lawyers, believe we should or should not, and to withhold some information, perhaps, that is not relevant. We must be free to practice our profession if you are going to be properly informed and if the public is going to be properly informed. I think that some members of the legal profession are

now attempting to make the press operate within certain restrictions which it deems to be correct. It is only one branch of government. There is the Executive Branch and the Legislative Branch and the fourth estate.

ASSEMBLYMAN MAYS: I agree with the newspapermen to a certain extent, but when a man's life is at stake, don't you think a court or someone should look at the notes to see if there is anything in your records to save this man's life?

MR. NEUBECK: The trouble is, it seems to me Mr. Brown has not indicated what it is that he thinks he might find in these notes. He has not been specific in his request for evidence. He has simply asked for everything.

ASSEMBLYMAN HERMAN: Let me crystalize the issue, if I may. The question is, assuming the test of relevancy and materiality - which I assume is the question that Assemblyman Mays is asking-- Assuming that the defense has established that it is not a fishing expedition, that there is relevant evidence needed to impeach credibility - which is as much an evidentiary problem as substantive evidence - and that relevancy and materiality can be shown, under that situation I think the Assemblyman's question is, should the newspapermen's privilege yield to the production of that evidence which might be material and relevant to the question of innocence or guilt? Is that the question, Assemblyman?

ASSEMBLYMAN MAYS: Something like it.

MR. NEUBECK: If what you are suggesting to me is that Mr. Brown could say there is relevancy here and be specific about what he is talking about and that consequently Mr. Farber should be--

ASSEMBLYMAN MAYS: Let forget Mr. Brown.

ASSEMBLYMAN HERMAN: Well, assuming that those tests have been met and there has been a prima facie case demonstrating that there is relevancy and materiality as to the production of those notes - any newspaperman's notes - which could affect the question of innocence or guilt of the particular defendant, in that given situation, having demonstrated that evidence of materiality and relevancy, do you think the newspaperman's privilege under the shield law should yield to the Sixth Amendment rights to the production of that evidence? I think that is the essence of the question. Your response, please?

MR. NEUBECK: If that has been shown and if that kind of relevancy and specificity has been demonstrated, as far as we are concerned, I think I would say yes.

ASSEMBLYMAN HERMAN: Assemblyman Kern, do you have any questions?

ASSEMBLYMAN KERN: Yes. What about personal gain of the reporter, whereby he stands to profit from the outcome of the decision in the court case monetarily? Do you think that compromises any privileges?

MR. NEUBECK: No it does not, Assemblyman. I think that has been one of the red herrings in this whole case. It is an unfortunate situation perhaps. I can't speak for Mr. Farber. Perhaps at this point Mr. Farber wishes he never had the book contracted for. Everyone, of course, has called attention to it. I think it is simply an unfortunate red herring in this case that has been brought up. It does not address the issues of the First and the Sixth Amendments. It does not address the question of the shield law. It is simply there. I think unfortunately the public perceives it to be very important. In fact, I think the public thinks it is more important than the issues we are here to talk about today.

ASSEMBLYMAN HERMAN: Hopefully, we will review the subject matter in a more dispassionate way.

ASSEMBLYMAN KERN: Continuing on that, do you think the fact that he has communicated his sources to a publisher or an agent - assuming he has done that -

that he has waived the privilege?

MR. NEUBECK: You have made an assumption which has not been demonstrated.

ASSEMBLYMAN KERNS: I am doing that because we are trying to deal with legislation that is not going to be specifically tailored to this case.

MR. NEUBECK: I think that is a dangerous hypothetical situation for us to discuss here. I think we cannot assume that Mr. Farber has shown all his notes to his publisher. I think for us to do that is dangerous. We are getting into an area that--

ASSEMBLYMAN KERNS: I am assuming that he has for the sake of the question. Do you think that constitutes a waiver?

MR. NEUBECK: No. I am not going to comment on that because I do not know and I will not answer that.

ASSEMBLYMAN THOMPSON: Well, hypothetically.

MR. NEUBECK: I am sorry, I will not get into those kinds of hypothetical questions.

ASSEMBLYMAN HERMAN: All right, one at a time, please.

Let me state the ground rules again for this hearing. As I stated earlier, it is not a question of whether we agree or disagree with a particular witness; we are here to solicit each witness' views so that we have a composite of testimony before us showing a cross section of views to help us decide how we are going to make the shield law a better one than it is. I won't get into any back and forth arguments.

ASSEMBLYMAN THOMPSON: We are just probing, Mr. Chairman.

ASSEMBLYMAN KERN: It has been put forward that we are dealing with constitutional amendments, matters that have been set forth in the Bill of Rights. The argument has been made that therefore there is no necessity for a shield law because you are relying on the United States Constitution or the New Jersey State Constitution. What do you think of that argument?

MR. NEUBECK: I don't think, Assemblyman, with all due respect, that you were here in the beginning where I noted in my prepared statement that unfortunately one of the dilemmas we have now is that six years ago the U.S. Supreme Court, in moving on this very matter, said that the First Amendment did not guarantee newsmen sufficient protection of confidential information and their sources. T$_h$erefore - and it was plainly stated - newsmen then ought to return to their states and ask their state legislatures to write shield laws -- which, in fact, you did. We were delighted that you wrote a shield law and that the shield law would serve as protection for the newsmen. Now, here we are and we have no shield law, for all practical purposes.

ASSEMBLYMAN KERN: Well, that is my next question. It has been stated by various newsmen that I know that it appears that the Legislature may propose and the courts dispose and that really there is no reason to have a shield law since the courts ignore it. Therefore, it has no utilitarian value. Why have one?

MR. NEUBECK: I think one of the things we feel so frustrated about and so concerned about is that we start out having these matters develop in the courts, that is, particular cases come up which require that newsmen take a stand on what seems to us an important principle. Then, our only avenue of seeming appeal of the question of whether we must produce or not is also in the courts. It is not in the Executive Branch of government and it is not in the Legislative Branch of government. We have to go right back in to deal with the same people, members of the same branch

that we are already having a problem with. Let's face it, gentlemen, those of us in the news profession stick together; those of you in the Legislative Branch of government are likely to stick together; and the judges are likely to stick together. That is a problem.

ASSEMBLYMAN HERMAN: Perhaps Madison and our founding fathers might have had a different view. I would like to extend, if I may, the courtesy of the chair to Professor Seeley for the purpose of questioning.

PROFESSOR SEELEY: Just one question. From your responses to a number of other questions, I wonder if it would be your position that by way of any legislation - further legislation - along the lines of the shield law that might be adopted, what you would like to see is a tougher standard against which to measure the need and the necessity to get at information -- the relevancy of the information, the importance of the information to the defense, and the absence of any alternative source. Subject matters like that are articulated in legislation for a court to use in order to measure need in making a decision as to whether or not disclosure should be forced, rather than any kind of absolute prohibition. Would that be a fair summary of your view?

MR. NEUBECK: Yes.

PROFESSOR SEELEY: Thank you.

ASSEMBLYMAN HERMAN: That is why we invited Professor Seeley back as a consultant.

MR. NEUBECK: I think he crystalized it well.

ASSEMBLYMAN HERMAN: Thank you very much for your testimony. If you wish to supplement it, through counsel or through yourself, we would appreciate any further views you would have. We will be keeping the record open.

ASSEMBLYMAN THOMPSON: I just have one question.

ASSEMBLYMAN HERMAN: You have one more question?

ASSEMBLYMAN THOMPSON: Yes, one more. In reference to a tougher standard, don't you think the court left the door open when they stated: "However, this opinion is not to be taken as a license for fishing expeditions in every criminal case where there has been investigative reporting, nor is it permission for an indiscriminate rummage through newspaper files"? Don't you think that left the door open?

MR. NEUBECK: Assemblyman, I am sorry, I don't know what decision you are referring to.

ASSEMBLYMAN THOMPSON: This is the Farber case.

ASSEMBLYMAN HERMAN: We have to recognize that this witness is an editor and not an attorney. He may not have gone through the Farber opinion.

ASSEMBLYMAN THOMPSON: I assumed he read it.

MR. NEUBECK: I have read press accounts of the opinion. You are talking - as I recall - specifically about the search and seizure aspect, are you not?

ASSEMBLYMAN HERMAN: I think that may be able to be addressed by other witnesses.

MR. NEUBECK: I think I would certainly rather have an attorney answer that for us.

ASSEMBLYMAN HERMAN: Mr. Neubeck, thank you very much again on behalf of the Committee for coming down.

MR. NEUBECK: Thank you for inviting me, Mr. Chairman and members of the Committee, thank you for hearing me.

ASSEMBLYMAN HERMAN: Mr. Barto, please. Mr. Barto is with the Passaic Herald News and he is Chairman of the News-Editorial Committee of the New Jersey Press Association. Thank you for coming, sir. We are happy to hear from you.

W I L S O N L. B A R T O: Thank you, Mr. Chairman and members of the Committee. The amount of information passed by many sources to newspeople in the course of a workweek is massive.

The first muster any tidbit must pass is whether it is accurate. A lot of time and money can go into establishing this to the satisfaction of writers and editors alike. What is left is considered to be unpublishable and can be cast aside or retained until such time that accuracy can be established.

Thus, it can be said that what newspeople consider to be solid information that should reach the public - and news organizations will stand behind it - is the information that will add credibility to the story.

What is left is considered to be unprovable at the time and unusable. So, why should any newsperson be required to pass on to anybody anything that he or she would not be willing to place before readers, listeners or viewers in the free exchange of information?

It is this unusable information that must be considered unavailable under the protection of the New Jersey Shield Law if fishing expeditions are not to begin from directions that no one can foresee even now.

Investigatory agencies and defense attorneys, too, have the powers to investigate that newspeople don't possess and ways of eliciting information that only they can use. The questions then is: Can they do their jobs without fishing through the newswriter's file, or can't they? For, what the press finds solid enough to pass on to the public will, indeed, appear in the course of news coverage.

The very role of the press, shouldered willingly, is to protect sources who, for various reasons the press is ready to accept, cannot come forward publicly with pertinent information. A news organization willingly transmits information it feels the people should have for their own good interests. And, not for one second do newspeople forget that what they disseminate can become actionable in a court of law.

In every criminal investigation, information is considered, but found to be unusable, by either side because it is found unprovable in time for presentation in court. So, it is not forthcoming. Nor are the sources identified, even for provable information in many cases. The only thing that counts is whether under the judicial procedure, the information is found to be accurate. The news organization already has made its determination, I might point out.

Why should the requirements of disclosure be any different for information gathered by newspeople in the course of their work?

The New Jersey Shield Law must guarantee this protection for press and people alike if it is to be worth the time a lot of persons - including this Legislature - invested in its preparation and enactment.

Newspeople must be sure their promise of confidentiality to a news source can be kept. The Shield Law must be ready if the test ever comes.

In the late 1950's, I was involved in investigative reporting into wide-spread fixing of the New Jersey "non-fixable" motor vehicle ticket in Monroe Township, Middlesex County. The upshot of two weeks of court session was that the magistrate, the mayor, the police chief, present and former councilmen and a businessman were convicted of contempt for tampering with the municipal court of that rural township.

It appeared as pretty small stuff, but I believed then and I believe now that tampering with even the smallest of municipal courts means that every court - yes, even the Supreme Court - sits on sand. Likewise do I believe that tampering with the confidentiality of sources whose information passes through fine screens before it is laid finally before the people, means that Freedom of the Press sits on sand too. Thank you very much. I would be willing to answer any questions.

ASSEMBLYMAN HERMAN: Let me ask you, if I may, Mr. Barto, the same question: What do you think we ought to do with the New Jersey Shield Law as it exists today? Do you think we ought to repeal it, amend it -- what do you suggest?

MR. BARTO: Certainly, I think we need it. I think there might be a clause, or provision of specificity - which was mentioned a little bit earlier. I think the only way I can discuss that is to get into specifics and talk about the Farber situation.

ASSEMBLYMAN HERMAN: All right.

MR. BARTO: I think that a defense attorney - in this case Mr. Brown - should go into court, possibly open court - and I am dealing now in the realm of judicial procedure, which I too do not contend to be an expert on - and say, "It is our belief that Dr. 'Y' is the man who carried curare samples from the locker of Dr. Jascalevich to the prosecutor. We would like to produce Dr. 'Y'." And, in this case it might be Dr. Smith. I am using a letter. I never did like the "Dr. X" situation to start with, but I was an ombudsman then. I am now an editor.

If you get specific and are willing to say, "Now then, we have reason to believe that Dr. 'Y' went to the reporter, or Dr. 'Y' went to the prosecutor, or Dr. 'Y' organized a group of other doctors to do this," now we are talking about something that somebody can respond to without calling in all kinds of files.

ASSEMBLYMAN HERMAN: Let me ask you one further question, along with that series of thoughts: If the defense attorney said witness Smith, who testified on behalf of the prosecution, said one thing here in court and we have reason to believe, based on a reasonable inference in the story, that he said something else to the reporter and the reporter's notes will disclose that, for the purpose of impeaching witness Smith's testimony, we need to see the reporter's notes to see whether he did or did not tell the same story both places - because we know that truth, probity, and consistency are very important questions - what would be your response in that situation?

MR. BARTO: You said something in there that interests me. You said that it was inferred from the story. Now all newsmen are on solid ground again because if that was in the story, we are ready to stand behind it. I would certainly say yes.

ASSEMBLYMAN HERMAN: Let me ask you this: I noted that in this so-called sifting process - which you referred to in your testimony - that there is sort of an inference that - and correct me if I am wrong - newspapermen and their editors are sifting relevancy as to what should and should not be presented, what is fair and what is unfair. But, when it comes to a courtroom and the question of what is relevant or irrelevant evidence, or what is material or immaterial evidence, do you think a reporter, an editor, or a newspaper should be able to take the position that it alone should be the best judge of what is relevant or material as to what it is going to produce or not going to produce?

MR. BARTO: You mean to produce -- not in the paper?

ASSEMBLYMAN HERMAN: In the courtroom?

MR. BARTO: I would say - and this goes back to my statement - that if those people - those newspeople - considered the information to be accurate, substantial, and substantiative of the story during the shifting process, then they have already made that decision.

ASSEMBLYMAN HERMAN: The point I am making, Mr. Barto, is very direct: Do you think that in a courtroom, whether we are talking about a newsman, an attorney, a doctor, a clergyman, an indian chief, or anyone who was called to testify and requested to produce information - and let's just stick with newsmen, editors and newspapers today - a newsman or his newspaper ought to be the final arbitor of what is or isn't relevant, or what should or should not be produced?

MR. BARTO: I think they should be the final arbitor of what they are passing on, if they consider it to be accurate information. I would not want to be responsible for passing on to anybody, court or whatever, information that I do not consider to be accurate.

Now, if you are going to ask me, "We understand that you have this in your possession and it says 'this' -- does it say 'this'"? Then I will answer yes or no.

