

Memo Sample

To: Steve Mathis
From: Junior Attorney
Date: October 13, 2017
Subject: Peggy Olesman Subpoena (Harrison v. Erikson Advertising L-2214-16);
Reporter's Privilege; Shield Law

Questions Presented

1. Whether Peggy Olesman falls within the class of people who can claim newsperson's privilege under New Jersey law by which she may move to quash the subpoena seeking her testimony about and documents related to her June 15th posting on her blog.
2. Whether Peggy has waived that privilege by sharing related information with others and to what extent.

Brief Answer

1. Probably yes. According to NJ law, Peggy's website and blog should be classified as news media and her connection with them is strong. So Peggy has the requisite connection to news media. Plus, she has the necessary purpose when gathering this news and the related materials were obtained in the course of professional newsgathering activities. Thus she has met all the three statutory factors of reporter's privilege set by NJ law.
2. Probably no. Peggy's publication of the article doesn't constitute a waiver, and her conversation with her sister and her other sources of news all happened in the process of gathering and editing news. According to NJ law and precedents, she has not waived the privilege.

Facts

Our client, Peggy Olesman, is a former employee of Erikson Advertising LLP. In this

company, she witnessed some affairs that disturbed her. In August, she was told the harassment and disrespect from Ferg Donnelson, a senior manager, to Joan Harrison, the plaintiff of the subsequent lawsuit. Then she knew more about these matters in the company from other colleagues. Believing that the management wasn't going to make any change, she left Erikson in December 2016.

Peggy decided to freelance and focus on her writing career. She created a personal website called "Peg Tales". She designed three subjects of this website: fashion, travel and "cruel world". The first two subjects are about life, while the last one is about her perspective on social issues.

The article noticed by the court was posted on June 15th, 2017, which was her launch of the "cruel world" part. In June she learned that Erikson fired Nora Smith, who was acknowledged as an excellent employee. Then she dug this incident and thought it is related to Ferg Donnelson and his habitual harassment behavior and the connivance of James Hobartson, who is the CEO of Erikson. She talked to other victims and drafted the post, which said she spoke to her former co-workers and disclosed an overall description of the undesirable company culture of her former employer and implied the harassment affairs done by a senior executor. Her sister helped tweaking the post, just as her other posts on the website. And after its launch, it attracted more traffic than usual.

Joan Harrison sued Erikson Company and James Hobartson on July 15th, and the court issued the subpoena requiring her to provide testimony and related documents. Peggy is unwilling to do so because this will destroy source's trust in her and make her much more difficult to get news in her future reporting career.

Discussion

I. Does Peggy Olesman fall within the class of people who can claim privilege under New Jersey law?

The privilege invoked in this case can only be newsperson's privilege. Other privileges, such as patient-physician privilege and lawyer-client privilege, are either obviously inapplicable or excluded from this question. The statute that rules newsperson's privilege is also called the New Jersey Shield Law, *N.J.S.A. 2A:84A-21*, which provides the class of people who can claim this privilege. Under this law and another seminal case, *Too Much Media, supra*, 206 N.J. at 241-42, 20 A.3d 364, people who can claim newsperson's privilege are those who: (1) have the requisite connection to news media, (2) have the necessary purpose to gather or disseminate news, and (3) the materials sought were obtained in the course of professional newsgathering activities. This section addresses each of these three requirements in order.

A. Peggy's "Peg Tales" can be classified as news media and her connection to it is strong enough to demonstrate that she has requisite connection to news media.

Peggy is not a classic reporter in traditional media, such as newspapers. Thus the question that whether her website or blog, "Peg Tales" (www.pegtales.com), can be regarded as news media is debatable. Therefore, the first requirement above should be analyzed in two parts: (1) whether "Peg Tales" can be classified as news media; (2) if so, whether Peggy has the requisite connection to it.

Firstly, we need to discuss the status of "Peg Tales" in the shield law. The definition of news media has been given by the shield law: "'news media' means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed,

photographic, mechanical or electronic means of disseminating news to the general public.” *N.J.S.A.* 2A:84A-21a. Since “Peg Tales” cannot be classified as any kind of the aforementioned traditional media, the question is whether “Peg Tales” belong to “other similar printed, photographic, mechanical or electronic means”.

In *Too Much Media*, the New Jersey Supreme Court set forth the principle for determining a new communication method’s status in the shield law. The court noted that “form alone does not tell us whether a particular method of dissemination qualifies as ‘news media’ under the statute”; it must be judged on a case-by-case basis, and the standard can be whether the other means of disseminating news are similar to traditional news media. So similarity is the focus of this analysis and it should be considered comprehensively.

