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THE COURT OF SPECIAL APPEALS OF MARYLAND TO THE PRESS SHIELD LAW: "GOOD NIGHT, AND GOOD LUCK"*

By: Timothy M. Mulligan**

Maryland has long prided itself in being the first State in the country to enact a press shield law.[1] The current version of the statute, codified in Section 9-112 of the Courts and Judicial Proceedings Article of the Maryland Code,[2] is predominantly the result of a 1988 re-

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* "Good Night, and Good Luck" is the title of a 2005 movie produced by Grant Heslov and written by Grant Heslov and George Clooney. GOOD NIGHT AND GOOD LUCK (Warner Independent Pictures 2005). It concerns the conflict between veteran journalist Edward R. Murrow and U.S. Senator Joseph McCarthy's anti-Communist investigations in the 1950's. *Id.* The movie's title was Murrow's signature expression used in closing his "See It Now" TV broadcasts. *Id.*

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[1] 1896 Md. Laws 437; Telnikoff v. Matusevitch, 347 Md. 561, 588-89, 702 A.2d 230, 244 (1997). For a historical review of free press issues in Maryland, *see Telnikoff*, 347 Md. at 580-95, 702 A.2d at 240-47.

[2] The statute provides in part as follows:

> (c) Except as provided in subsection (d) of this section, any judicial, legislative, or administrative body, or anybody that has the power to issue subpoenas may not compel any person described in subsection (b) of this section to disclose:
> (1) The source of any news or information procured by the person while employed by the news media or while enrolled as a student, whether or not the source has been promised confidentiality; or
> (2) Any news or information procured by the person while employed by the news media, in the course of pursuing a professional activity, or any news or information procured by the person while enrolled as a student, in the course of pursuing a scholastic activity or in conjunction with an activity sponsored, funded, managed, or supervised by school staff or faculty, for communication to the public but which is not so communicated, in whole or in part, including:
> (i) Notes;
> (ii) Outtakes;

enactment,[3] which was designed to substantially expand the law, providing an absolute privilege for the source of news or information and a qualified privilege for any unpublished news or information which only could be overcome per the guidelines advocated by Justice Stewart in his dissent in *Branzburg v. Hayes*, 408 U.S. 665 (1972).[4]

Observers, however, should not necessarily conclude Maryland courts will enforce the press shield statute. There are only two reported decisions (both from Maryland's intermediate appellate court)[5] interpreting the 1988 re-enactment, and this article posits that both those decisions structurally followed the plurality opinion in *Branzburg*, not Justice Stewart's dissent, in contradiction to the enactment of Section 9-112. These rulings raise questions as to what extent a press shield law exists in Maryland and how future courts may interpret the statute.

> (iii) Photographs or photographic negatives;
> (iv) Video and sound tapes;
> (v) Film; and
> (vi) Other data, irrespective of its nature, not itself disseminated in any manner to the public.
> (d)(1) A court may compel disclosure of news or information, if the court finds that the party seeking news or information protected under subsection (c)(2) of this section has established by clear and convincing evidence that:
> (i) The news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or anybody that has the power to issue subpoenas;
> (ii) The news or information could not, with due diligence, be obtained by any alternate means; and
> (iii) There is an overriding public interest in disclosure.
> (2) A court may not compel disclosure under this subsection of the source of any news or information protected under subsection (c)(1) of this section.
> (e) If any person described in subsection (b) of this section disseminates a source of any news or information, or any portion of the news or information procured while pursuing an activity described in subsection (b) of this section, the protection from compelled disclosure under this section is not waived by the person.

MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2010) (hereinafter "Section 9-112" or "press shield law").

[3] MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (1988) (current version MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2010)).

[4] *See* Prince George's County v. Hartley, 150 Md. App. 581, 603, 822 A.2d 537, 550 (2003) (Maryland's press shield law "is essentially a codification of the factors discussed in the *Branzburg* dissent . . . .").

[5] *See Hartley,* 150 Md. App. at 602-03, 822 A.2d at 549-50; *see also Forensic Advisors,* 170 Md. App. 520, 907 A.2d 855.

I. BACKGROUND

Maryland first passed a press shield law in 1896.[6] Prior to 1988, the press shield law in Maryland was a one-sentence statute that protected only a reporter's sources.[7] The reporter's information itself was not

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[6] 1896 Md. Laws 437; *Telnikoff*, 347 Md. at 589-90, 702 A.2d at 244.

