

# Pennsylvania Bar Association Quarterly

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Volume XXXV

1963 - 1964

(October, 1963 to June, 1964, inclusive)

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10/25/64

JOSEPH M. FIRST, *Editor*

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1964

## PROJECT CONSTITUTION—A REPORT

BY WM. A. SCHNADER

Immediate Past President, Pennsylvania Bar Association; Chairman,  
Special Committee on Project Constitution

“Project Constitution” is the name by which the public has come to recognize the twelve proposed amendments to the Pennsylvania Constitution which, if adopted by two successive Legislatures (not two successive sessions of the same Legislature), would give Pennsylvania a new Constitution of eleven articles instead of the present Constitution of eighteen articles.

The two successive Legislatures could act at the regular sessions of 1964 and 1965, and the twelve amendments could be submitted to the voters in November, 1965. Parenthetically, the question has frequently been asked—“How can the Legislature adopt resolutions proposing constitutional amendments at its 1964 session?” The answer is that the amendment to the Constitution adopted in 1959, which provided for regular sessions in the even numbered years, merely prohibited the Legislature in these sessions from enacting “any laws except laws raising revenue and laws making appropriations” (1959 P.L. 2158). A resolution is not a law. It does not go to the Governor for approval or disapproval. Therefore, the Legislature being in session can adopt resolutions to its heart’s content.

Subsequent to the Association’s meeting in Tamiment in June, the Legislature passed, and the Governor signed, Senate Bill No. 692 (Act No. 262), providing for a referendum at the November 1963 election on the question whether a constitutional convention shall be called. If a majority of the electors voting on the question vote in the affirmative:

Candidates for delegate will be nominated by the political committees of each party;

Delegates will be elected at the spring primary in 1964;

The convention will convene on July 1, 1964;

The convention must make its report not later than January 15, 1965; and

The product of the convention will be voted upon at the November 1965 election.

The twelve resolutions which were introduced into the House of Representatives in 1963, embodying "Project Constitution" were not reported out of committee. This was "according to plan." The legislative leaders felt that with so many controversial matters pending in the 1963 session, an attempt to hold hearings on the Bar Association's proposals was out of the question. Instead, it was proposed that our resolutions be prepared for introduction the moment the 1964 session convenes, so that there will be no doubt about the Legislature's ability to give them due consideration. That plan will not be affected by the result of the vote on a constitutional convention.

We propose to urge the 1964 Legislature to adopt the resolutions which constitute "Project Constitution," so that if the product of the constitutional convention (if a convention is called) is unsatisfactory, it will be possible to bring the Bar Association's proposals before the people without the loss of two years, which would inevitably result if our proposals were not adopted by the 1964 Legislature.

The Association, through the Committee on Project Constitution, will, if a convention is approved by the electorate, present its proposals to the convention and will tender its services to the convention in any way which will be most helpful.

The Association has been urged to participate in the campaign for a constitutional convention. The Governor has urged the Board of Governors to endorse a convention. A very influential member of the Legislature has urged us to wage a campaign against a convention.

The Board has, I believe very wisely, determined to take no part in the campaign, which may become quite controversial as election day approaches. The Association is interested in a better Pennsylvania Constitution. Its interest in

the method of attaining this result is minor. We believe we have demonstrated that our State can have a modernized Constitution without a convention, but if the voters prefer to have a convention we shall do our utmost to help the convention propose the best possible Constitution.

At a meeting of the Board of Governors in Harrisburg on September 14, two important actions were taken, as follows:

1. It was resolved that the Association make every effort to have its 12 proposals brought before the electorate, but with special emphasis on the Association's proposal for a new Judiciary Article; and

2. The Board approved sponsorship by the Association of a layman's conference on "Modernization of Pennsylvania's Judicial System" under the auspices either of the American Judicature Society itself or of the "Joint Committee for the Effective Administration of Justice," the Chairman of which is Mr. Justice Tom C. Clark of the Supreme Court of the United States and in which the American Judicature Society is represented.