ASSEMBLYMAN HERMAN: How about if the court disagrees with the newspaperman's conclusion? Under the assumption that reasonable people can disagree from time to time, where there is a disagreement as to what is relevant or material in a court of law and the court says it thinks there is a prima facie showing of relevancy and materiality, under that given set of circumstances do you think that the shield law or any constitutional amendment that we have, either by way of State or Federal government, should grant a newspaperman or his newspaper the ability to say, "Notwithstanding your determination, I don't think it is relevant or material, therefore I am not producing the evidence or the documents"?

MR. BARTO: I would want to say whether I am going to pass that information on, that is correct.

ASSEMBLYMAN HERMAN: How about if a lawyer is the one that says that? Do you think there ought to be a different standard for a lawyer or a doctor or an engineer, or they guy down the street that owns the candy store who is called to testify and who many have some records? Do you think that they, as witnesses, are under a different test as to whether they are going to produce evidence than a newspaperman is?

MR. BARTO: I would not want him to pass on any inaccurate information.

ASSEMBLYMAN HERMAN: So, in other words, what you are really saying is that every witness should have the opportunity to decide what evidence they wish to give and don't wish to give, notwithstanding the court's determination of relevancy and materiality?

MR. BARTO: Well, in a situation like that I think that these questions would come after an awful lot of investigation by prosecution and defense.

ASSEMBLYMAN HERMAN: I am talking about the witness' ability to be able to withhold response, whether it be by way of verbal testimony or demonstrative evidence, by not producing a document or notes, or whatever it may be. Do you think that every witness ought to have that right? And, where would our court system be if every witness did have that right?

MR. BARTO: Would the court system want to go fishing into the records of all of these people? We have things that I must assume they think they want and

once again it gets down to specificity and I think they have to say that they understand that, or know that -- I would say even, "We know this; do you have it or do you not? Does it say this"? I think we are getting into a little bit of strategy then, as far as prosecution or defense is concerned.

ASSEMBLYMAN HERMAN: This is my last question and then I am going to pass this on to the other members of the Committee because we do have other witnesses to hear today. This makes what I think is a very simple and clear-cut case.

MR. BARTO: Yes.

ASSEMBLYMAN HERMAN: Does a newspaperman,have the right, once a determination of relevancy and materiality has been made as to evidence within his custory and control, to withhold that information after he has been told by a court that there has been a prima facie showing of relevancy and materiality and that it wants him to produce the information because it may weigh on the question of guilt or innocence, taking into consideration the Sixth Amendment right to a fair and impartial trial and the production of all evidence?

MR. BARTO: And, at that point--

ASSEMBLYMAN HERMAN: Assuming there has been a demonstration of materiality and relevancy?

MR. BARTO: And, also that there has been a demonstration that this information is in the possession of that witness -- that is what you are saying too?

ASSEMBLYMAN HERMAN: That there is a prima facie showing.

MR. BARTO: That can be a solid question of, "Does it show this or does it not show this"?

ASSEMBLYMAN HERMAN: Outside of a fishing expedition, yes.

MR. BARTO: Yes, I think that a responsible citizen and newspaperperson would, in effect, cooperate in a situation like that. But, you are talking about a fact now, or a piece of evidence, that you know,or have reason to believe very strongly, in in the possession of a news person.

ASSEMBLYMAN KERN: Following that up, you do feel that there is a difference between the First and the Sixth Amendments and that the Sixth Amendment is not equal; the First Amendment does not take precedence over the Sixth?

MR. BARTO: Did you say that it does not take precedence?

ASSEMBLYMAN KERN: The Fist does not take precedence over the Sixth?

MR. BARTO: I should like to have the case at hand, seriously.

ASSEMBLYMAN KERN: Well, that is the argument that is being made in the Farber case, generally speaking.

MR. BARTO: Well, I would say, once again, if it has been shown-- I think there would have to be something under this shield law. We would have an awful lot of lawyers employed for a long time in a situation like this. But, we are talking about putting this thing up against the standards of a shield law, which has not taken place in this situation. I assume you would know we would fight for a strong shield law along the way.

ASSEMBLYMAN KERN: You would be in favor, I take it then, of some sort of procedural standard to be put into the shield law, or a separate piece of legislation, which would guarantee demonstration of necessity, relevancy, and protection for the news corps?

MR. BARTO: Indeed.

ASSEMBLYMAN MAYS: Mr. Barto, you said that newsmen stick together,

legislators stick together, and lawyers stick together.

MR. BARTO: Well, Bill said that.

ASSEMBLYMAN MAYS: Do you think that the judges on the Supreme Court are trained like a lawyer? Do they have the mind of a lawyer, just as you have the mind of a newsman? Do you think they think differently when it comes down to the Farber case? Are they trained to think the way Ray Brown does, or any lawyer does when they present their case?

MR. BARTO: Well, I certainly think there is a different approach. I would think that in the search for truth there is no difference. But, with the approach I would say yes; there is no question about it.

ASSEMBLYMAN MAYS: Okay. Do you think there should be a committee set up of newspapermen and lawyers on a case where a man's life is at stake, in order to go over such things and look at a confidential report?

MR. BARTO: You are talking about the information, Assemblyman.

ASSEMBLYMAN MAYS: Yes.

MR. BARTO: No, I don't think so. I am perfectly willing to let this operate within the judicial procedure, knowing full well that the judicial procedure changes over the years. This is the give and take that our system is noted for. We make mistakes sometimes, but it all comes out very well. It has so far.

ASSEMBLYMAN MAYS: My last question is: Do you think that Farber went on a fishing expedition after the first time it was thrown out in 1966?

MR. BARTO: Was on a fishing expedition?

ASSEMBLYMAN MAYS: When he started checking things out?

MR. BARTO: Well, he certainly went right to sources. As I recall the situation, it was triggered by four deaths in Michigan. This is a typical newspaper procedure. You begin to think about the relevancy of a story in your own area. In this case, it happened to be the New York Times in North Jersey, and you will remember, it is almost like the Hall-Mill murder. That is about ready to come up again, I would say. We never solved that thing either. I don't even know if anyone remembers that, or knows about it. You have to work in a New Brunswick newspaper to know anything about Hall-Mill. But, it is a situation where there was certainly no disposition of the case. Here you had these four deaths and no one had any explanation for them.

ASSEMBLYMAN MAYS: Do you think he was fishing?

MR. BARTO: I think he was looking into a story in his area. This thing came up again.

ASSEMBLYMAN MAYS: So, he was fishing?

MR. BARTO: No, I don't think so. He went to records. He went to evidence.

ASSEMBLYMAN MAYS: How come the Grand Jury didn't indict the man the first time?

MR. BARTO: Well, that is more than I know.

ASSEMBLYMAN HERMAN: With due respect, I think we are getting beyond the pale of our inquiry here.

Assemblyman Bates.

ASSEMBLYMAN BATES: With some of the things you said, I think you are getting dangerously close to upholding confidentiality as an absolute privilege. Do I misread you?

MR. BARTO: No, I think you are right. And, maybe we are not thinking of a bank president, Assemblyman. We are talking about the little guy, although

bank presidents get more scared than little guys.

One of the examples I can give you is - and this doesn't get into the aura or the glamour of a Superior Court trial - I worked 14 years with the Trenton Times and you would be amazed - you state officials - at the stories that come to newspapers, particularly the Trenton Times, from rank and file employees of this state government -- from the fact that the air conditioning never did work in the Labor and Industry Building to a very absent state supervisor who says, "We have to go and wish Charlie a happy birthday" and comes back one and one-half hours later to his job. Newspapers get this stuff by the ton, you see, and you do the sifting. It is a situation where you just can't, in many cases, say who did it because it could, indeed, cost them their well being in a lot of different situations.

ASSEMBLYMAN THOMPSON: In your statement you use the terms unusable and unpublishable. You also state that the newspaper feels that people should have news for their best interest. What I would like to know is, how do you define these intangibles like "unusable" and "unpublishable" and "best interest"? You say a newspaper should be the final arbitrator and the court should step aside when a reporter takes the stand? Do you feel as though he should make the decision on what information is unusable? Should he make the decision on what constitutes unusable news, or unpublishable news? The court has something to say about what constitutes evidence.

MR. BARTO: There is no question about it. They are in their realm and we are in ours. This unpublishable and unusable information starts out first with accuracy. We get all kinds of different pieces of information and we must determine, to start out, if it is accurate. Then, if it is accurate, you begin trying to substantiate it. You then get to the point where it is accurate enough to be presented, whether it be in written word or whatever. But, then we deliver it to our patrons - our listeners or readers or viewers. That is going on all the time.

Most times, this information is not thrown away because you never know when a situation will come up where you can, indeed, prove the accuracy of that bit of information. Now, this is the kind of thing that reposes in newspaper offices all over the land -- in news rooms all over the land.

ASSEMBLYMAN THOMPSON: Show me how that is in step with the whole check and balance system of this Republic -- in other words, the judicial, the legislative and the executive branches of government. You claim that they have the privilege of making the final determination of what is useful and what is non-publishable. As Mr. Herman stated, there is a Sixth Amendment question and a Fourteenth Amendment question versus the First Amendment question in a criminal case where a lawyer needs this information -- at least he tells the court that it is relevant and he needs it in order to prepare his case for the defendant.

MR. BARTO: Well, my feeling along those lines is, you are asking for information that we ourselves have not proved usable. You are asking us to--

ASSEMBLYMAN THOMPSON: Who is making this determination?

ASSEMBLYMAN HERMAN: Let's not fight.

ASSEMBLYMAN THOMPSON: I am not fighting; I'm just probing.

MR. BARTO: We have made the determination that we cannot go to press with it, in this case. As I mentioned in my statement, all the information we use, we are ready to stand behind. It is also actionable in the courts if it is inaccurate and wrong, or whatever.

Now, what you are asking for is information that we have not felt is

usable, or that we can use. I can guarantee you that every bit of information that you find usable to add to the credibility of the story, will be used.

ASSEMBLYMAN KERN: In a criminal procedure where the state has not been able to compile enough evidence to bring forth an endictment or a conviction and an independent newspaper reporter delves further and is able to emass enough material to support an indictment and possibly a conviction, and he turns it over to the state and there is an indictment and a subsequent trial, do you think that individual would lose the privilege because he has become an instrumentality of the state, the people and the criminal prosecution?

MR. BARTO: He then has become an arm, so to speak. Once again, I would have to know the information that you are talking about. You are talking about information now that has not been used in his publication?

ASSEMBLYMAN KERN: Right. But, it has been used in the judicial process to bring forth the indictment and the prosecution.

MR. BARTO: Let me say this: I am now speaking for Wilson Barto. Yes, I would say that we have a situation here were a reporter became an arm of the investigatory body and it is a bad situation, but it is the kind of situation that apparently everybody likes because it helped an investigatory agency do something it was not able to do. This is a shame because they have the wherewithal and they have the procedures to use that newspapers and news people just don't have and, I would say, don't necessarily want to have.

ASSEMBLYMAN HERMAN: Mr. Barto, thank you very much for taking the time to come down.

We would now like to hear from James Ahearn, the Managing Editor of the Bergen Record.

J A M E S A H E A R N: Thank you for inviting me here. I have read the opinions of the court in the Farber case and I will attempt to answer whatever questions you have about that. I do have some preliminary comments. I do not have an elaborate prepared testimony.

The question was asked by Mr. Kern before about where the line should be drawn between the First and the Sixth Amendments. I think that issue has been resolved and that the conflict is no longer between the First and the Sixth Amendments. The U. S. Supreme Court has ruled in Bransberg that a reporter has no absolute right to refuse to offer his testimony before a Grand Jury. The State Supreme Court has reiterated that opinion and what we are faced with here is a confrontation between the shield law and the Sixth Amendment.

I would agree with the conclusion of the State Supreme Court that where there is a conflict between a state law and a constitutional amendment, the constitution should prevail.

Now, there are other considerations here that we have to bear in mind. Mr. Herman asked before,what is the difference between a newsman who is called to testify and a candy store owner, or a lawyer? If we give special privileges to a newsman, why shouldn't the candy store owner have the same right? Well, there are several answers to that. A lawyer does have special rights. He can refuse to testify as to confidences. A doctor can claim a special relationship with his patient. A priest can claim a special relationship with a penitent. And, the Legislature, in its wisdom, has granted similar privilege with respect to newsmen and their sources. This privilege, the essence of it or the core of it, has been upheld in principle by both the State Supreme Court and the United States Supreme

Court. Both these bodies have said that it is a fair, reasonable, and good service to the public to recognize that newsmen are in a special situation, vis-a-vis the Constitution and the courts. They are somewhat different from the candy store owner. So, there is that difference.

Mr. Kern asks what use is the shield law if the Legislature proposes and the court disposes and the court can do whatever it wants with any statute that covers it. I think there is a good answer to that. The State Supreme Court went out of its way to recognize the legislative intent with this law. I think Justice Handler in his dissenting opinion recounted the history of the shield law, dating back to 1913 when there was no newsman's privilege. He cited the successive statutes passed by this legislature to insure that newsmen and their sources will have some protection before the law. So, the court did, in fact, even in the course of issuing this opinion, recognize the special responsibility of the press and the special duty of this institution in American society and gave credence to it. It did not throw the statute out, hook, line, and sinker. What it did, in effect, was to construct its own amendments, by fiat, to the statute.

Let me talk about some of those amendments. The initial reaction to the State Supreme Court ruling in this matter focused on division of opinion between the majority and dissents. I think that a more interesting view we can take here this morning, looking towards the future, is the points of concurrence in terms of the congruence between the majority and the dissenting opinions. All of the justices are in agreement that care should be taken not to rush precipitously to compel a reporter to disclose confidential material and that when push comes to shove and a need for such compulsion is established, a showing must be made that the material sought is relevant and necessary to the conduct of the defense.

All of the justices are also in agreement that the material to be produced - the material sought - should not be available to a less intrusive avenue. In other words, if the court can reach out and grab that testimony from somebody else and not force a reporter to testify to what somebody told him or her in confidence, then that is the avenue that should be taken.

Finally, in the phrasing of Justice Mountain for the majority, the court must establish that the defendant had a legitimate need to see the material. For my purposes - and the purpose of many editors, I think - the interesting part of the decisions came in where they differed -- where the majority differed from the dissenting justices, and, as you can imagine, not in favor of the opinion of Justice Morris Pashman or Justice Handler. I would counsel that in amending the shield law, taking whatever further action you propose to take, that you give careful consideration to the rationale of Justice Pashman -- that when a defendant is in a situation where he is trying to compel production of documents from a reporter, the defense be required to specify what material he wants. He must make up a list of classes of items or specific items of what he needs. It should not be sufficient for the defense to say - as it has in the Farber case - "This man has all sorts of information; I don't know what the information is, therefore I must see everything before I can come to a determination as to which of those things are relevant." This would let the defense, in effect, determine what is relevant. The defense ought to be required to specify exactly what it wants.

In the Farber case - to return to the point at hand here - it is not unreasonable to expect defense in this case to make a series of specifications. It, according to Justice Mountain's decision, had a whole list of things that are

wanted and, according to Justice Mountain, this list was a plausible list. There were things on it that the defense could well have benefited from knowing. As further events have proved, some of the items on that list are, in fact, open to question. In my own view, what happened here - and the unhappy part of this whole incident - is that the State Supreme Court, having established this new standard, failed to apply it. It rushed to judgment. It took as established fact a list of contentions that - exparte contentions - the defense had made that had not been subjected to searching cross examination. Had that cross examination taken place, I am confident that Mr. Farber would not be in jail today.