[7] The 1896 version of the press shield law provided:

> No person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose in any legal proceeding or trial, or before any committee of the Legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on an in which he is engaged, connected with or employed.

MD. ANN. CODE ART. XXXV § 1A (1896) (current version MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2010)).

In 1949, the law was re-enacted to include radio and television journalist:

> No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose in any legal proceeding or trial, or before any committee of the Legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on an in which he is engaged, connected with or employed.

MD. ANN. CODE ART. 35 § 2 (1949) (current version MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2010)).

In 1979 (the last re-enactment prior to 1988), the law was re-enacted to be gender neutral and to protect the source regardless of whether the information was disseminated.

> A person engaged in, connected with, or employed on a newspaper or journal or for any radio or television station may not be compelled to disclose in any legal proceeding or trial or before any committee of the Legislature or elsewhere, the source of any news or information that was obtained by the person for purposes of publication in the newspaper or journal or for purposes of dissemination by a radio or television station where the person is engaged, connected with or employed.

MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (1979) (current version MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2010)).

In 2010, the press shield privilege was extended to student journalists, *i.e.*, persons "[e]nrolled as a student in an institution of postsecondary education and engaged in any news gathering or news disseminating capacity recognized by the institution as a scholastic activity or in conjunction with an activity sponsored, funded, managed, or supervised by school staff or faculty." *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (b)(2) (2010).

protected, and if a reporter voluntarily disclosed the source, the privilege was waived.[8]

Although limited, the one-sentence statute at least meant that Maryland reporters had statutory protection for their sources – something unavailable at the federal level as of the time of this writing.[9] The only United States Supreme Court case directly addressing the First Amendment and journalists' source privilege is *Branzburg v. Hayes*.[10] In *Branzburg v. Hayes*, Justice White, writing for himself and Justices Burger, Blackmun, and Rehnquist, held that the First Amendment to the U.S. Constitution does not provide newspersons with even a qualified privilege against appearing before a grand jury and being compelled to answer questions as to either the identity of news sources or information received from those sources.[11]

Justice Powell concurred in the plurality's opinion, but wrote separately "to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."[12] Justice Powell emphasized that "no harassment of newsmen will be tolerated," and that a reporter may move to quash a subpoena if he believes that "the grand jury investigation is not being conducted in good faith."[13]

In dissent, Justice Douglas argued that journalists should have an absolute privilege against testifying.[14] In a separate dissent joined by Justices Brennan and Marshall, Justice Stewart advocated a qualified privilege:

> when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be

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[8] *See* Lightman v. State, 15 Md. App. 713, 724-26, 294 A.2d 149, 156-57, *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972); Tofani v. State, 297 Md. 165, 170-73, 465 A.2d 413, 415-17 (1983).

[9] At the time of this writing, the U.S. Senate is considering a federal press shield law entitled the Free Flow of Information Act, S. 448, 111th Cong. (2009). The U.S. House of Representatives passed a similar version of the shield bill in March 2009. H.R. 985, 111th Cong. (2009) and 145 Cong. Rec. H4202 (daily ed. March 31, 2009).

[10] Branzburg v. Hayes, 408 U.S. 665 (1972).

[11] *Id*. at 674, 685 (citing Caldwell v. United States, 434 F.2d 1081 (1970)).

[12] *Id.* at 709 (Powell, J., concurring).

[13] *Id.* at 710. Justice Powell's concurrence has been cited by some courts and commentators as evidence that *Branzburg* did in fact create a qualified reporter's privilege. *See, e.g.,* Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5426, at 746-47 (1st ed. 1980). This question, however, is beyond the scope of this article.

[14] *Branzburg*, 408 U.S. at 711-25.

> obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[15]

While the plurality in *Branzburg* did not recognize a constitutional newsperson's privilege, it acknowledged that individual state legislatures may create such privileges.[16] In 1988, the Maryland General Assembly expanded the news media privilege when it repealed the former, one-sentence version of the press shield law[17] and re-enacted the current, multi-paragraph version. The 1988 re-enactment of Section 9-112 represented a substantial increase in the privileges provided the news media and overruled all of the prior reporter subpoena cases in Maryland except *Bilney v. Evening Star Newspaper*[18] and *WBAL-TV Div., Hearst Corp. v. State*.[19] The holding in *Lightman v. State*[20] and dictum in *State v. Sheridan*,[21] stating that Section 9-112 applied only to the source of the news and not the news or information itself, was overruled by the new Section 9-112(c)(2). The holding in *Tofani v. State*,[22] that voluntary disclosure of a source waives the privilege, was overruled by the new Section 9-112(e).