Obviously, the one article of the Constitution in which lawyers *should* be most interested is the article on the Judiciary.

On August 15th, a pamphlet was distributed to all of the members of the Association containing a revision of the Judiciary Article as originally proposed by the Association.

This pamphlet also contained the address of Mr. Glenn R. Winters, Executive Director of the American Judicature Society, given at Tamiment. Mr. Winters spoke of the Association's proposal for a new Judiciary Article and concluded with these words:

"\*\*\*The question now is not 'What *kind* of a plan shall we have?' but 'What shall we *do* with *this* plan?'

"My answer to that question is quick, clear, and, I hope, convincing. Take it out and sell it to your fellow citizens of this great Commonwealth, with every confidence that in so doing you are serving their best interests and the cause of justice."

Finally, the pamphlet contained a recital of what change the Special Committee on Project Constitution had made in the proposed Judiciary Article. Although every member of the Association has received this pamphlet, it may be appropriate to record here what these changes are:

1. Instead of having the statewide Nominating Commission elect the Chief Justice of Pennsylvania for terms of five years, we would have the members of the Supreme Court elect their own Chief Justice for terms of five years. And we would eliminate the restriction which would permit a Chief Justice to serve only two terms as such.

2. We would preserve the separate Orphans' Courts in Allegheny and Philadelphia Counties but we would rename all separate Orphans' Courts and all divisions of the District Court, created to perform their functions, "Estates Courts" or "Estates Divisions." We would also provide that the Legislature may create a separate Estates Court in any district but only upon recommendation of the Supreme Court.

3. Instead of calling the heads of the Superior Court, the District Court, the Estates Court and the Community Court Presiding Judges, we would call them President Judges.

4. We would provide in the Schedule that the Community Courts should begin to function three years after the remainder of the Article becomes effective. This would permit every magistrate, alderman and justice of the peace in office when the Community Court would displace him to have served a full six-year term after notice of the proposed change.

5. We would increase the minimum mandatory retirement age from 65 to 70 years.

6. We would make it clear that Judges of the District Court, Estates Court and Community Court must reside within their districts while serving.

7. We would liberalize the restrictions on non-legal activities of a Judge so as not to prevent him from lecturing.

teaching, writing or acting as an officer of a non-profit professional organization.

Now, a word as to the Joint Committee for the Effective Administration of Justice.

That Committee consists of representatives of the American Bar Association, the American Bar Foundation, the American College of Trial Lawyers, the American Judicature Society, The American Law Institute, the Association of American Law Schools, the Columbia Project for Effective Justice, the Conference for Chief Justices, the Institute of Judicial Administration, the Junior Bar Conference, the National Conference of Bar Presidents, the National Conference of Bar Secretaries, the National Conference of Court Administrative Officers, the National Conference of Judicial Councils, the National Conference of State Trial Judges, the National Conference of Juvenile Court Judges, and the National Aid and Defender Association. Our own Attorney General, Walter E. Alessandroni, is a member of the Committee, as is also Glenn R. Winters, who has previously been mentioned.

One of the purposes both of the Committee and of the American Judicature Society is to promote modernization of the judicial systems in states which are still operating under out-worn systems fashioned in the last century. Conferences on judicial reform have been held in Nevada, Ohio, Oklahoma and Wisconsin and are being planned in Florida, Louisiana, Maryland and Texas.

The plan is to have approximately 125 of the leading citizens of Pennsylvania assemble in Philadelphia in early 1964 for a conference which will hear speakers from other states, as well as from Pennsylvania, discuss our judicial system as it is, our judicial system as it would be if the Judiciary Article contained in Project Constitution were adopted, how the Missouri (or Pennsylvania) Plan of selection and tenure of judges has worked in other states and the success of other states in replacing their minor judiciary

with a court of limited jurisdiction manned by judges learned in the law.

The conference will be broken up into panel groups for four rounds of discussion. There will be three topics, all of which each panel will have an opportunity to discuss. These subjects are: Judicial Selection and Tenure, Court Organization and Administration and Courts of Limited Jurisdiction.