To return to the question that Mr. Herman asked about Mr. Gormley's initial testimony concerning the parallel between the search warrant issue and the subpoena, I think they are related and I would draw this analogy: I think that in both cases we are dealing with an institution that does have some recognized special rights under the constitution - the press - and I think the solution in both situations is the same. Prior to issuance of a search warrant, or the compulsion of documents from a reporter, a hearing should be conducted where the attorneys for the reporter and for the defense can thrash out what they believe their rights and duties are and what the facts of the case are.

Now, I would be glad to answer whatever questions you may have. Let me say first that Peter Banta of Winne and Banta, counsel for the Record, who bears certain scars from recent proceedings before various panels on these very same matters, will be following me here and will be happy to answer specific questions about things like the waiver.

ASSEMBLYMAN HERMAN: Assuming the Handler-Pashman procedure is implemented in some form of statutory amendment, if we had that in the law would you agree that if those standards were met, assuming that proof of relevancy and materiality was demonstrated in accordance with due process, that a newsman would be obligated then to produce that information?

MR. AHEARN: Well, you say that you assume that relevancy and materiality are established?

ASSEMBLYMAN HERMAN: Yes. In accordance with due process, which I think Handler and Pashman went out of their way to delineate in those two opinions.

MR. AHEARN: They went further than that. They said that the material should also not be available from another source.

ASSEMBLYMAN HERMAN: Assuming all of that, without going through it item by item -- assuming that that whole checklist was met, the Pashman-Handler checklist, do you think that a newsman then ought to be obligated to bring that material into court?

MR. AHEARN: Essentially, yes.

ASSEMBLYMAN HERMAN: This is just strictly an opinion question. Do you think that if we were to amend the process to somewhat comport with the Handler-Pashman due process Sixth Amendment test and we require, legislatively, that all these evidentiary proceedings be held prior to the actual jury being sworn in, that would enhance the process and perhaps eliminate a Farber type situation?

MR. AHEARN: Yes -- get it out of the way before the trial begins.

ASSEMBLYMAN HERMAN: Yes. By the way, I thought your testimony was excellent. The points you made deserve much attention from this Committee. That does not say that the testimony of the other witnesses was to any less extent relevant to this Committee.

You made some analogies here which I would like to just briefly explore

with you, if I may. You made reference to the doctor, the lawyer, and the priest, and their common law right not to disclose. That really goes not to the source but to the question of the substance of the information, doesn't it? Isn't that somewhat different from the newsman's privilege, which in this instance is a question of source versus the question of the information itself?

MR. AHEARN: I don't know. I don't know whether a doctor is entitled to refuse to say that he even has Mr. Smith for a patient. You will have to enlighten me on that.

ASSEMBLYMAN HERMAN: Maybe your counsel might want to respond to that. I understand that, from the constitutional journals and information that I have, there is a difference between disclosure of the recipient versus disclosure of the substance. I think that perhaps is some distinction that can be discussed; I think it has to be, in reference to what is before us.

I guess we both can assume that nowhere in the constitution do we find an expressed sentence or two - an expressed doctrine - that newsmen have the right of confidentiality of sources. I think we can agree with that, right?

MR. AHEARN: True.

ASSEMBLYMAN HERMAN: I assume that we are alleging that it is a derivative, or implied, power arising out of the press' right to be a free press.

MR. AHEARN: Now we are backing into the whole First Amendment issue. Yes, there is some color of the First Amendment protection. The State Supreme Court opinions here take due note that you can't have a free press, really, if you don't have people out asking questions. This has to be part of it. But, the issue, as I understand it, is not being confronted and settled on the First Amendment.

ASSEMBLYMAN HERMAN: Maybe this is not even relevant to this proceeding, but in the context of this discussion on the First Amendment - the right of a free press - arises the question of whether you view the right of a free press as a greater right than the right of free speech, which is also incorporated in the First Amendment.

MR. AHEARN: They are both great great rights.

ASSEMBLYMAN HERMAN: Perhaps I will narrow the focus for you. I assume that in the right of free speech I could get up and make a statement - assuming that I am not a journalist - that I have information that such and such occurred. I guess I could then receive a subpoena requiring me to say who told me that. Do you think in that situation, where I as a non-journalist, under my right of free speech, get up and make a statement that I have such and such information about Mr. Smith, Mr. Jones, or whoever, which was told to me by a confidential source and which bears on the question of guilt or innocence in a particular proceeding, have a right, under subpoena, not to disclose that information?

MR. AHEARN: Where did the subpoena come from?

ASSEMBLYMAN HERMAN: Assume it is issued by a Grand Jury or a court of competent jurisdiction in a trial.

MR. AHEARN: It is not a civil case?

ASSEMBLYMAN HERMAN: Civil or criminal.

MR. AHEARN: Well, if it were civil we would be in a libel situation then or a slander situation, actually, and I think that the person cross examining you would have grounds to compel you to either speak up about your source or to suffer the liklihood of appropriate damages being levied against you.

ASSEMBLYMAN HERMAN: How about a criminal case in which I am just called as a witness and where I make a statement,in essence,based on information that I said

I had which bears on the question of the guilt or innocence of that particular defendant and my source has the information? Do you think I ought to be compelled to disclose my source or, under my right of free speech should I be able to alledge that I can't produce that information because,like the press, I have a right not to name my source because free speech is the same as free press?

MR. AHEARN: Well, that is an interesting argument. I think Chief Justice Burger has come down with the point of view that the institutional press has no rights that an individual doesn't have.

ASSEMBLYMAN HERMAN: As a newspaperman and a man of apparently great intellect, I am trying to get your views before this Committee on that particular point of view.

MR. AHEARN: I think it is a very interesting point. I am really not prepared to confront it today. Perhaps I can take it under advisement some other time. (laughter)

ASSEMBLYMAN HERMAN: We will start the questioning with Assemblyman Thompson.

ASSEMBLYMAN THOMPSON: Suppose you have a situation where a newspaper reporter takes the stand and makes certain admissions and takes the Fifth Amendment against self-incrimination as to other questions, citing the New Jersey shield law? What recourse does the court have in order to protect the defendant's right with respect to the Sixth Amendment versus the New Jersey shield law?

MR. AHEARN: Well, this is in essence what is happening in the Farber case. The court has very strong power. It can put a person in jail, as it has.

ASSEMBLYMAN THOMPSON: Yes, I know, for contempt, but I am saying what can it do in the final analysis? A criminal case is pending; there are exparte proceedings going up and down. What resources do they have to get this information in order to find out what the truth is in a particular case?

MR. AHEARN: Well, the court has declared that there are avenues, that there are weapons open to it to compel the witness - or the reporter - to testify, as it has done in this case. What we are here for today is to try to narrow and redefine what that power should be and how it should be employed.

ASSEMBLYMAN THOMPSON: Thank you.

ASSEMBLYMAN HERMAN: Assemblyman Kern.

ASSEMBLYMAN KERN: Do you see a distinction in who is requesting the information, as opposed to the State trying to secure the material by way of subpoena or search warrant and a defense counsel seeking material? Do you think that has any bearing on the privilege for a reporter, or the press?

MR. AHEARN: Yes, I do. I am not confident of my knowledge of the law in this matter, but the Sixth Amendment applies to the right of the defendant to compel production of testimony, not to the right of the prosecutor. However, I am told - and perhaps you would like to readdress that question to Mr. Banta when he comes before you - that there has been some additional ruling on that. I think it was in the Nixon case, where the prosecutor claimed that he too had a due process right. You might want to draw him out on that.

ASSEMBLYMAN KERN: Well, there is one basic difference in the amount of compulsion that those two sides would have. There is obviously a lot of compulsion behind the State, where the defense counsel has to have some prima facie showing.

MR. AHEARN: He ought to. He ought to be required to make this threshold evaluation, or to meet that threshold standard that the court has been talking

about.

ASSEMBLYMAN KERN: In line with that then, there would be a distinction between a search warrant and a subpoena - a search warrant on behalf of the state and a subpoena on behalf of a defendant.

MR. AHEARN: Yes. What I am proposing, in essence, is that instead of proceeding with a search warrant procedure, what in effect would be done is to turn it into a subpoena with the reporters able to challenge and cross examine to defend their rights.

ASSEMBLYMAN KERN: Than you do see a need for the Gormley Bill?

MR. AHEARN: If I understand it correctly, yes.

ASSEMBLYMAN HERMAN: I want to thank you for your testimony here.

Mr. Banta will be our next witness. Mr. Banta is from the firm of Winne, Banta, Rizzi and Harrington and is counsel of record for the Bergen Record.

P E T E R B A N T A: Thank you, Mr. Chairman. I have a prepared text and I will make copies available to this Committee and to the press. I am going to skip through a little bit of it. Parts that aren't immediately relevant to the Committee's main concerns today I may not deal with so much in my oral testimony, but it will be part of your record so that the Committee will have time to focus on the subjects which I know are of great interest to us today.

I will just start through it. My name is Peter Banta. I am an attorney in Hackensack. In the last few years, I have had first-hand experience in the state and federal courts with the New Jersey Newspaperman's Privilege Law. I represent the Bergen Evening Record Corporation, publisher of The Record, and I am now serving as New Jersey counsel to the New York Times and Myron Farber, whose documents were subpoenaed by the defendant in the "Dr. X" curare trial, still in progress in Hackensack.

The views I express are my own and not those of either the Times or the Record, or any of their editors or reporters. I want the Committee to be aware, however, of my affiliations. My interests are identified with those of the print media. I have experienced first-hand how courts and litigants regard subpoenas to newspapers.

In short, courts and judges regard privileges in general, and the newspaperman's privilege in particular, as obstacles to getting at the truth in a particular case, and their hostility to the newspaperman's shield law often shows in their rulings. The press may uncover crime or do other things which are regarded as good, but it is the press coverage of pretrial and trial proceedings which seems to judges to create obstacles to providing fair trials, especially for criminal defendants. Extensive pretrial publicity may make obtaining unbiased jurors more difficult. Extensive trial coverage, especially of proceedings outside the presence of the jury, makes it harder to keep the jury's decision based solely on the evidence before it, or requires the court to sequester the jury during the trial, to the jury's discomfort and annoyance and to the expense of the State.

To its credit, the New Jersey Supreme Court last year in the Allen case barred gag orders, following the lead of the U. S. Supreme Court in the Nebraska case.

The gathering and printing of news serves a desirable public function, one which others can describe more eloquently than I can. Preserving the secrecy of confidential sources is essential to gathering of news of official misconduct. Think for a minute of the ability of Woodward and Bernstein of the Washington Post to break open the Watergate coverup through the use of "Deep Throat" and other

confidential sources.

The amendments to the shield law which were passed last year were designed in part to overcome the decision in 1972 in the Peter Bridge case, which held that the shield law then in effect protected disclosure of material only from undisclosed sources, not undisclosed material from a known source. Bridge spent over 20 days in jail for contempt for refusing to disclose the unpublished portion of what a disclosed source told him.

A previous legislative attempt to override this decision was vetoed by Governor Cahill as going too far.

The present statute attempts to be consistent and to be integrated with the present waiver rule, Rule 37, by starting "Subject to Rule 37..." and then proceeding with its text. In fact, the present law and the waiver rule, which is a general rule applying to all testimony and privileges, do not mesh properly and the conflict between them has enabled the courts to find waiver where, in my view, the new law makes clear that none was intended.

For example, the new law clearly protects undisclosed material by protecting disclosure of -- this in part b of the new law, and I am quoting - "(b) any news or information abtained in the course of pursuing his professional activities whether whether or not it is disseminated." In my view, that applies to undisseminated information, information still on the reporter's notes or in the files. It seems clear enough.

Rule 37, however, provides that disclosing a portion of privileged material is a waiver of the privilege as to all of that material. This is inconsistent with the idea of partial dissemination. In one court case last fall, I argued that if there was a conflict the general language of Rule 37 should yield to the specific, recent provision of the new shield law. The judge disagreed and found a waiver as to an entire interview because a portion of it had been printed. If that ruling, not officially reported, becomes the general law, the 1977 amendment is meaningless in this respect and we are back to 1972, to the Bridge case. Something has to be done to clarify the relation of the waiver section to the shield law. At present, the law is unclear and invites a narrow interpretation.

Another problem with the existing law, as I found in court, was that the provision protecting disclosure of - I am now referring, and I will paraphrase, to Part a and Part b of the law: a. The source, author, means, agency or person from or through whom any information - published in such newspaper- was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered. In our view, this gave you the right to protect sources where they weren't disclosed, or even if you had a disclosed source to protect undisclosed material. In one case against me a prosecutor argued and a judge agreed that this really meant that you had to have both undisclosed material and an undisclosed source and if you named your source, as a matter of statutory interpretation, even before you got to a waiver section, you weren't within the statute. And, on that point again, the judge agreed with my adversary and ruled that the privilege did not apply. I think we are back to the same situation again, namely that if you have no protection by naming a source, we are no better off than we were under the Peter Bridge case.

Another problem with the waiver rule is found in the reference to Rule 37, providing for a waiver occuring - and I am quoting - if the holder has "contracted with anyone not to claim the right or privilege...." I went back trying to find the source of that and references in the 1955 Supreme Court Committee on Evidence, in turn

making further references, indicated that this dealt with situations like employees and employment, especially public employment, where as a condition of employment employees had to agree not to claim Fifth Amendment privileges against self incrimination with respect to their activities at work and similar matters. It is now being argued, as in Myron Farber's case, if he signed a book contract, he has contracted to blow his privilege, in effect, and therefore he now has an immediate duty of disclosure. I don't think as a matter of legislative history that is a correct argument and I don't think it is a correct one now. I think that some clarification should be in order.

I might mention that I don't see where in this instance Farber, who has a publisher, is really any different than a reporter who has an editor. In this instance, until the book comes out - if that is what is to be - the journalist is going to be working with someone on it. A newspaperman has never felt that he has waived his privilege by disclosing something to his editor. I don't know that a reporter who publishes books should be any different.

I think it is a well known fact that journalists write books. The story of the Watergate coverup by Woodward and Bernstein is another example. Richard Harris, who wrote a very fine article for the New Yorker on matters involving the Coswell nominations, and others, has published books based on these articles, and there are many other examples that come to mind.

Several conclusions emerge from my experience under the present law. First, its meaning is not clear to judges and, I think, incorrect interpretations have been made. Second, judges hate to see possibly relevant material withheld by the press in reliance on the shield law, especially in criminal trials, and they will look, consciously or unconsciously, for a way to compel disclosure.

One consequence, I fear, in the present state of affairs is the tendency of lawyers, especially defense lawyers in criminal prosecutions, to subpoena the files of any journalist who investigated the subject and wrote, or did a broadcast about the defendant and who may have talked to persons who would be witnesses at the trial. Lawyers have a duty to their clients to be diligent, thorough, and develop evidence, and they find it hard to hold back subpoenas to newspapermen and get a free ride on the reporter's investigation instead of the attorney doing his own.