In another recent precedent, the court analyzed whether the blog in that case was a kind of media, and its analysis can be interpreted as four factors. To determine whether the similarities between a new means of disseminating news and traditional news media are sufficient, a court may consider: (i) its newsworthiness; (ii) investigatory methods used by the writer; (iii) the frequency of posts; (iv) the writer’s hours of working. *In re January 11, 2013 Subpoena by Grand Jury of Union County*, 432 N.J. Super. 570, 75 A.3d 1260. As this case was also about blog, these factors are especially applicable in our case. Here, “Peg Tales” works well under the four factors. The content in her blog about fashion, travel and “cruel world” has newsworthiness because it does spread some current information and the law didn’t set a high standard about newsworthiness, *see Kinsella v. Welch*, 362 N.J. Super. 143, 153, 827 A.2d 325 (App.Div.2003); she interviewed Nora and did a telephone interview with Trudy, thus she used professional methods in “Advertising for Equality”; she posted her article regularly and

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frequently — usually once a week ; and after her resignation, she dedicated herself into the website full time. With all these standards satisfied, the similarities between “Peg Tales” and traditional media should be concluded sufficient.

A minor factor considered by the court is readership. In a precedent, a free tabloid was decided as a news medium partly because of its 25,000 weekly readership. *In re Avila*, 206 N.J. Super. 61, 63, 501 A.2d 1018 (App.Div.1985). Here, we can infer that website traffic has the equivalent significance as readership in printed media. According to the website traffic service Site Tracker, from November 2016 to June 2017, the monthly traffic of “Peg Tales” is between 100 to 1500, keeping a rapidly increasing trend, *see Website Analytic Report for: www.pegsworld.com*, 16. The traffic may be a supporting argument for Peggy, though not very persuasive.

Opposing counsel could argue that Peggy’s post is similar to a comment on a message board, and is therefore not news media, but this argument is unpersuasive. Granted, in *Too Much Media*, the court held that Oprano, the message board in that case are not news media because the posts there are more akin to “letters to an editor” and “a little more than forums for conversation,” *see Too Much Media, supra*, 206 N.J. at 241-42, 20 A.3d 379. But here, Peggy’s post is unlike a message board. Although she has some interactions with her fans, she is the publisher of all her posts and her article is obviously different from threads in forums. Therefore, a court would probably not find *Too Much Media* applicable here.

Secondly, we discuss the connection between Peggy and the media. In *In re January 11, 2013 Subpoena*, the court held that newsperson who has the connection with news media “must have some nexus, relationship, or connection to ‘news media’ as that term is defined.” In

another precedent, the court said the newsperson must be actively affiliated with and engaged in any aspect of the news process. *Gastman v. N. Jersey Newspapers Co.*, 254 N.J.Super. 140, 145, 603 A.2d 111. Here, Peggy is the creator and operator of the website and she exercises all the operating, writing and editing work. She posts regularly and actively — as she said, most of the time she “managed to post something new about once a week,” see *Meeting with Peggy Olesman*, 15. Under the standard above, Peggy has a strong connection with the media “Peg Tales”.

Some factors seem to be adverse for Peggy’s connection with news media and they may be raised by the court or the plaintiff Joan Harrison. However, they are just plausible and can be disproved. The first one is about the person’s status as a professional. Peggy is not a professional reporter, nor employed by traditional media. However, in *In re January 11, 2013 Subpoena*, the court held that the person seeking the protection of shield law doesn’t need to be a professional. Second, In *Too Much Media*, the court found the person’s position as an employer of media is also irrelevant. The third factor is whether the person consistently and exclusively authors newsworthy writings. Here, though the sued article is undoubted news, her other posts about fashion and travel are seemingly not as newsworthy as it, regardless of our contention that the standard of news is pretty low. However, according to the decision of *Too Much Media*, a newsperson is not required to only release newsworthy news. In *In re January 11, 2013 Subpoena*, the court articulated that no governing case law precludes this court from granting the privilege to a claimant who authors newsworthy posts, while also posting information which is less newsworthy or inartfully drafted. The fourth factor is the person’s neutrality in the news. The New Jersey Supreme Court excluded this factor in *In re January*,

even though this factor is not very relevant here.