After a full day's discussion of these subjects, a conference consensus will be reached on the following morning.

Invited to participate in this conference will be representatives of the League of Women Voters and of the P.T.A., editors representing large dailies, small dailies and weekly newspapers, representatives of radio and TV, men and women engaged in the professions, in business, in industry and in agriculture. There will be representatives of labor, service clubs, our colleges and universities and religion. Lawyers and judges will make up not more than 10 per cent of the conference.

The names of speakers and the exact time and place of the conference will be announced in due course and invitations will go out to a representative group of Pennsylvanians.

President McTighe has named Thomas W. Pomeroy, Jr., of Pittsburgh, as Chairman of the Association's Committee which will handle this event. The other members of the Committee will be the 12 zone members of the Board of Governors and President McTighe, *ex-officio*. The Board very graciously insisted that the writer of this article serve as Honorary Chairman.

Chancellor-elect Voorhees of the Philadelphia Bar Association, who will have become Chancellor by the time the conference takes place, will appoint a Philadelphia Committee on arrangements which will cooperate with the State Bar Association Committee.

Plans for further activity are under consideration, but will probably not take shape until after the referendum vote.

## PROTECTION OF NEWS SOURCES IN PENNSYLVANIA

BY GREGORY M. HARVEY  
of the Philadelphia Bar

Newspaper reporters have long believed that their ability to obtain certain kinds of news is dependent upon public confidence that newsmen will protect their sources of information against disclosure. The Supreme Court of Pennsylvania recognized the validity of this belief in *Taylor and Selby Appeals*, 412 Pa. 32, 41, 193 A. 2d 181, 185 (1963) :

"We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information." (Emphasis by the Court.)

For this reason, the reporter's obligation to protect news sources has always been one of the most important parts of his code of ethics. Reporters have repeatedly declined to disclose their sources to grand juries and other investigating bodies, although the courts have generally refused to recognize any constitutional or common law privilege against such disclosure.<sup>1</sup> With few exceptions, reporters have served jail terms for contempt of court rather than comply with an order to disclose sources.<sup>2</sup>

Twelve states, including Pennsylvania, now have statutes which create a privilege against compulsory disclosure of news sources. The Pennsylvania Act of June 25, 1937, provides :

"No person, engaged on, connected with, or employed by any

1. *E.g.*, *Garland v. Torre*, 259 F. 2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

2. Note, 77 Harv. L. Rev. 556, 558 n. 8 (1964) ; Note, 36 Va. L. Rev. 192 n. 9 (1950).



newspaper of general circulation as defined by the laws of the Commonwealth, or any press association or any radio or television station, for the purpose of gathering, procuring, compiling, editing, or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof."<sup>3</sup>

In Pennsylvania and other states the original statutory privilege has been broadened in recent years to include radio and television newsmen as well as those employed by newspapers and press associations.

The judicial reaction to these statutes has been mixed. Courts in California and Maryland have held that newsmen were not compelled to produce certain evidence which would disclose sources,<sup>4</sup> but two New Jersey decisions indicate that a similar statutory privilege provides a relatively narrow protection.<sup>5</sup>

Until the opinions in *Taylor and Selby Appeals*,<sup>6</sup> no reported Pennsylvania case had construed the Act of 1937. Those cases involved subpoenas duces tecum served on the general manager and city editor of *The Bulletin* during a grand jury investigation of the Philadelphia city government. The subpoenas demanded six different kinds of material relating to John Fitzpatrick, a former city official.

Both Taylor and Selby declined to produce the materials, claiming the privilege granted by the Act of 1937. The Court of Quarter Sessions sustained the privilege as to much of the material demanded by the subpoenas, but held that an article published in *The Bulletin* constituted a waiver

3. Act of June 25, 1937, P.L. 2123, §1, as amended, Act of Dec. 1, 1959, P.L. 1669, §1, 28 P.S. §330 (1959).

4. In re *Howard*, 136 Cal. App. 2d 816, 289 P. 2d 537 (1955); *State v. Owens*, No. 677 Misc. 1925, Cir. Ct. Carroll County, Md., May 11, 1925.