Or, as I have seen, the lawyer wants to "go fishing" in the files of the reporter and newspaper, just to see what might be there that would be helpful. This is what is happening in the "Dr. X" trial to Farber and the Times. Farber didn't come along until 10 years after the deaths in question, and could not have any firsthand admissible evidence. He has testified that he doesn't have any viles of curare - physical evidence as such - and what he is really being asked for is his interview notes, primarily, with other witnesses, plus whatever else he has. I might add, I have not seen his notes - any of them - and I really don't know what is in them. I have found as a lawyer, at least until you have to get to that point, you are better off not to know what is in your reporter's notes, then you can't be asked to disclose it either -- or don't disclose it by accident or otherwise.

In federal criminal cases, under the new federal rules of evidence, no statutory privilege applies - and the New Jersey privilege does not apply in Federal prosecution in New Jersey. But, in the federal courts, at least in my recent experience, I have been very narrowly restricted as to what can be subpoenaed or required to be produced and it does not permit fishing expeditions. In this, they are relying on the federal rules of criminal procedure, especially Rule 17c, which is very similar to the New Jersey rule, dealing with the scope of discovery in criminal cases.

I will come back to that a little bit further along.

A part of the problem that comes up in these subpoena cases has not to do with the reporter being called to the stand during the trial and being asked to testify as to statements that were made to him, or produce his notes; that is at least subject to objections to relevancy and materiality. The problem is with the reporter being subpoenaed in advance and asked to turn over all of his file, or a substantial portion of it, as really a form of pre-trial discovery. Criminal rules, both State and Federal, drastically limit discovery compared to what civil discovery is. Notwithstanding the Sixth Amendment rights of defendants, the courts, in their rule-making power, have not seen fit to give very broad discovery powers to defendants. They are entitled to no looks into the prosecution files where there are statements of witnesses and certain mixed information from others. They can't go out and take depositions of third parties. If a witness won't tell a defense lawyer what he knows about a matter, the lawyer's only remedy is to put him on the stand and ask him and cross his fingers as to what he says then. So, I think in this discussion as to balancing rights, I am concerned about the courts that have seen fit in their rule-making power not to give broad discovery ruling, and all of sudden deciding that when a newspaperman is involved, there is a broad discovery right.

Now, another problem in my view is one of turning all of the papers over to the judge to screen before the judge has made any preliminary determination of privilege or relevance. I think most determinations can be made by the court without seeing the documents, and I have had experience in this.

Suppose also that in the Farber case the defendant was not a surgeon but was a member of organized crime? Could a reporter safely give his notes of confidential informants to a judge, unsure if the claim of privilege would be allowed? If disallowed, the identity and statements of confidential sources would be disclosed to a probable member of organized crime. In fact, I heard a Deputy Attorney General, who will remain nameless, state that in his opinion if this case had been one involving a member of organized crime, the judge would not have made the same ruling that he did with respect to Myron Farber -- this is by way of an aside.

ASSEMBLYMAN HERMAN: We won't push you for your source.

MR. BANTA: Another reason I don't want to disclose the source is, in all fairness it was given to me by an intermediary and therefore it is hearsay. But, the intermediary was a reliable source.

ASSEMBLYMAN HERMAN: Nonetheless, it is now subject to publication without confirmation. Go ahead.

MR. BANTA: I will try to bring this to a close so that I can deal with questions.

The recent Farber case creates problems, apart from Farber's particular fate. The court fell into the trap of assuming that it owed a criminal defendant almost unlimited discovery. Not so. The federal courts, as I have pointed out, drastically limit discovery. In a recent federal subpoena case, which I conducted before Judge Meanor in Newark - the judge, I might add, is no believer in the newspaperman's privilege and as a Superior Court Judge, in 1972, put Peter Bridge in jail - his initial remarks were, when I stood on my feet, "I don't want to hear about the First Amendment and the newspaperman's privilege. He nonetheless dealt with a motion to quash a very broad subpoena addressed to a reporter involving a prosecution for extortion. He denied defendant's request that he take possession of and look at reporter's notes. He rejected the subpoena as a "fishing

expedition." When the defendant said, "Well, how do I know what I want until I look at it" the judge, in effect, said, "Well, that proves it is a fishing expedition because you don't know what you want." He finally narrowed it down in that instance to interview notes of specific prosecution witnesses, in the theory that might be relevant for impeachment purposes, but would otherwise not require the newspaper to identify all the persons it talked to nor disclose any notes, other than a few statements it had. Since that did not involve confidential sources, the newspaper complied and the matter was disposed of. The judge at no time had possession of any of the newspaper's notes, and I think a good judge in a lot of instances can deal with this subject without having to have everything turned over and piled on his desk.

Other federal courts have gone through the kinds of balancing tests which are the subject of the discussions of Justice Mountain and Justice Pashman in this particular case.

I think the balancing tests are really only relevant where the privilege wouldn't otherwise appear. I think we have to keep defendants from routinely just issuing subpoenas to newspapers. One allegation in the Farber case by Ray Brown - and he said this a dozen or a hundred times - is that in his view the reporter was an arm of the prosecution and was an investigator for the prosecution. As a matter of fact, the only thing Farber has really turned over or given to the prosecution is a copy of a ten-year-old transcript which was one time in the prosecutor's file and which Farber tracked down in a New York lawyer's office and gave back to the prosecutor. He at no time has turned over his notes of interviews with all these other people he talked to. I think in that instance the defendant has very cleverly shifted attention away from his own desire to use Farber as an investigator by claiming that he has been an investigator and arm of the prosecution. If, in fact, he had turned anything over to the prosecution, the defendant would be entitled to it as a matter of pre-trial discovery from the prosecutor.

That basically concludes my prepared remarks. I would certainly be happy to deal with any of the questions that have been raised earlier that you or any members of the Committee wish to present to me. Because the Farber case is still going on, I think I should keep my own remarks about the strategy and positions somewhat general, but I will deal with that.

ASSEMBLYMAN HERMAN: I would ask all the members to recognize that. I would just point out that prosecutors and defense attorneys involved with that case were not invited to participate in these hearings today by the Chair because I felt that it is an on-going criminal case and there is no attempt by these hearings to interfere in any way, nor do we want to give the impression that we are interfering with that trial. We are dealing with broader questions of legislative policy here today, that issue being only part of the scope of our inquiry.

You mentioned the opinion of Mountain, Pashman, and Handler. Can we agree that notwithstanding the differences as to procedure that there is a general statement in all three of those opinions that where a shield law collides with the Sixth Amendment, the Sixth Amendment must prevail?

MR. BANTA: I think that is a fair statement of the opinions, yes.

ASSEMBLYMAN HERMAN: And, as a lawyer, do you hold to that view as expressed by those three justices?

MR. BANTA: I think we still have an argument pending in this case, before the U. S. Supreme Court, that there are certain fundamental rights under the First

Amendment which the Supreme Court did not recognize in the Branzburg case. We would like to say that we hope they would recognize it this time around and I don't want to abandon that argument.

ASSEMBLYMAN HERMAN: Assuming the question of the shield law versus the Sixth Amendment-- Do you agree?

MR. BANTA: Yes.

ASSEMBLYMAN HERMAN: Let's, so I don't put you in an uncomfortable position because it is still a matter before the court, say this legislature passed any law which would collide with the Sixth Amendment, wouldn't you say that any law passed by this legislature which collided must give way?

MR. BANTA: I think so. I think the first duty - and this, I think, is standard constitutional interpretation - is, you try to find a way for them to live side by side and only when you can't find some way of accommodating them both by reasonable interpretations of both the constitution and of the law - or the application of the law - then only at that point do you find a stalemate, or conflict, and have to choose the constitutional provision over the statute.

ASSEMBLYMAN HERMAN: So, I assume that we agree that no matter how we would refine or amend the statute and no matter how salient we might think a particular public policy would be which is derived out of a particular statute, that if it did collide, not only with the Sixth but with any constitutional amendment, that statute would have to give way to the extent of the collision?

MR. BANTA: No question about it.

ASSEMBLYMAN HERMAN: Let me ask you the same question I tried to ask all the other witnesses who took the time to appear before us today. In addition to the comments you made in reference to Rule 37, and some of the clarifications you would like to see - and, by the way, we hope that you will perhaps propose them to us within the next two to three weeks; we would be happy to receive them - what else would you do to make the shield law a more viable document?

MR. BANTA: I just saw a text, which I have had only a brief chance to look at, of a possible procedural mechanism for implementing the Supreme Court rule. I think part of the problem is that we don't have a good mechanism and the Farber case, I think, illustrated the problems of the defects with the mechanisms in dealing with questions of privilege and also dealing with, even before you get to privilege, what is the proper scope of discovery. We have a lot of privileges and I think newspapermen's privileges are particularly sensitive in that if possible you really don't even want to have to disclose this to a judge unless it is really material. There ought to be a way whereby we can dispose of as much of a subpoena as possible on grounds of the bredth of the subpoena, requiring showings by the defendant, or the person issuing the subpoena - and we have had some subpoenas issued by prosecutors - of the relevance of the material to the prosecution. I think relevance in this instance has to be more than,-- you know, it might be marginally useful if some witness testifies as to a minor point that he might have made which made a slight difference in his testimony.

But, going to the heart of the matter--

ASSEMBLYMAN HERMAN: The essence of guilt or innocence?

MR. BANTA: I think really close to that -- the kind of thing that the absence of it would make a reversal in a trial. The absence of alternate information and this comes up in a context, such as a couple of reporters may have gone to a union meeting - they attended it - and a lot of events took place there that are not necessarily

in and of themselves a crime but they are subpoenaed and asked to state what took place. Well, a lot of people went there and I think before reporters are subpoenaed there would have to be a showing as to why other people could not be subpoenaed for the same information.

I think we now have to get these subpoenas cleaned up as much as possible and in some instances it would be clear that privileges may apply without the judge having to read it. You usually don't have to go into asking a lawyer or a client what they talked about between themselves for a judge to know that the conversation between them is subject to a privilege -- or that between a husband and wife. Sometimes you might, but as a general matter I think you don't.

ASSEMBLYMAN HERMAN: And that, of course, doesn't go to the source of the information, but to what the information is itself, right?

MR. BANTA: Right. I think we have to reemphasize that our privilege is - and certainly since the 1977 amendment - more than a source rule; it is a rule that protects the information that is not printed in the newspapers and that may have come from known sources.

In the Farber case it is well known that Farber talked to a number of people who have also testified at the trial. There is no need for-- And, these people have been subject to examination and cross examination.

ASSEMBLYMAN HERMAN: Lets take it out of just the Farber context and let's just address that question, if we may, relating to the issue of credibility and the issue of conflicting statements which might affect credibility. Assuming that the Handler-Pashman tests are met and everything that is required to be demonstrated is being demonstrated, do you think a reporter under those given situations, when it goes to the issue of the credibility of a witness who, it may have been demonstrated, told Farber, or reporter Smith, or reporter Jones, one thing but he testified to another on the stand, should be required to produce those notes as evidence in order to sustain the conflict in the two statements?

MR. BANTA: I think as a general matter credibility has been upheld as one basis of showing of relevance. I think that it may affect the credibility of some witness and get you to the next step of showing somehow that that witness is an important witness whose testimony is very material.

ASSEMBLYMAN HERMAN: Accepting my assumption that all the tests have been made, under that given situation shouldn't a reporter, like any other witness, be compelled to testify or produce whatever documents he or she may have?

MR. BANTA: I think the damage to the reporter's source in that instance - or the reporter's relationship with sources, or the reporter's ability to get access to his sources - may very well outweigh, in terms of social damage, the damage to that defendant.

ASSEMBLYMAN HERMAN: Well, the damage to that defendant may only be his guilt and imprisonment. Taking that issue head on, the question of the damage to the particular defendant - and I am making an assumption that you and I both agree that the question of one's liberty is the most basic of all fundamental rights that we have; I hope you agree with that concept - and taking the Sixth Amendment right of due process, the right to be confronted, the right to be able to prove your innocence and have all the probative evidence and credible evidence produced, do you think in a given situation that a newsman, or anyone else, should be able to become the final arbitor as to what testimony or evidence he or she will put before the court in reference to that particular issue at hand - the question of the guilt or the innocence of the defendant?

MR. BANTA: I think the newsman is ultimately the final arbitor in one sense, only in the sense that the newsman has the power, or the option, of perhaps defying an order of the court, finally arrived at, and paying the penalty, namely contempt, or whatever happens to him. I think that he is certainly entitled to have all his arguments considered first because a lot of them may dispose of the issue without getting to that. But, any litigant, or party, has the option, finally - and I don't certainly commend this to any newsman, but I certainly state it as a factor - where in his judgment his obligation to his source is such that he does not feel that he can reveal it, then he has to be prepared to pay the penalty. I think the courts, as in any area of civil disobedience, has to recognize that there is a matter of principle on that. It isn't just merely a stubbron defiance of the court.

ASSEMBLYMAN HERMAN: Let's just discuss that for a minute because you raise an interesting question. In a court room - and I am asking now - under our system of jurisprudence, based on a valid subpoena, presupposing all that we have gone through, all the tests that we have are met, where will our system of justice go if a reporter, a lawyer, or anyone,where it has been demonstrated that relevancy, materiality, necessity - the whole bit - has been met, where will our system of justice go if each of us who is called as a witness has the right to withhold the giving of testimony - in essence, having the witness become the final arbitor of what is relevant, material, and necessary versus the court? Where will our system of justice go?

MR. BANTA: I don't know how to respond except to say that there are very few instances where you get to that point. I think they are fairly exceptional.

ASSEMBLYMAN HERMAN: Some of them may have a person's life at stake.

MR. BANTA: Well, in those instances -- I am not aware of any except perhaps the present Farber case, in which it has been so clearly presented.

ASSEMBLYMAN HERMAN: And, hopefully, we will be prospective in what we do here.

MR. BANTA: I think you are going to more often see defiance such as you had with Earl Caldwell, who covered the Black Panther community in San Francisco for the New York Times.

ASSEMBLYMAN HERMAN: Can we disregard the prosecution for a moment and the Grand Jury?

MR. BANTA: Okay.

ASSEMBLYMAN HERMAN: I would like to just direct this question to the very basic issue of that evidence - because you and I and the members of this Committee may very well agree on the production of records for prosecution purposes - and the very basic question of guilt or innocence - okay? - that very fundamental Sixth Amendment right to stay out of jail if we are innocent and to have produced for us in a court of law all the relevant material and necessary evidence available to be disclosed, in those situations if we allow a witness, regardless of his or her profession or occupation, to become the final arbitor of what he or she will or will not produce, what does that do to our system of justice and what does it do to the Sixth Amendment?

MR. BANTA: Well, I think when the witness defies the final order to testify, it is inevitably somewhat damaging to the system. I think our problem comes insofar as judges themselves are not infallible and in the Farber situation one of the problems has been how to obtain relief, or Appellate review, of possibly erroneous

decisions. I am sorry to come from your general statement back to a specific, but part of the problem in that case has been the penalties visited on this person, while he is saying, "I think this judge is wrong and I want another judge to hear me."

ASSEMBLYMAN HERMAN: That, of course, is one of the reasons why we are here - to see whether we can work out a procedure which would negate that type of situation.