B. Peggy has the necessary purpose to gather or disseminate news.

According to *In re January*, if the news media previously contain a sufficient degree of “news”, it will be much more clear that the newsperson has the necessary purpose. Since the article “Advertising for Equality” is actually the launch of Peggy’s part of “the cruel world”, her previous posts are mostly about travel and fashion. So the question before us is whether they can be seen as containing “a sufficient degree of news”. As we have mentioned, the court’s interpretation of “news” and “news media” under the newsperson’s privilege is broad, *see Kinsella*. In *In re Avila*, even the articles on a print tabloid publication could be regarded as news. Under the low standard of news, the previous posts should contain sufficient degree of news, thus this is a favorable argument for Peggy’s purpose to gather news. To sum up, according to the shield law and precedents, this factor can be satisfied easily.

In the practice of New Jersey civil procedure, including the most relevant case *In re January*, besides other testimony, the newsperson can testify the purpose of herself at the plenary hearing. So Peggy can testify her own purpose, which she claims was to gather and disseminate news, *see Meeting with Peggy Olesman*, 14.

The plaintiff may raise the “intent test”, which requires individual claiming the privilege must demonstrate such intent existed at the inception of the newsgathering process. See *Too Much Media*. This test is a little adverse for Peggy because she formed her determination of creating the post after her communication with several former co-workers. However, this test is from federal precedent and the court in *Too Much Media* declined to rely on it because “it does not comport with the precise language of the Shield Law.”

C. Materials sought were obtained in Peggy's course of professional newsgathering activities.

The New Jersey Shield Law has precisely defined the term "course of professional newsgathering activities" as below, which is the key to prove that Peggy has satisfied this factor:

"In the course of pursuing his professional activities' means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage."

N.J.S.A. 2A:84A-21a (h). We can see under the New Jersey shield law, the standard of this factor is pretty broad. Here, Peggy gathered news through her interview with two victims and her social gathering with former co-workers. In the second requirement section, we have proven the purpose factor. And obviously, she was not involved in physical violence or property damage in this case, thus the exclusion clauses are inapplicable. So she has met the requirements of the course factor.

II. Has Peggy waived newsperson's privilege?

A person waives that privilege if he has either: (1) contracted with anyone not to claim the right or privilege, or (2) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone. *See N.J.S.A. 2A:84A-29; In re January 11, 2013 Subpoena*. In this case, the contract article is obviously not applicable. So we need to look up whether Peggy has disclosed privileged matter and whether case law will interpret it as a waiver.

Firstly, Peggy's activity of publishing the sued article should not constitute a waiver of the newsperson's privilege to disclose the privileged material. The shield law in New Jersey

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provides that a newsperson has a privilege to refuse to disclose any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated, *N.J.S.A.* 2A:84A-21. This rule is also supported by case law. For example, In a relevant precedent, the court held that a reporter who publishes an article in a periodical does not waive the newsperson's privilege. *In re Venezia*, 191 N.J. 259, 922 A.2d 1263. Here, Peggy gathered privileged material through her newsgathering activities, and exposed, though a little, in her article Advertising for Equality. However, based on the rule articulated above, her publication does not constitute a waiver.

Second, Peggy's conversation with Nora, Trudy and her former co-workers was within her process of gathering news and didn't constitute a waiver. Shield law affords newspersons an absolute privilege not to disclose confidential sources and editorial processes, absent any conflicting constitutional right. *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376. In this case, the court retrospect the legislative history of the shield law, especially its two amendments, paid attention to the exhaustive list of news-gathering activities of the provision, and concluded that the Legislature did not intend a narrow interpretation. And the editorial process, including communications between newspersons, is also privileged and could not be waived. Here, Peggy's interview with her source was the process of gathering news, which will falls in the category of "a disclosure which is itself privileged" in *N.J.S.A.* 2A:84A-29, so that it will not constitute a waiver.

Third, Peggy's sister Sue falls in "person from or through whom any information was ... compiled, edited..." and Peggy has the right not to disclose her. In *In re Venezia*, the court held that a reporter waives the privilege if he makes disclosures outside of the newsgathering or

reporting process. In this case, however, Sue should not be regarded as a person outside of the newsgathering or reporting process because she helped Peggy tweaking the article, as she always did in her previous postings. As we have mentioned, the employment relationship between a newsperson and the media or the professional position are not required for the recognition of a newsperson. *See In re January 11, 2013 Subpoena; Too Much Media*. To say the least, even though Sue might be seen as a person outside of the process, Peggy doesn't need to disclose the private conversation between Sue and her based on the newsperson's privilege, if Joan doesn't know the conversation.

Conclusion

Peggy has met all the three statutory factors of reporter's privilege set by NJ law: (1) the requisite connection to news media; (2) the necessary purpose to gather or disseminate news; and (3) materials sought were obtained in the course of professional newsgathering activities. So she falls within the class of people who can claim reporter's privilege. And her publication of article and conversations with sources and her sister didn't constitute a waiver.