5. *Brogan v. Passaic Daily News*, 22 N. J. 139, 123 A. 2d 473 (1956); *State v. Donovan*, 129 N.J.L. 478, 30 A. 2d 421 (Supreme Ct. 1943).

6. The opinion of the Court of Quarter Sessions is printed at 148 Phila. Legal Intelligencer 556 (April 22, 1963, p. 8).

of privilege as to information supplied by Fitzpatrick himself. On appeal, the Supreme Court held that no waiver had occurred and that the privilege was valid as to all the materials.

These two decisions make possible answers to several of the most important practical questions which may arise under a newsman's privilege statute: when does the statute apply, what materials does the statute protect, and when is the protection of the statute lost through waiver of the privilege.

#### WHEN DOES THE STATUTE APPLY?

In Pennsylvania the newsman's privilege is only one of several statutory privileges applicable to certain occupational groups, including lawyers, physicians, clergymen and certified public accountants.<sup>7</sup> Like the other occupational privileges, the statutory newsman's privilege is absolute, in that a court may not decline to apply the statute merely because the court believes that in a particular case the privilege should yield to some other interest. Such discretionary statutes have been suggested,<sup>8</sup> but none has been adopted.

Unlike some of the other newsman's privilege statutes, the language of the Pennsylvania Act of 1937 is unqualified by a requirement either that the information concerned have been published or that the information have been published in good faith and without malice.<sup>9</sup>

Under the terms of the act, the newsman's privilege may be claimed in "any legal proceeding," conducted in Pennsylvania under the authority of state law, and almost certainly in federal civil proceedings as well.<sup>10</sup>

7. Act of May 23, 1887, P.L. 158, §5(d), 28 P.S. §321 (1959) (attorneys); Act of June 7, 1907, P.L. 462, §1, 28 P.S. §328 (1959) (physicians); Act of Oct. 14, 1959, P.L. 1317, §1, 28 P.S. §331 (Supp. 1962) (clergymen); Act of Sept. 2, 1961, P.L. 1165, §8, 63 P.S. §9.11a (Supp. 1962) (certified public accountants).

8. *E.g.*, New York Law Revision Commission, Leg. Doc. No. 65A, pp. 6-7 (1949); Note, 54 Nw. U. L. Rev. 243 (1959).

9. See, *e.g.*, Md. Ann. Code art. 35, §2 (1957) (requiring publication); Ark. Stat. Ann. tit. 43, §917 (Supp. 1961) (not applicable if publication with malice).

10. See Fed. R. Civ. P. 43(a); 5 Moore, Federal Practice, ¶ 43.07 (1951). But see Fed. R. Crim. P. 26.

Since the privilege is absolute, unqualified, and available in any legal proceeding, the extent of the material protected by the privilege will frequently be the crucial factor in determining whether a newsman is justified in declining to answer questions or produce evidence.

#### WHAT DOES THE PRIVILEGE PROTECT?

One difference between the newsman's statute and other Pennsylvania occupational privileges is that the newsman's statute protects against compulsory disclosure of the "source of any information" obtained by the newsman, while the other statutes protect against the disclosure either of "confidential communications" or of "information" acquired in the course of performing the occupation.<sup>11</sup> While this difference in language might seem to indicate that information itself is never protected under the Act of 1937, both courts deciding the *Taylor and Selby* cases realized that the protection of sources contemplated by the act cannot be achieved unless the act is interpreted to allow newsmen to decline to reveal information which might disclose sources.

The lower court considered in detail several classes of material, each of which was held to be within the protection of the privilege. One class involved the request for memoranda and expense records of investigations conducted by the newspaper as a result of information furnished by John Fitzpatrick. The lower court had "no doubt that investigations" of this type would "encompass confidential interviews with other persons who would give information only on condition that their identity be kept secret." The request for production was therefore denied, because "exposure of the newsman's material in this instance might reveal the names of other informants."