But, getting back to what I was asking, I do mean to put you right on the old spot, I want to know from you as an attorney - me to you as attorney to attorney - what damage, in your opinion, is done to the very basic concept of protecting a person's freedom if we can't compel a witness in a courtroom, assuming that everything has been shown to be appropriate as far as necessity, materiality, and relevance, and what does it do to the whole concept of Sixth Amendment and the basic liberties of an individual where we permit that type of situation to occur?

MR. BANTA: We already have the situation with other privileges. For example, there is a current article in one of the law reviews--

ASSEMBLYMAN HERMAN: Counsel, let's talk about this one. I would be very, very pleased if you could respond to this particular question. I am only probing, Mr. Thompson.

MR. BANTA: Okay. I think it comes back to saying that if I accept all the premises that are given, I have to agree with your conclusion. I think the problems all come in getting through the premises of relevancy, materiality, absence of alternate sources--

ASSEMBLYMAN HERMAN: Assuming that those premises are correct, you would agree it would do great damage to the whole process, right?

MR. BANTA: Well, it certainly undermines the concept. The damage, in fact, I would have to wait and see what happened. I don't want to predict that the whole system is going to crash because I don't think you are going to have many examples, in fact, of that. There are always miscarriages of justice for a lot of reasons but the system survives the individual miscarriage of justice.

ASSEMBLYMAN HERMAN: Let me ask you another question, if I may - again putting you on the hot seat. In a given situation in which a witness intentionally whitholds evidence which weighs on the question of guilt or innocence, do you see that in a much different light as to the eventual outcome if a witness perjurs himself or gives false testimony, isn't the net result possibly the same - that it might affect the question of guilt or innocence? Nondisclosure versus false disclosure?

MR. BANTA: Perjuring himself, he is at least subject to cross examination on what he said.

ASSEMBLYMAN HERMAN: We are talking about the conclusion as to the question of guilt or innocence.

MR. BANTA: The jury might come out with a different result - I think that is what you are saying - from what it would if he testified.

ASSEMBLYMAN HERMAN: Which of itself does great damage to the system, if we believe in the Sixth Amendment.

MR. BANTA: I think it does great damage to that defendant. I think the system has a certain resilience to survive individual miscarriages of justice. I think that certainly the principle is damaged.

ASSEMBLYMAN HERMAN: I think we can agree that where a particular defendant is harmed, the system is harmed. You can't have the system to protect all and certainly to the degree that we soil it, we soil it, right?

MR. BANTA: I think if the problem was rampant the system would be damaged. If it is an occasional problem, I think the system will survive it. But, I will not minimize the individual harm of that particular instance.

ASSEMBLYMAN HERMAN: You appear to be advocating selective civil disobedience.

MR. BANTA: No, I'm not. I am just saying that as with any principle that an individual feels strongly about, if it conflicts with what society says is actual duty to society and he sincerely believes it, he is either going to have to conform to society, or if it is a matter of some kind of conscience or principle, he is going to have to be prepared to pay the price, whether it is the refusal to submit to the draft, whether it is a refusal to pay a poll tax, or whatever.

ASSEMBLYMAN HERMAN: That is not exactly the same as when it comes to the question of a person's guilt or innocence, because his paying the price may also mean that somebody else pays the price, right?

MR. BANTA: I would hope that a reporter, at least in his own mind, wouldn't feel that it is going to make a difference in the trial. Now, a judge, in effect, has made a different conclusion so we have to accept that, perhaps,as the law today.

ASSEMBLYMAN HERMAN: That is somewhat different.

MR. BANTA: It is a very difficult problem. I certainly am not counseling it. In my counseling function to newspapers, I basically tell my clients that they should not write stories where they are not prepared to disclose a source where they don't have a privilege to protect them. Now we are seeing that in serious criminal prosecutions you may not have a protection where this information is particularly relevant. In my function, in my counseling functioning, I think that newspapers have to be very wary about what they print in reliance on sources that they are, under no circumstances, in a position to disclose.

ASSEMBLYMAN HERMAN: Two more questions and then I will turn it over to the Committee. Payment of counsel fees -- would you advocate that in Farber type situations, in order to perhaps protect against fishing expeditions, that the party that winds up with the adverse decision perhaps pay counsel fee?

MR. BANTA: I have a general aversion to shifting the burden of counsel fees to an opposite party in most situations. I have the same feeling here.

ASSEMBLYMAN HERMAN: Forgetting the New York Times and raising the question not of the Bergen Record, New York Times, and some of the other papers that may have the wherewithal to fight the subpoena, but going to those situations where you may have an improper subpoena issued, one that was really, truly a fishing expedition - maybe the local paper that has 5,000 or 10,000 in circulation and who just may not have the staying power to fight a Farber-like subpoena - how do we handle that situation?

MR. BANTA: I certainly won't disagree with the principle in that context. If that was my client and a judge finds some kind of bad faith, or lack of reasonable grounds and issues a subpoena, I think he should pay some cost. I am hopeful that in those instances you would not have the kind of cost that have undoubtedly been run up in the Farber situation.

But, I had a situation in Federal Court where basically, aside from negotiating with the attorney to try to see whether he voluntarily would narrow his subpoena, we took care of it all in one day in court.

ASSEMBLYMAN HERMAN: You can see where a newspaper, or even a defendant of limited means, could very well be denied due process by the inability to present either an adequate prosecution of a subpoena or an adequate defense of it?

MR. BANTA: I think a lot of newspapers would have a problem with it. I don't know whether the small newspapers are the ones that are most likely to have the initial information or the investigatory staffs who would have generated this information in the first place.

I certainly don't want to claim to speak at all for small papers with their own problems. I intended to come from a large newspaper context with a great devotion to contesting what it regards as unjust subpoenas.

ASSEMBLYMAN HERMAN: And an ability to contest?

MR. BANTA: Yes, and an ability to commit the resources of the paper. I certainly think that there is a lot to be said for the small newspapers in this and this has been an argument that has been made in the liable cases -- that small newspapers would be inhibited by defending libel cases.

ASSEMBLYMAN HERMAN: Last question: There has been some discussion here of the Nixon case. By the way, do you generally agree with the Supreme Court's conclusion that Nixon should have produced the tapes?

MR. BANTA: Yes.

ASSEMBLYMAN HERMAN: That the executive privilege, in effect, was implied or derivitive and was not absolute?

MR. BANTA: Well, they held it had a constitutional dimension, but on the balancing of equities in that case, I accept it as the law of the land.

ASSEMBLYMAN HERMAN: Well, do you agree with it philosophically? Do you agree that it was a good decision, a proper decision?

MR. BANTA: Well, I think so. I think in that case, certainly that balancing test was met.

ASSEMBLYMAN HERMAN: Let me ask you this: Do you think that since Nixon raised what obviously was an implied or derivitive right out of the separation of powers constitutionally, taking the question at hand - and I assume you knew this question was coming - in the First Amendment situation of non-disclosure of sources, verses the equity or balancing test of the compelling interest of justice, do you think that the press generally, assuming that the same tests that were met in the Nixon matter are met through a subpoena for information, has a greater right of non-disclosure than the President did?

MR. BANTA: I have a lot more trouble dealing with questions the more general they get. I tend to deal better with more specific matter.

ASSEMBLYMAN HERMAN: Well, specifically, on the one hand Nixon said I am not producing this evidence because of my constitutional protection and executive privilege derived from my expressed powers and separation of government - legislative, executive and judicial. In that matter, the court said balancing of equities, necessity, produce the information, relevance, etc. -- okay?

In the Farber situation, we have an allegation of derived, implied confidentiality, derived through a shield law and First Amendment rights. I am saying if the executive privilege is not absolute and, where demonstrated, the President can be compelled to produce relevant information by subpoena, does the press, in the utilization of the First Amendment - the implied and derivitive rights which they claim through the confidentiality of sources, as the President claimed confidentiality - have a greater right than the President has?

MR. BANTA: Well, this is what we are arguing in our pending petition to the Supreme Court.

ASSEMBLYMAN HERMAN: I am asking for your opinion.

MR. BANTA: Well, I don't want to give an opinion on something that I have a petition pending before the U. S. Supreme Court on. If to sustain our position there we have to argue that we have a greater right than the President, we will do it. But, I am not leading the forefront of developing that argument.

ASSEMBLYMAN HERMAN: That certainly goes to the context of legal flexibility of the system.

Assemblyman Kern.

ASSEMBLYMAN KERN: Thank you.

ASSEMBLYMAN HERMAN: Excuse me. I would like to express our thanks to Professor Seeley, who took the morning to be with us. He has to prepare for a Federal case tomorrow. He will make a federal case in Federal Court. Thank you Jim, I appreciate your coming.

ASSEMBLYMAN KERN: You seem to make a distinction between the duty to society or individual defendants, and a duty to the source on the part of a newspaperman and that he has to therefore make that type of a decision.

MR. BANTA: I think so.

ASSEMBLYMAN KERN: Isn't it generally true in our system that when anyone claims a privilage, the way things are set up today, they claim at their peril? There is no preliminary procedure at all in this state for testing the validity of a privilege.

MR. BANTA: I wouldn't have thought there would need to be one. The legislation,in my view, was reasonably clear. If you could read it and it seemed as if you fell within it, it seems to me that you were entitled to claim it, at least until now. I didn't feel the absence of procedure was a particular weakening or impediment to the privilege, or any of the privileges.

ASSEMBLYMAN KERN: Yes, but now it has been demonstrated that that is not the fact.

MR. BANTA: Now it appears we will need a procedure and the Supreme Court has suggested one and this Committee can certainly consider what tests it may feel can be imposed on this privilege. The question comes up as to how that gets integrated with the rulemaking power of the courts and I don't want to express any opinion as to where the line is drawn in that area.

ASSEMBLYMAN KERN: Well, that is generally true of all privileges -- that this is the case. There is no procedure for testing the privileges, presently, whether it be newspaperman, husband, wife, priest, parishoner, or whatever. There is no preliminary mechanism. Everything is claimed at your peril and it comes down to a compulsion to either disclose if the privilege is found not to exist, or pay the penalty.

Now, you made another point in trying to limit the scope of a process whereby the reporter's material is examined. You put in a distinction between the essence of guilt or innocence. You seem to rule out completely the area of credibility as a valid purpose for a discovery procedure.

MR. BANTA: I think when you are dealing with credibility, it requires, in my view, that the credibility be that of a witness whose testimony itself is quite central and quite material. This came up in a federal case in which a newspaper had to make a disclosure. In this instance, a newspaper had interviewed and recorded on tape the interview with a person who was the prosecution's chief witness. The prosecution's own witness destroyed his own copy of the tape and the newspaper had the only copy of the tape and the attorney subpoenaed that. The court in that instance ruled that even though that tape was going to be used solely for impeachment, the testimony of the witness

was so central to the case that Judge Sirica, who made that decision, ruled on that basis, even though it was impeachment, he would require disclosure. He even went on to say that he felt that because of the peculiarities of the case and the fact that it was such a central kind of a matter, he felt the case would really not be much of a precedent because you would not routinely have this kind of fact situation repeating itself.

But, in that instance because of the impeachment question there was a finding that it really did go to guilt or innocence because the witness was the chief accuser of the defendant.

ASSEMBLYMAN KERN: You would then rule out other ares of credibility, such as the witness's background or material that would be contrary to what he testified to but not central to the issue of the case?

MR. BANTA: I think so because I think what you get there is the defense attorneys groping for anything they can use to try and chip away a little bit here and there at a prosecution witness who really quite possibly may hurt them in other ways. I saw this in a federal case I had in Newark. Those attorneys, I think, given the nature of the case against their client, were somewhat desperate for anything they could use to try to chip away at these witnesses in any form or fashion. I am concerned there may be a blanket order as to any particular witness who testifies on anything, and that any statement from him might have to be turned over.

The only problem that comes up is that you are going to see a change in the way newspapermen keep their notes. Maybe that is not the Committee's problem. Since the U. S. Attorneys are now going to keep the same kind of statements of witnesses, as Judge Meanor says, instead of writing down all the answers when they interview a witness, they will write down all the questions and throw away the answers. They basically use the questions as a memory device to recall what they were told and when they have to give the defendant a copy of the statement he will have nothing, nor the statements of third parties.

ASSEMBLYMAN HERMAN: Mr. Thompson.

ASSEMBLYMAN THOMPSON: I have a couple of questions. One is in reference to Section 8 of Rule 37. You drew an analogy dealing with newspaper-editor relationship and a newsman's-publishing house relationship.

MR. BANTA: Yes.

ASSEMBLYMAN THOMPSON: My question is, basically don't you think there is a distinction between these relationships? This is in reference to a contract that I think is pointed out in Rule 37.

MR. BANTA: Of course, one thing in the privilege makes it easy in the newspaperman's situation and that is the editor is within the definition of newspaperman as well as his reporter. So, they are both newspapermen, so there is protection there.

ASSEMBLYMAN THOMPSON: Right.

MR. BANTA: Well, very often in terms of newspapers, you get reporters who are freelancers who are not direct employees and whose relationship is perhaps no more close to that editor than the author might be to his publisher. Perhaps in some instances authors are quite close to publishers. The publisher might have commissioned the book in advance, as happened with Farber. Somehow there is the idea that the book comes out with hot news after the fact and is not entitled to the same protections. I really resist that view. The books the journalists have written have rebutted that better than I could.

ASSEMBLYMAN HERMAN: I think we are taking the definition of book out of

context. A book is a reporting, is it not?

ASSEMBLYMAN THOMPSON: Yes, but taking the argument to its final conclusion, wouldn't Farber be wearing two hats? In one instance he is a newspaper reporter and in the other instance he is an author.

MR. BANTA: I think this happens quite regularly. I think reporters, at the same time they are writing stories-- I know a reporter for another newspaper who has written a magazine article on the same subject that he has written newspaper articles on.

ASSEMBLYMAN HERMAN: So that we can clarify this particular issue, I think the law is quite clear, in my opinion anyway, and if not, we will further clarify it. But, a newspaperperson, or a reporter, whether he or she writes a book, a magazine, or a newspaper article is still a reporter. He is a communicator of information. I really don't think we ought to get hung up on that in that particular area. I think we ought to make it clear that for the purposes of New Jersey's shield law, or any amendments thereto, that the communicator of written information is the communicator of written information, regardless of whether it is bound or distributed on a daily basis, or a weekly basis, or a monthly basis.

MR. BANTA: I just want to make one more point. Very often, people who write books -- these books are serialized, or excerpted in newspapers or magizines first and to that extent they are journalism as well as books, whether it be a book about Linden Johnson or others that are excerpted in the New York Times and others. So, I think there is a real overlap that the Chairman has noted.

ASSEMBLYMAN THOMPSON: I have one more question. In reference to the Farber case, the defense counsel had a subpoena duces tecum which was generally broad in nature. In fact, some newspaper people refer to it as a fishing expedition. You mentioned in your statement that there were some witnesses who testified in the case that obviously the defense was trying to solicit information from Mr. Farber's notes and they could have gotten this information because the witnesses took the stand and testified and were cross examined. For purposes of impeachment - dealing with credibility and impeachment of those particular witnesses - don't you think it would have been necessary for the defense counsel to obtain this information in order to find out whether the information that the witnesses told Mr. Farber and the information that they testified to on the stand was the same?

ASSEMBLYMAN HERMAN: For the record, I am going to direct that you do not answer that question in a specific way since you are still involved with the prosecution of this appeal.

ASSEMBLYMAN THOMPSON: Take the Fifth?

ASSEMBLYMAN HERMAN: No, no, no. The whole purpose of this hearing - and why we haven't invited others who are specifically involved, is that there is still a trial going on, Mr. Thompson and there is still a pending appeal. You can answer in a general way. You will be permitted to do that. I just don't want to interfere with the judicial process.

If you can answer that last question without making specific reference to this process which you are still involved in, on appeal, in a more general way, please feel free to. Otherwise, I ask you not to respond.

MR. BANTA: Well, I think that impreachment evidence is a more derivitive kind of evidence and a lower quality kind of evidence than direct evidence because it really doesn't deal with guilt of innocence; it deals with the credibility of a person's testimony, and then whether you belive what that person says on guilt or innocence. There is a lot of discretion given to trial judges under the criminal

law, and I am not a criminal lawyer, as to how far they will let a defense lawyer, or a lawyer, go in terms of impeachment evidence. They don't let him go on and on forever trying to develop impeachment evidence. They want to keep the focus to the point already. So, on occasion, I think perhaps everyone could agree that impeachment evidence is very important.

Just like the tape recording that I mentioned, I would just say that I don't think it rises to the level of constitutional dimensions that the defense lawyer is entitled to unlimited access to impeachment information, whether from a reporter or any other source.

ASSEMBLYMAN HERMAN: Mr. Thompson, do you have any other questions?

ASSEMBLYMAN THOMPSON: No.

ASSEMBLYMAN HERMAN: I have just one last one. I raised this question to Mr. Ahearn. Do you believe, as a lawyer who is obviously familiar with the constitutional process and the First Amendment, that the freedom to publish versus the freedom of speech -- that the former is greater than the latter? Does it have a higher constitutional solemnity as to disclosure of sources?

MR. BANTA: Let me see if I understand what you mean.

ASSEMBLYMAN HERMAN: Let me rephrase it. If I write it as a newspaperman based on sources that I have, versus I speak it, do I have a greater right of non-disclosure? In other words, is there a greater constitutional solemnity of free press versus free speech under that situation?

MR. BANTA: I think there is but the Supreme Court has backed off from that recently and I am therefore in the minority there.

ASSEMBLYMAN HERMAN: May I have your views as to why you think there is a greater right of free press than there is to free speech?

MR. BANTA: I guess it is because the press has a kind of representative function in terms of it can do more than any individual member of the public can do. For example - and this was a Supreme Court case where the Supreme Court ruled against the press - the KQED case, where the press wanted access to a jail in San Francisco and the 9th Circuit said they were entitled to it. The Supreme Court reversed and in effect said that the sheriff doesn't have to let any citizen who knocks on the door go through the jail, or in this case they let them through only in mass groups and therefore they should not have to let the press through under any different circumstances. Mind you, I think the press can perform a real function in monitoring the conduct of government there that may require that they be given some different treatment. A court of appeals agreed and the Supreme Court did not agree. The arguments, I think, had been better stated in those various opinions than I can give in relying on recollection that goes back a period of time now.

ASSEMBLYMAN HERMAN: Mr. Banta, I want to thank you for taking the time out to come here this morning. Your testimony was very fine.

We have two or three more witnesses. Some of our members of the Committee and other people in the audience have a very provincial attitude towards eating so I would like to ask -- let me just ask: I believe we still have Mr. Deckelnick present; Mr. Lesemann; and Mr. Sherman. Bill, you will be around, I hope. Would any of you gentlemen mind if we took a lunch break for an hour? Does that create an undue hardship? (negative reply)

Thank you. I would like to start again promptly at 2:00 so that we do not unduly delay anyone.

(lunch break)

AFTER LUNCH BREAK

ASSEMBLYMAN HERMAN: I would like to now call Mr. Gary Deckelnick, State Editor, Asbury Park Press.

G A R Y D E C K E L N I C K: Thank you, Mr. Chairman. I have just a very few preliminary remarks, sir. I believe the reason my paper asked me to come here, as opposed to sending someone else, is not because I am State Editor, but because before I was a State Editor, I was an investigative reporter. I have written stories that resulted in indictments. I have been subpoenaed and they thought I might be able to answer the type of questions that are most likely to be asked by this Committee.

As one who has done that type of work, I urge you to make the shield law as absolute as possible. I realize there is nothing this Legislature can do to contravene a decision already executed by the U. S. Supreme Court. But, short of that, I urge as absolute a shield law as can be with literally no exceptions because I think it is society that benefits from us having that type of exception.

Two of the cases which I worked show how society can benefit - we found out during our investigation - were cases which eventually led to indictment. The information was in the posession of various law enforcement agencies for more than two years before we stumbled onto it. They did noting until the publication of the information forced action, literally. In both stories we relied heavily on confidential sources for tips. I think the rulings are going to make that type of reporting impossible.

You heard Mr. Banta say this morning that he is already advising reporters to be careful of what they write. I can tell you that immediately after the Stanford-Daily decision, I went through my own files at the newspaper and purged information I had there and which I would have liked to retain because if I needed to, I would go back and look up various contacts. I cannot do that now because I do not know who some of those contacts are. But, now no one else has access to them either and I felt that this was a step I had to take in view of the way decisions have been running.

So, I urge as broad a law as possible with as few exceptions as you can make in light of the Supreme Court decision.

ASSEMBLYMAN HERMAN: Do you have any suggestions?

MR. DECKELNICK: Yes, sir. For one, I would completely eliminate the waiver. I believe a newsman should only be called on to answer for that which he has published. If I write in the paper that something is said by Assemblyman Herman, I certainly should be compelled to answer questions as to whether or not you said it.

ASSEMBLYMAN HERMAN: How about if I were your confidential source?

MR. DECKELNICK: If I did not have your name in the paper?

ASSEMBLYMAN HERMAN: Right.

MR. DECKELNICK: Then I should not be forced to divulge it.

ASSEMBLYMAN HERMAN: How do you gear that with the whole concept of the Sixth Amendment?

MR. DECKELNICK: I can.

ASSEMBLYMAN HERMAN: I am interested in hearing your opinion.

MR. DECKELNICK: There are two ways it can be done. The first way is the way Farber is doing it - simply by going to jail. You can just say it is a matter of conscience and pay the penalty for your decision.

But, there is another way by which I think it can be done. It is going to sound strange to hear, but if indeed a defense counsel - and that is what you are talking about with the Sixth Amendment; you are talking about defense as opposed to prosecution--

ASSEMBLYMAN HERMAN: That's correct.

MR. DECKELNICK: (continuing) --if indeed a defense counsel can make a strong, positive showing that a reporter is in possession of information that is material to the case and which is exculpatory in nature, and he refuses to divulge it, I think he should have the option of moving for a direct acquital and getting it. Now, that sounds wierd, but it is done all the time. What makes it sound wierd is that it is something that is going to be forced on the prosecution. Indeed, prosecutors on their own decide not to prosecute thousands of cases simply because they don't want to divulge sources.

To cite examples, many times when State Troopers or FBI agents work undercover on narcotics or subversive investigations, there are points in time when a prosecutor will say, "Okay, this case is worth prosecuting, therefore we will blow the source and we will prosecute." But, along the way there are many criminal acts which these people see, including conspiracies.

ASSEMBLYMAN HERMAN: But, under the theory that you propose I would just like to ask you a question. Under the theory that you propose, doesn't the newspaperperson, under those circumstances, dictate what should be prosecuted and what should be dismissed?

MR. DECKELNICK: To a certain extent, I suppose you would say yes, but he is doing that anyway if he decides to pay the price of conscience and go to jail.

ASSEMBLYMAN HERMAN: Let me ask another question, Gary, if I may. Under our system of justice, assuming that we are going to try cases in court rooms and that is going to be the constitutional arena for the decisions of who is guilty and who is innocent, should any class of citizen, whether it be a newspaperperson or somebody else, decide for themselves - and thus become judge and jury - as to whether they are going to produce testimony or not going to produce testimony when it relates to guilt or innocence?

MR. DECKELNICK: That has been an accepted right for certain classes of our society for years.

ASSEMBLYMAN HERMAN: As to whom, sir?

MR. DECKELNICK: Well, the press has had it but it has been overturned.

ASSEMBLYMAN HERMAN: I will let you finish but it sounds like what you are saying is sort of Orwellian. It sounds like all of us are equal but some of us are more equal than others.

MR. DECKELNICK: No, it is society making its own judgment as to if it can't have two things, which it wants more. For example in the Jascalevich case, let's assume that Mr. Brown was not seeking to produce Farber but was seeking, instead, to compel -- Let's assume that the witness in this case was a man who was someone other than Jascalevich who administered the curare and this was known only to--

ASSEMBLYMAN HERMAN: Alleged to administer the curare.

MR. DECKLENICK: Alleged to. (continuing) --this was known only because he confessed to it to a Roman Catholic priest. Let's assume that Mr. Brown was trying to compel the priest to give that evidence. Is there any doubt in anyone's mind here that the court would not uphold Mr. Brown's effort?

ASSEMBLYMAN HERMAN: Is that based on a different type of privilege?

MR. DECKENICK: Well, it goes to the question of are there two classes.

I think it stems from the same thing -- the First Amendment.

ASSEMBLYMAN HERMAN: I think perhaps constitutionally we disagree as to where the priest's, the attorney's, the doctor's, and the wife's privilege comes from. I don't think you will find them rooted in the constitutional process.

MR. DECKELNICK: Well, it is a decision made by society, so there are in fact two classes and society creates that second class because of benefits which may accrue to it.

ASSEMBLYMAN HERMAN: Do you have any questions, Mr. Thompson?

ASSEMBLYMAN THOMPSON: No.

ASSEMBLYMAN HERMAN: If, by the way, Mr. Deckelnick, you or your paper have any specific suggestions - and I would say this just generally to any witness or anone who is present here today - for specific amendments to the shield law, we would certainly be happy to receive them. I thank you for coming. I appreciate your comments.

MR. DECKELNICK: Thank you, Assemblyman.

ASSEMBLYMAN HERMAN: Carl Lesemann.

A R T H U R L E S E M A N N: Incidentially, my name is Arthur Lesemann.

ASSEMBLYMAN HERMAN: We will note that and make the necessary changes.

MR. LESEMANN: By way of introduction - and I received an invitation to appear here today - I am a lawyer and I am a member of the firm of Mazer, Lesemann and Rupp in Hackensack. I served as a New Jersey attorney for a large number of national media institutions who filed an amicus curiae brief in the Farber case. There were about 31 one of them, including the Miami Herald, the Washington Post, the three television networks, the Chicago Sun Times, and some others, including a number of associations of news-gathering professionals.

Because of that participation, of course, I can't quite emerse in the issues of the case. I, of course, read the decision of the Supreme Court, which our position lost, with more than passing interest.

I will try to be as specific as I can in outlining the problems as I see them and I will try to make some suggestions for solutions.

It seems to me that the decision, as it ends up and with the law being what it is today, will quite likely result in a great number of broad, almost limitless, searches into the investigations, files, and the notes of newspaper reporters who have done, or are doing, any kind of investigative reporting. In many cases the activities of such a reporter may result in just what has happened in the Farber case -- an indictment, followed by trial.

It seems clear to me that this decision can and probably will have an impact far beyond just the Myron Farber-New York Times situation.

Mr. Banta spoke of that this morning and I agreed with most of what he said. Just personally, and off the record, I have read at least three instances within the last couple of weeks of subpoenas like this being issued. Defense attorneys in criminal cases are very imaginative people and I think we can look forward to a great many of those in the future.

Incidentally, and before proceeding, and this has come up peripherally, although we are talking about a newspaperperson's privilege, it seems to me that these concerns are really equally applicable to other privileges which we have long taken for granted: husband-wife privilege, priest-penitent, lawyer-client, doctor-patient. Our problems in those areas may not be as likely to arise, as with the newspapermen, but they can arise and if they do I can't, for the life of me, see why the same

principles applied by the Supreme Court in the Farber case wouldn't be applied there as well.

I would respectfully suggest that if and when you draw up legislation clarifying the privilege law, that you ought to consider - without seeming to be presumptuous - corrective legislation, or amendatory legislation, which would cover all of these privileges because these questions can arise and they are going to have to be handled. Hopefully, they can be handled better than they were in the Farber case. I think one thing that has been made clear out of that is that the result is unsatisfactory from everyone's point of view. Farber is in jail and the New York Times is facing very large fines. Doctor Jascalevich and his lawyer also do not yet have the information they want. It is just totally undesirable, no matter how you look at it.

Now, to the extent that the New Jersey Supreme Court has decided, as a matter of constitutional law, that the reporter's privilege has to bend before the Sixth Amendment guarantee of a fair trial, I think we have to, obviously, work within that framework and any amendment of the law that the Legislature might adopt must be made within those constitutional limits set out by the court. I think that is the given from which we start.

I think that acting within those limitations, the Legislature can make a substantial improvement on what I am afraid might otherwise follow from the Farber decision.

Now, obviously I read that decision very carefully. There were some tears in my eyes but I read it a number of times. First, the court did say that before requiring this in camera inspection - in chambers inspection - a trial court had to make a threshold determination that there was a reasonable probability that the information was material, that it couldn't be secured from a less intrusive source, and that the defendant has a legitimate need to see and use the material. Now, if I read that correctly, and I read it three or four times, the court did not say that you had to have a hearing before that threshold determination was made. Indeed, that was the crux of the dissent between Justice Pashman and the rest of the court.

It seems to me that such a hearing should be required and I believe it is within the province of the Legislature to set out that requirement by statute.

In the Farber case the court said there was ample space in the record for an affirmative finding on all of those criteria. But, what I frankly found inexplicable in that decision is the fact that the attorneys for Mr. Farber and the Times were never given the opportunity, really, to argue or rebut the claim. It would seem clear to me - respectfully - that in any future case, any attorney representing someone who is claiming this privilege must have the opportunity early-on to meet and argue against the findings which the defense attorney is probably going to urge.

Now, another of what I thought was a central point in the court's decision - and, again, an area which I would think the Legislature might address - is that in camera inspection - the fact that Mr. Farber was told to turn over all of his material to the court, the court would look them over, and then we would have some determination. The inspection was resisted by Mr. Farber and the Times on what I would think would be sound grounds. A disclosure to a judge is a violation of the privilege just as much as disclosure to the police, to the public, or anyone else. And, the Supreme Court disposed of that rather lightly and that is a matter of concern because unless and until the Legislature changes that, that is the law within which we are working. What the court said about that in camera inspection is - and I quote - "Such an in

camera inspection is not in itself an invasion of the privilege; rather, it is a preliminary step to determine whether, and if so to what extent, the privilege must yield to the defendant's constitutional rights. In other words, they are saying that even assuming it is all privileged material, nevertheless the judge has the right to order it to be made available to him for his inspection.