Another demand was for reports of polygraph examinations of Fitzpatrick, made at the request of the newspaper.

11. Act of May 23, 1887, P.L. 158, §5(d), 28 P.S. §321 (1959) (attorneys, "confidential communications"); Act of Sept. 2, 1961, P.L. 1165, §8, 63 P.S. §9.11a (Supp. 1962) (certified public accountants, "information").

The court held that the experts conducting the examination were the "source of any information" concerning the tests. Since those experts had not been named so as to waive the privilege, the reports of the tests did not have to be produced, because such production would disclose the identity of the sources.

In making these determinations, the test applied by the Court of Quarter Sessions, and impliedly affirmed by the Supreme Court on appeal, is that "where the source of information is not identified or named, a grand jury does not have the right to the production of information supplied by the informants," if such production might tend to disclose the identity of the source. This rule was applied by the lower court both to information which probably had been obtained only by an assurance of confidentiality extended to the source, such as the results of investigations into municipal corruption, and to information not shown to have been obtained by an assurance of confidentiality, such as the reports of polygraph examiners. This uniform application of the rule is consistent with the language of the statute, which protects against compulsory disclosure of the source "of any information," and not merely against the disclosure of the source of "confidential" information and communications.

On appeal, the Supreme Court impliedly affirmed the lower court's application of the statute to prevent an indirect disclosure of sources. The Supreme Court also held that the effect of the statute cannot be avoided by requiring the newsman to produce information with the names of sources deleted, since this would realistically nullify the object and intent of the act.<sup>12</sup> Even with names deleted, the context of the information would frequently tend to disclose the identity of sources. The Supreme Court further held that the word "source," as used in the phrase "source of any information," includes documents and other inanimate sources as well as individual persons.<sup>13</sup>

12. *Taylor and Selby Appeals*, 412 Pa. at 43-44, 193 A. 2d at 186.

13. *Ibid.*, 412 Pa. at 40, 193 A. 2d at 184-85.

## HOW IS THE PRIVILEGE WAIVED?

The courts interpreting newsman's privilege statutes have agreed that the newsman's privilege can be waived, although the statutes themselves do not contain express waiver provisions similar to those in most other occupational statutes.<sup>14</sup> The courts have also agreed that waiver must result from acts of the newsman, or the news medium he represents, and not from acts of the source. This interpretation is required by the language of the typical statute, which states that "no person . . . employed . . . for the purpose of gathering . . . news, shall be required to disclose the source of any information. . . ." The Supreme Court of New Jersey, interpreting this language, held that "one thing is clear: the statute confers a privilege upon the newspaper editor, and not upon the source. . . ."<sup>15</sup> Since the privilege is conferred upon the newsman, the courts have reasoned that waiver of the privilege must be controlled by the newsman, who "can voluntarily make a disclosure."<sup>16</sup> This is in contrast with the other occupational privileges, which are controlled by the person who originates the privileged communication.<sup>17</sup>

The legislative grant of the privilege to the newsman, rather than to the source, may reflect the history of newsmen's cases at common law. Newsmen themselves have almost always protected their sources, even at the risk of punishment for contempt. In enacting the statutory privilege, the legislature probably extended protection to the newsmen alone, not to the source, because only the newsmen appeared to need any legislative protection.

Since the privilege may be waived, the crucial question in most of the reported cases has been whether particular acts constitute waiver. If the identity of the source has never been mentioned, no waiver has occurred. Doubt arises in cases in

14. *In re Howard*, 136 Cal. App. 2d 816, 289 P. 2d 537 (1955); *Brogan v. Passaic Daily News*, 22 N. J. 139, 123 A. 2d 473 (1956).

15. *Brogan v. Passaic Daily News*, 22 N. J. 139, 151, 123 A. 2d 473, 480 (1956).

16. *Ibid.*, 22 N. J. at 152, 123 A. 2d at 480.

17. *E.g.*, *Miller's Alleged Lunacy*, 27 Pa. County Ct. 49, 52 (C.P. 1902) (waiver of attorney's privilege by client).

which the newsman or his publication actually prints the name of the person who is the source.