It seems to me that the Legislature does have the constitutional power to bury and alter that demand for an in camera inspection and I would think that is a question that you should address, and limit the right to the in camera inspection.

The scope and bredth of the subpoena at issue in Farber, I think, is another critical point - the demand to turn over everything. In the Farber case the court pointed to a number of specific items which Raymond Brown pointed to as being important pieces of information. I assume - I don't know, but I assume - that was true. From that, there was what seems to me a very large leap to an order which says you turn over not only those materials but, in fact, you turn over everything. I think that another issue, therefore, that the Legislature might address is the need to limit a disclosure order to specific materials for which there has been a proper showing of need.

Now, in the short time available to me since I received your invitation, I put together what I consider to be a draft for a possible statutory amendment and I hope that does not seem presumptuous. It seeks to address the questions that I have discussed here that seem to me to be proper and important areas for the Legislature to address.

I did not have an opportunity to really examine Mr. Gormley's bill, which I only saw this morning, but I think generally the approach is somewhat the same -- the language. I think ours may perhaps be more detailed. It is far from a finished product. I hope it could be of some assistance in pointing out the issues which I see as emerging from this case, and which the Legislature might wish to address. It does provide a suggested method of addressing those questions specifically. It sets out the need for a hearing and tries to define the issues to be resolved at the hearing -- the issues that most people talk about; materiality, non-waiver, non-availability of a less intrusive source -- and it makes clear that the person who may be subject to an order for disclosure must be given an opportunity to contest the order during each procedural step and it tends to limit the in camera inspection. As I indicated earlier, it would address the question of all of the privileges and not just the newman's privilege.

I think that would conclude the remarks I have prepared. I would be happy to respond to any questions. And, if I can be of any further assistance in any way, I would be more than happy to be of service.

ASSEMBLYMAN HERMAN: As a first comment, we appreciate your present participation. It is like the army: Once you volunteer, we have you.

MR. LESEMANN: That's all right.

ASSEMBLYMAN HERMAN: So, we will be happy to keep you and we would hope that you could perhaps refine what you intend to turn over, making some additional suggestions along the line. We will be happy to keep you on our mailing list in order to keep you abreast with what we propose. If you have any additional comments in that regard, we would appreciate your critique.

I would like to ask you just a couple of questions in regard to your testimony. Would you generally agree that handling this matter on a pre-trial basis would be better than during the trial?

MR. LESEMANN: Yes, I do. I suppose sometimes inevitably you are going to have to handle it during the trial because the question may arise then. But, to the extent possible, I agree with you completely.

ASSEMBLYMAN HERMAN: What do you think about counsel fees and the ability to protect both the defendant who has a limited means and the large majority, I would assume - I would assume that most newspapers are of limited size and limited finances in this State - in order to guarantee against the winner being the one who can hold out the longest because they have the most resources?

MR. LESEMANN: I don't know. Let me put it this way: That problem arises in so many areas of the law and the theory in New Jersey is by and large to pay your own counsel fees, baring something extraordinary. I have never been one hundred percent sure that that is right, but on the other hand I haven't been so certain that we ought to change it because it does kind of deter bona fide litigation. I think I would perhaps make that available in the area of patent abuse and bad faith, but limit it to that.

Certainly, the Farber case is an example, I think of both sides bona fidely and truly believing that they are in the right, that they are on the side of the angels. I think both of them had a lot going for them. Certainly, in a case like that, I think the imposition of counsel fees would be inappropriate. You would have to have something more and limit it to a really patently unreasonable position or bad faith.

ASSEMBLYMAN HERMAN: You mentioned the in camera inspections and limiting a judge's review. If I can draw you to a parallel situation, I would like to cite the Nixon case and Judge Sciricca and the Supreme Court's order in that case and putting faith in the court to be able to limit disclosure in order to have some bottom line where if somebody has to look at something, maybe it ought to be the judge. How do you view the Nixon situation and the production of documents to be reviewed by Sciricca under that U. S. Supreme Court order in relation to what should be done in a Farber-like situation?

MR. LESEMANN: In that connection I would like to respond, Mr. Chairman, to a question that you have raised a couple of times -- who makes the final decision? I think the court examination by Judge Sciricca was perfectly appropriate. If one reads the decisions in that case, it was very clear the prosecutor was demanding the turn-over of material which was privileged. There is a very similar parallel to Farber's privilege. There had been a very specific showing of need. The prosecutor had gone to great length to explain to the court and give Mr. Nixon's attorneys an opportunity to rebut the claim that this was not only something that was vaguely relevant, but this was critical. There was no other way he would get it. He went to the heart of what the whole issue was all about. As I said, there was no other way to get it. It was clearly material. It was clearly needed and on that basis, Judge Sciricca was given the right to inspect it in camera. I think that is perfectly appropriate in the newspaperman's case as well, provided those same kinds of showings are made - which I don't think were made here.

In answer to your question, "Who makes the final decision," The Supreme Court really said in the Nixon matter that obviously the court has to make the final decision. I don't think there is any question about that. In a newspaperman's situation or in anyone else's situation, given our system of government and our system of law, a judge has to make that final decision. What we are all, I am sure, trying to do is lay down some rules and procedures and standards by which we can hope the judge is going to make the best possible decision. With all respect to all of the

courts involved in this, I think the way this matter was handled procedurally did not lead to a sound decision.

ASSEMBLYMAN HERMAN: We hope your appearance here today and your continued cooperation will help us do just that.

Are there any questions? Mr. Thompson.

ASSEMBLYMAN THOMPSON: I have one question. You mentioned the need for a hearing. Am I reading you correctly? You say the need for this hearing is to protect the reporter's rights as far as due process is concerned. You say Farber never got a chance to have this type of hearing to present the merits of his side of the case.

MR. AHEARN: Yes.

ASSEMBLYMAN THOMPSON: Just straight contempt proceedings were imposed on him.

MR. AHEARN: Right. He was told several times - and, of course, I went through the transcript - or his attorneys were told, "I am not going to hear that argument." The trial judges would not listen to his argument on the merits until after the in camera inspection had taken place. They told him he could then raise those issues.

I would respectfully disagree with that. I think that is inappropriate. I think you have to have two kinds of hearings, basically, before you are required to turn over anything to the judge. A defense lawyer has to make some kind of preliminary showing. I won't repeat all those criteria. Then after the judge gets the material - limited material and not an order that says "turn over everything to me and I will look at it and discard 90% which is probably irrelevant and then we will talk about the 10%"- and makes his in camera determination, then he should say - and I think Mr. Gormley takes the same approach - "At this point I am inclined to release this letter, this note, etc.," and then give the parties an opportunity to argue about it at that time.

ASSEMBLYMAN HERMAN: Can we stop there just for one moment? You have raised a question that has given me some concern. How do we protect the non-disclosure of that information, assuming that either party wants to appeal? How would you handle an appeal from the newspaper side and how would you handle an appeal from the defendant's side at that point?

MR. AHEARN: Well, I don't really know how to respond to that. I gave that some thought in the past and I don't see-- Well, our present position would be - the present position of the law in New Jersey - that you have to ask for leave to appeal.

ASSEMBLYMAN HERMAN: I am talking about the non-disclosure of the information. I am talking about, for instance, the newspaperman's situation where the judge says, "I am releasing this 10% of the information; I think it is relevant." The newspaperman might not want that disclosed until he exercises his right to appeal. And, conversely, you have the other side who may want more information. How does one handle, on the basis of an appeal, the logical and legitimate arguments on information they may or may not see?

MR. AHEARN: I think to an extent you have to take your chances and I think we ought to leave it as it is now: Whichever party wants to appeal, he should be required to ask the Appellate Court for leave to appeal. It should be left to the discretion of the Appellate Court. I don't think it really makes sense in terms of judicial administration to give an automatic right of appeal from any such determination, some of which could be piddling and not really significant. Others could be

critical. As everybody knows, I guess, with a final judgment, you can appeal but there are procedural steps along the way and you have to ask the Appellate Court for the right to appeal. I think that unless someone can come up with a standard that I can't come up with, I think probably the best solution is to leave it in the hands of either party who has the right to ask the Appellate Division to review it and then leave it in their discretion.

ASSEMBLYMAN HERMAN: Are there any other questions. (no questions) I want to thank you for your testimony, Mr. Ahearn.

Our next witness will be William Sherman who is Vice President of Nassau Broadcasting. He appears here also as Director of the National Broadcasters Editorial Association.

W I L L I A M S H E R M A N: Mr. Chairman and members of the Committee, we seem to be dealing with an Alice in Wonderland situation. We want to change a law that is absolute and put specifics into it, so that a judge who ignored an absolute law can then ignore specifics.

You have a law that says the judge cannot see it unless -- subject to Rule 37. The law is very clear. It includes judges; it includes the Legislature; and it includes all investigative bodies. It says you don't have to reveal your sources or any of the information that you haven't published.

Now, that was ignored at every level in the New Jersey judicial system. The trial court judge ignored it. His superior ignored it. The Appellate Division ignored it. The Supreme Court ignored it. It never heard argument on the issue. All took the defendant' word that these materials were relevant and ordered them turned over.

Now, the Committee is considering changing the law to put specifics in. Well, unless you are going to put some specific in there to punish a judge who doesn't comply with the law, the changes aren't going to help the law at all.

Perhaps with some of the newer members of the Legislature, this law was a long time in coming. There was a law on the books that was found inadequate. Peter Bridge went to jail because of that law. That law also excluded, for one reason or another - maybe by oversight - broadcasters. Radio and television were excluded from that law. A new bill was put in for a new shield law. That bill, introduced by Alex Menza, took four years to get through this Legislature. It passed both houses without a dissenting vote in either house. The bill was gone over very carefully through the committee system - through the whole works. Everybody knew what they were passing. Everybody knew what they were voting on. They knew exactly what they were doing. They were giving the newsmen of New Jersey an absolute privilege to refuse to divulge information and to refuse to reveal their sources.

Now, if a judge chose to ignore another law that you passed-- For instance, committal to state institutions. Previously, someone could try to get a rich aunt committed so that they could have fun with the money and all it took was going to one judge and, bang, the committal was signed and away she went. Well, that was changed so that you would need two doctors' certificates that the woman was indeed incompetent. If a judge ignored that, and consistently chose to ignore that law, and all the judges consistently chose to ignore it and would commit anyone, well you would raise nine kinds of Cain.

ASSEMBLYMAN HERMAN: That is what the impeachment process is all about, right?

MR. SHERMAN: That's right. But, with this, instead of anybody raising Cain with the judge for ignoring the statute, as written, you want to change the statute to make it more difficult for the people it was designed to protect.

Farber was denied due process all the way down the line, there is no question about that. You brought up something earlier about the Sixth Amendment problem, concerning disallowance to members of the press: It would destroy the fabric of the system by allowing them to determine this. Well, it may affect some individual cases, but I tell you now that there are many cases stewed up by over-zealous prosecutors who get information during the course of a trial that they do not wish to introduce and which might be mitigating for the defendant and, thus, send some guy to jail, and there are stupid judges who hand down erroneous rulings and five years later another court says they are wrong. But, in the interim, somebody sat in the "slamer" for five years. The fabric of the system is in much more trouble through that avenue than through the occasional instance when a reporter is withholding information.

ASSEMBLYMAN HERMAN: That almost sounds like what I hear in some of the statutes we deal with concerning unemployment, where we have people say to us, "Well, everyone else is an exception to the rule and screwing up, so why shouldn't we?" I don't know if I totally buy that argument.

MR. SHERMAN: I would like to address one other red hearring on this thing. The other one red herring is the book, which is protected by the First Amendment and which, according to every reading I have seen on our shield law, is protected by our shield law. So, it matters not. If he was going to produce a television show about it it wouldn't matter. It is all protected under our shield law and under the First Amendment.

ASSEMBLYMAN HERMAN: I think the members of this Committee would agree with that.

MR. SHERMAN: So, I think that book nonsense is a red herring in this.

ASSEMBLYMAN HERMAN: Bill, I would like to ask you a couple of questions. You sat through this entire hearing, I believe.

MR. SHERMAN: Yes.

ASSEMBLYMAN HERMAN: We had a number of witnesses who appeared as attorneys for the press associations and newspapers. We had a number of people who appeared as editors and in various newspaper capacities and who testified that it was in the main - as I understood it - that where there was basically a collision with the Sixth Amendment, that the Sixth Amendment would have to prevail. Do you take that same position?

MR. SHERMAN: No. I'm sorry, I do not. There is a First Amendment and there is a Sixth Amendment and I haven't seen anything written, anywhere, in the United States Constitution that says one amendment takes precedence over another amendment. They are all given fairly equal status.

I was joking earlier with you before the Committee session started. Keep in mind which one was first. You know, when they wrote that thing, this came first. These freedoms that we were guaranteed were uppermost in the minds of the people who wrote those documents.

ASSEMBLYMAN HERMAN: So, you view the First and Sixth Amendments as equals?

MR. SHERMAN: As equals, yes.

ASSEMBLYMAN HERMAN: I think there may be a few constitutional scholars that may disagree with that view.

MR. SHERMAN: Now, if a reporter witnesses a crime, I say there is no privilege there.

ASSEMBLYMAN HERMAN: Let me ask you something. Freedom of Speech is also part of that? Let me see how that First Amendment goes -- does free speech come before free press?

MR. SHERMAN: It just might.

ASSEMBLYMAN HERMAN: Do you view free speech as having greater priority than free press?

MR. SHERMAN: I have no qualms with free speech, as long as anyone who speaks freely is subject to libel laws, slander laws, etc. Joe McCarthy had no difficulty in the United States Senate or elsewhere, other than on the Senate floor, saying, "I have a list of 203 names in the State Department who are members of the Communist Party." He was never prosecuted for that.

ASSEMBLYMAN THOMPSON: He was immune.

MR. SHERMAN: Not when he was wasn't on the floor.

ASSEMBLYMAN HERMAN: He was immune to a lot of things but that is neither here nor there. The question at hand is free speech. Do you view, in the context of a witness being legitimately subpoenaed as to the question of relative material evidence, if a witness, on the one hand, said, "Mr. So and So is guilty of a crime because six sources told me, etc." and put the same thing in writing, that because he put it in writing as a journalist he would have a higher right - or a greater right - not to disclose what he put in writing, versus if he had stated the same thing?

MR. SHERMAN: No, except under our shield law.

ASSEMBLYMAN HERMAN: Well, do you think that any law that we passed in this State - we are talking about the judge "ignoring", to use your language, the law - if it collides with a particular amendment, whether it be the First, the Second, or whatever amendment it might be - Fourteenth, Sixth - no matter how clearly it is stated and how clearly we all understood it to be worded - and I have to thank you because on most occasions you usually tell us we don't know what we are voting on; I'm glad there was one in which we did--

MR. SHERMAN: After four years it happened by osmosis.

ASSEMBLYMAN HERMAN: But, under that given situation, where we have a law that is clearly stated and clearly understood and it collides with any amendment, whether it be of the State Constitution or the Federal Constitution, notwithstanding how clearly it is stated and how clearly it is understood, don't you think-- ?

MR. SHERMAN: The Constitution would have to prevail.

ASSEMBLYMAN HERMAN: You mean we agree that that would also have to apply to the shield law?

MR. SHERMAN: If the shield law collided. We do not agree on that point, however. I don't believe the shield law collides with the Constitution of the United States.

ASSEMBLYMAN HERMAN: Mr. Thompson, do you have any questions of Mr. Sherman?

ASSEMBLYMAN THOMPSON: I think you have covered all my questions.

ASSEMBLYMAN HERMAN: Bill?

ASSEMBLYMAN BATE: And, therefore, because of that belief that is why the privilege is absolute, isn't that right?

MR. SHERMAN: That's right. The only reason I am testifying is because I looked at the list and I listened to some of the testimony and I perhaps am the only one who is both a news executive and a working reporter. It is nice to be a managing editor and sit inside and not be the guy who is going to the slammer. It isn't any of the executives of the New York Times that are going to jail, it is Myron Farber; it the reporter who is going to jail for not divulging the source. The Times itself may have monetary penalties, but none of the hierarchy is going to jail. It is the reporter who faces that. And, it is the reporter who needs protection. So, the executives can be very aloof about that privilege because they are not the ones who are

facing the problem.

ASSEMBLYMAN HERMAN: Let me ask you just one question which just seems to follow in my mind from that last comment. How about if it is the defendant who is going to jail because of the non-production of evidence?

MR. SHERMAN: Well, the same thing could happen if someone walked into your office, as an attorney, and was a client of yours and happened to tell you: "Gee, you know that guy didn't do that," - the guy on trial - "I did it." Where would you be? Why have you got the privilege?

ASSEMBLYMAN HERMAN: There is an interesting question as to whether we do have the privilege.

ASSEMBLYMAN KERN: There is a good decision on that.

ASSEMBLYMAN HERMAN: We don't.

ASSEMBLYMAN KERN: It is clear; we don't have it.

ASSEMBLYMAN HERMAN: We don't have the privilege. So, now that we have responded to your question and now that we are all in the same boat, I will pass this to Mr. Mays to see whether he has any questions.

ASSEMBLYMAN MAYS: He already answered my question with his last answer. In your mind, Mr. Sherman, does justice come before a reporter?

ASSEMBLYMAN HERMAN: In other words, does a newspaper privilege not to disclose your sources come before the very fundamental question of justice, guilt or innocence?

MR. SHERMAN: At the very least on the Federal level, even with the Nixon tapes, there had to be a definite showing of specificity and I like to use "the source of last resort" -- that there is no where else to go. In the Farber case there are lots of other places to go and they are going on a fishing expedition for everything. They are not asking for a specific piece of information. They want everything he has, whether it really is pertinent or not.

ASSEMBLYMAN HERMAN: Assuming they were asking for specifics, what would be your view in the Farber case?

MR. SHERMAN: If it were very specific, I would probably give.

ASSEMBLYMAN HERMAN: All right.

ASSEMBLYMAN KERN: You mentioned the awesome power of a judge and his authority to make a mistake and compel production of something that maybe should never have been done and there is no way to penalize him. You wanted some teeth in the law so that there would be something hanging over the judge in the event he made the wrong decision. Who would impose that kind of a penalty? Would it be another judge?

MR. SHERMAN: In all probability.

ASSEMBLYMAN HERMAN: Not necessarily under our constitutional scheme of things. There are two or three ways to impose a penalty.

MR. SHERMAN: He can be impeached through the legislature.

ASSEMBLYMAN HERMAN: Non-reappointment.

ASSEMBLYMAN KERN: I am talking about specific application.

MR. SHERMAN: You see the problem as I see it it is, no law in New Jersey is safe today. No law that you guys pass is safe if every judge up and down the line can ignore it right off the bat and not pay the least bit of attention to it. Your response is, "Well, let's change the law."

ASSEMBLYMAN KERN: Don't you get a feeling through that there is a certain esprit de corps among the bench in this situation?

MR. SHERMAN: I would call it collusion, but I will buy esprit de corps. There has been a growing animosity - seemingly, at least in my view - between the media and the judiciary. We may see a turn-around after some of the people who are presently serving on the U. S. Supreme Court - because I think there will be a change when there are new appointments made to the U. S. Supreme Court - that will reestablish an affirmation of the First Amendment. That will do away with a lot of the decisions from the court that is sitting now - Mr. Blackman and company.

ASSEMBLYMAN KERN: Assuming that we have this clanishness, from the trial judge to the highest court of the land - wouldn't there be a problem with any sort of penalties that are set forth by way of judicial review?

MR. SHERMAN: You may have, but it would still be nice to be there and at least they are reportable.

ASSEMBLYMAN HERMAN: Let me ask this last question, if I may, Bill. Do you think we just ought to close up shop and go home and not do anything?

MR. SHERMAN: Speaking as an individual totally removed from all of this, you may as well, the courts have taken over anyhow.

ASSEMBLYMAN HERMAN: You don't think there are still three branches of government?

MR. SHERMAN: No, not in New Jersey in any case. The courts decided the income tax question. The courts decided the education question. The courts have decided the free press question. It is nice that we are able to see you fellows once in a while. (laughter)

ASSEMBLYMAN HERMAN: I might say it is nice to see you once in a while too.

With that, I just want to remind everyone that Alice had a lot of friends at a tea party and maybe we can bring this tea party to a close. I don't believe there are any further witnesses. I want to extend my thanks to everyone who has taken the time to appear. The hearing is now adjourned.

STATEMENT OF PETER G. BANTA
Before the New Jersey Assembly
Judiciary, Law, Public, Safety and Defense Committee

My name is Peter Banta. I am an attorney in Hackensack. In the last few years, I have had first hand experience in the state and federal courts with the New Jersey Newspaperman's privilege law. I represent The Bergen Evening Record Corporation, publisher of The Record, and I am now serving as New Jersey counsel to the New York Times and Myron Farber, whose documents were subpoenaed by the defendant in the "Dr. X" curare trial, still in progress in Hackensack.

The views I express are my own and not those of either the Times or the Record or any of their editors or reporters. I think it important, however, to advise this Committee that my interests are identified with those of the print media, and I have experienced first hand how courts and litigants regard subpoenas to newspapers.

In short, courts and judges regard privileges in general, and the newspaperman's privilege in particular, as obstacles to getting at the truth in a particular case, and their hostility to the newspaperman's Shield Law often shows in their rulings. The press may uncover crime, which is regarded as good, but its coverage of pretrial and trial proceedings may seem to judges to create obstacles to providing fair trials, especially for criminal defendants. Extensive pretrial publicity may make obtaining unbiased jurors more difficult. Extensive trial

coverage, especially of proceedings outside the presence of the jury, makes it harder to keep the jury's decision based solely on the evidence before it, or requires the court to sequester the jury during the trial, to the jury's discomfort and annoyance and to the expense of the state.

To its credit, the New Jersey Supreme Court last year in the Allen case barred gag orders, following the lead of the U.S. Supreme Court in the Nebraska case.

The gathering and printing of news serves a desirable public function, one which others can describe more eloquently than I can. Preserving the secrecy of confidential sources is essential to gathering of news of official misconduct. Think for a minute of the ability of Woodward and Bernstein to break open the Watergate coverup through the use of "Deep Throat" and other confidential sources.

The amendments passed last year were designed in part to overcome the decision in 1972 in the Peter Bridge case, which held that the Shield Law then in effect protected disclosure of material only from undisclosed sources, not undisclosed material from a disclosed source. Bridge spent over 20 days in jail for refusing to disclose the unpublished portion of what a disclosed source told him.

A previous legislative attempt to override this decision was vetoed by Governor Cahill as going too far.

The present statute attempts to be consistent with the present waiver rule, Rule 37, by starting "Subject to Rule 37 . . .". In fact, the present law and the waiver rule, which applies to all testimonial privileges, do not mesh properly and the conflict between them has enabled the courts to find waiver where the new law makes clear that none was intended. For example, the new law clearly protects undisclosed material by protecting disclosure of "(b) any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated" (emphasis added). It seems clear enough. Rule 37 provides, however, that disclosing a portion of privileged material is a waiver of the privilege as to all of that material. This is inconsistent with the idea of partial dissemination. In one court case last fall, I argued that, if there was a conflict, the general language of Rule 37 should yield to the specific, recent provision of the new Shield Law. The judge disagreed and found a waiver as to an entire interview because a portion of it had been printed. If that ruling, not officially reported, becomes the general law, the 1977 amendment is meaningless in this respect and we are back to 1972, to the Bridge case. Something has to be done to clarify the relation of the waiver section to the Shield Law. At present the law is unclear and invites a narrow interpretation.

Another problem with the existing law, as I found in court, was that the provison protecting disclosure of:

a. The source, author, means, agency or person from or through whom any information (published in such newspaper) was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated."

* * *

was read in the conjunctive, namely, that to claim the privilege, neither the source nor any of the privileged material be disclosed. If the source was disclosed the court interpreted the shield law as not applicable, apart from any question or waiver. I think the clear intent of that section is that the newspaperman is protected as to the source, the news, either or both.

Yet a judge ruled against me on that item, holding that both the source and material had to be undisclosed, putting us all the way back to the Bridge case, supra.

Another problem with the waiver rule is the reference to waiver as occuring if the holder has

"(a)" contracted with anyone not to claim the right or privilege..."

References in the 1955 Supreme Court Commission on evidence made clear that this refers to instances like an employee who contracted not to claim his Fifth Amendment privilege against self incrimination. Instead arguments have been made, in the Farber case, for example, that signing a book contract is a

waiver under this section: Journalists write books - Watergate has resulted in several. A mere contract to write a book about a subject should not be construed as a waiver under this section.

Two conclusions emerge from my experience under the present bill. First, its meaning is not clear to judges and, I think, incorrect interpretations have been made. Second, judges hate to see possibly relevant material withheld by the press in reliance on the Shield Law, especially in criminal trials, and they will look, consciously or unconsciously, for a way to compel disclosure.

One consequence, I fear, in the present state of affairs is the tendency of lawyers, especially defense lawyers in criminal prosecutions, to subpoena the files of any journalist who investigated the subject and wrote (or broadcast) about the subject and who may have talked to persons who would be witnesses at the trial. Lawyers have a duty to their clients to be diligent and thorough and develop evidence, and find it hard to hold back subpoenas to newspapermen and get a free ride on the reporter's investigation instead of the attorney doing his own.

Or worse, as I have seen, the lawyer wants to "go fishing" in the files of the reporter and newspaper, just to see what might be there that would be helpful. This is what is happening in the "Dr. X" trial to Farber and the Times, since Farber didn't come along until 10 years after the deaths in question, and could not have any firsthand admissible evidence.

If persons who talk to reporters have to assume that their identities and statements, given in confidence, will be routinely subpoenaed and disclosed to the judge and possibly to a criminal defendant, you can imagine the inhibiting effect this will have.

In federal criminal cases, no statutory privilege exists, but the federal courts narrowly restrict what can be subpoenaed, and do not permit fishing expeditions. In the state courts, the same narrow view of criminal discovery and civil discovery does not seem to apply, at least in the "Dr. X" trial.

A good part of the problem which has come up recently is not a reporter's being called to the stand as a witness and being asked questions, which at least is subject to objections of counsel for the litigants and rulings as to relevancy and materiality, but having to turn over in advance, the reporter's whole file. Turning all the papers over to the judge to screen before the judge has made preliminary determination of privilege, overbreadth and relevance is not the answer. Most determations can be made by the court without an in camera review. Suppose in the trial involving Farber's notes, the defendant was not a surgeon, but was a mob figure. Could a reporter safely give his notes of confidential informants to a judge, unsure if a claim of privilege would be allowed. If disallowed, the identity and statements of confidential sources would be disclosed to a member of organized crime. What assurance could a reporter give his source?

The recent New Jersey Supreme Court decision in Farber creates problems, apart from Farber's particular fate. Requiring, as the court did, that all subpoenaed material be given to the judge for review when relevance had been shown as to only a portion and before the claim of privilege would be considered, is outrageous. The court fell into the trap of assuming that it owed a criminal defendant almost unlimited discovery. Not so. The federal courts drastically limit defendant's rights by subpoena for discovery and by authority in the Supreme Court decision in U.S. v. Nixon. In that case, the court rejected a claim of executive privilege but only after it had first determined that the tapes subpoenaed were material and relevant and probably contained admissible evidence in the forthcoming trial of the Watergate coverup conspirators. It reaffirmed that subpoenas must be shown to be likely to produce relevant evidence.

In a recent federal subpoena case before Judge Meanor, who is no believer in newspaperman's privilege, the court rejected defendants' requests that he take possession of and screen the subpoenaed reporter's notes; it also rejected the breadth of the subpoenas as a "fishing expedition." He narrowed the subpoena to cover only statements of prosecution witnesses and quashed the rest. Since no confidential sources were affected by the modified subpoena, the reporters complied with the Court's order. If a confidential source has been involved, a further conflict would have been present. Even so, newspapers now face routine subpoenas from criminal defendants in notorious cases, and routine motions

to quash will be the response, to the benefit of lawyers and practically no one else.

In 1972, the U.S. Supreme Court in Branzburg, by a divided vote, held that no blanket newspaperman's privilege existed under the First Amendment to the U.S. Constitution, in the cases under review. Notwithstanding this ruling, lower federal courts have been very wary of ordering newspapermen to disclose confidential information, possibly because no clear majority opinion spoke for the court.

There is also a civil side to litigation involving the newspaperman's privilege. One is libel law. The New Jersey courts long ago ruled that if a newspaper pleaded fair comment and good faith as a defense in a libel case, it waived its privilege as to sources and information. in support of that defense. Even this can be too broad. Assume an anonymous and very sensitive confidential source said that a public figure was a member of organized crime and this was independently verified by the newspaperman before publication, which regarded the initial informer's statement as only a "lead" to be followed up. Upon a suit for libel by the criminal, if the newspaper pleaded truth, it could be forced to disclose the name of that informant to his great peril, or if it refused, the court would have its suppress its defense of truth. The plaintiff could then recover damages for a true statement. A much stronger privilege has been judicially created to protect government informers who are not

witnesses, whose information leads to a prosecution.

What the Legislature can do is clarify the waiver question. The California shield law provides specifically that a waiver of a portion is not a waiver as to the whole. A specific provision to this effect in the New Jersey shield law would help prevent misapplication of the Rule 37. The shield law should not be subject to Rule 37, but those aspects which should apply should be incorporated into the shield law.

One problem remains about which there may not be much the Legislature can do. This concerns the implementation of the Supreme Court's opinion in the Farber case. Hopefully the trial judges will be able to narrow overbroad subpoenas, and determine most questions of privilege based on the arguments of the party issuing the subpoena and the newspapermen, and on the adequacy or inadequacy of the showing of relenancy, lack of alternate source and compelling need required of the proponent of the subpoena. Ideally, in only a few cases will material, notes, etc. have to be submitted to the court for in camera review. If on the other hand trial courts routinely require all reporter's, notes and other documents to be turned over to the court, the press will be considerably burdened and relief will be needed, whether from Appellate Courts or the Legislature.

Dated: October 12, 1978