If the person is merely identified as the participant in a news event, for example, as the speaker at a public meeting, the newsman may not be required to testify concerning the information learned from that person. Such identification does not identify the person as the source of any information obtained by the newsman. Even if the newsman prints in quotation marks a statement made by the named person at a public meeting, he is not required to testify concerning that statement, since the newsman may have received the statement from some other person in attendance at the meeting.<sup>18</sup>

A more difficult problem of waiver occurs when a newspaper discloses that a person has spoken to its reporters, or discloses that a person has been the source of a particular piece of information. One possible rule for these situations would hold that the newsman has waived the privilege entirely with regard to the named person, opening up inquiry as to all the information he has received from that source. The Supreme Court held, however, in the *Taylor and Selby* cases, that waiver applies only to statements made by the source "which are actually published or publicly disclosed and not to other statements made by the informer to the newspaper." 412 Pa. at 44, 193 A. 2d at 186. This more limited rule reflects the basic reasons for the privilege. In the typical case of information concerning wrongdoing in government, the need for an assurance of secrecy arises from the fear of a source that he may be subject to retaliation if he is publicly identified as the source of particular information which is distasteful to persons in authority. This possibility of retaliation is not likely to result merely from the fact that the source is known to speak with newsmen, because many persons connected with government frequently speak with newsmen.

Since the need for secrecy relates to the identification

<sup>18</sup>. In *re Howard*, 136 Cal. App. 2d 816, 819, 289 P. 2d 537, 538 (1955).

of an informant as the source of particular pieces of information, and not merely as a source of information in general, a disclosure by a newsmen that John Doe is the source of one piece of information will not be a waiver of the newsmen's privilege with regard to all the information received from John Doe. For example, a newspaper may safely publish the fact that John Doe, a public official, is the source of an ordinary statement concerning the operations of the municipal government, without waiving the newsmen's privilege against being compelled to disclose that John Doe is also the source of a published article concerning a sensational scandal within the same government. Similarly, a newspaper may safely publish that John Doe conferred with reporters at his usual weekly news conference, without waiving the privilege against being compelled to disclose that at the end of the conference John Doe produced information proving that Richard Roe had accepted a bribe.

Still undecided in Pennsylvania is the question whether waiver of the privilege can occur in the process of defending a libel action. The Supreme Court of New Jersey held that a newspaper which pleaded fair comment and good faith as affirmative defenses and produced testimony that the libelous article was based upon "a reliable source" could be compelled to disclose the identity of the source, since these actions by the newspaper amounted to a waiver of the privilege.<sup>19</sup> Whether Pennsylvania would adopt this rule in a similar case is uncertain, particularly since the New Jersey court was influenced by the doctrine, now abolished in Pennsylvania, that statutes in derogation of the common law should be strictly construed.<sup>20</sup> In the *Taylor and Selby* cases, on the other hand, the Pennsylvania court stated that the statute should be "liberally construed" in favor of the newsmen. In support of the New Jersey rule, there does seem to be an

19. *Brogan v. Passaic Daily News*, 22 N. J. 139, 151-54, 123 A. 2d 473, 480-81 (1956).

20. *Ibid.* The rule of strict construction is abolished in Pennsylvania by the Statutory Construction Act of May 28, 1937, P.L. 1019, §58, 46 P.S. §558 (1952).

unfairness in allowing a newspaper to rely on "reliable sources" as a defense and still withhold the identity of those sources. On the other hand, there may also be unfairness in holding that a mere plea of reliable sources operates as an automatic waiver of the privilege, particularly when the possibility of waiver may not have been foreseen. The rule more consistent with modern theories of pleading, and adopted by the New Jersey court, is to require the newspaper to make a choice between the defense and the privilege, rather than to hold that the pleading operates automatically as a waiver. Until the Pennsylvania rule is determined, news media defending libel actions should be careful to avoid an inadvertent waiver of the newsman's privilege.