Bilney, however, was not overruled because it held that a reporter's characterization of a source as gratuitous or voluntary does not constitute a waiver.[23] *WBAL-TV Div*. was not overruled because it assumed, without deciding, there was a qualified privilege to withhold unpublished news and applied the standard proposed by Justice Stewart's dissent in *Branzburg*.[24] The current Section 9-112 essentially adopted the standard advocated by Stewart's dissent for unpublished news or information.[25]

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[15] *Id*. at 743.

[16] *Id*. at 689. Justice White also stated:

> There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

Id. at 706.

[17] *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-112.

[18] 43 Md. App. 560, 406 A.2d 652, *cert. denied*, 286 Md. 743 (1979).

[19] 300 Md. 233, 477 A.2d 776 (1984).

[20] 15 Md. App. 713, 294 A.2d 149 (1972).

[21] 248 Md. 320, 322 n.1, 236 A.2d 18, 19 n.1 (1967).

[22] 297 Md. 165, 176, 465 A.2d 413, 419 (1983).

[23] *Bilney,* 43 Md. App. at 570, 406 A.2d at 658.

[24] *WBAL-TV Div.*, 300 Md. at 243-44, 477 A.2d at 781.

[25] *Branzburg*, 408 U.S. at 744 (Stewart, J., dissenting).

Maryland's current press shield law provides an absolute privilege as to a reporter's sources of information and a qualified privilege as to any unpublished information.[26] Pursuant to Section 9-112(c)(2), the qualified privilege extends to:

> Any news or information procured by the person while employed by the news media, in the course of pursuing professional activities, for communication to the public but which is not so communicated, in whole or in part, including:
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> (i) Notes;
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> (ii) Outtakes;
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> (iii) Photographs or photographic negatives;
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> (iv) Video and sound tapes;
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> (v) Film; and
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> (vi) Other data, irrespective of its nature, not disseminated in any manner to the public.

The qualified privilege can be overcome only by establishing by clear and convincing evidence all three of the following requirements set forth in Section 9-112(d)(1):

> (i) The news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or any body that the power to issue subpoenas;
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> (ii) The news or information could not, with due diligence, be obtained by any alternate means; and
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> (iii) There is an overriding public interest in disclosure.[27]

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[26] MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c)(1) & (d)(2) (2010).

[27] While no post-1988 Maryland decisions discuss the "public interest" requirement, other jurisdictions have found that in civil cases, "where the public interest in effective criminal law enforcement is absent," courts must be "mindful of the preferred position of the First Amendment and the importance of a vigorous press" which requires finding that "…in the ordinary civil case the civil litigant's interest in disclosure should yield to the journalist's privilege." *Zerilli*, 656 F.2d at 711-12.; *see also* Baker v. F & F Inv., 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 419 U.S. 966 (1974) ("in civil cases in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony").

Further, even if a party seeking information satisfies all three of the requirements of Section 9-112(d)(1), the issue of disclosure is still in the court's discretion as Section 9-112(d)(1) only provides that the court *may* order disclosure, not that it *shall* order disclosure.[28] It is, thus, still within the court's discretion whether disclosure should be ordered under the particular circumstances of the case before the court.[29]

Since the substantial revisions to the press shield law in 1988, there have been only two reported appellate decisions interpreting the statute: *Prince George's County v. Hartley*[30] and *Forensic Advisors v. Matrixx Initiatives*.[31] This article argues that both appellate decisions were decided contrary to the provisions of Section 9-112.

II. PRINCE GEORGE'S COUNTY V. HARTLEY

In *Hartley*, the Court of Special Appeals of Maryland held that the Circuit Court for Prince George's County erred in quashing civil administrative subpoenas on three reporters directing the reporters to give testimony at a police department disciplinary hearing of a police officer named Brian Lott.[32] The journalists reported in three separate newspapers[33] that they overheard Officer Lott say: "I wish I would have been there in '95. I would have shot the bastards, and we wouldn't have all this crap."[34]

The *Hartley* court found that the reporters were the "source" of the information sought, and Section 9-112 does not apply when the reporters are the "source" of the information.[35] In the alternative, the *Hartley* court held that even if the reporters were afforded privileges per Section 9-

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[28] *See* Bice v. Bernstein, 1994 WL 555379, at *2, 22 Media L. Rep. 1966 (Md. Cir. Ct. 1994) ("Even if the three prongs are demonstrated to exist by a sufficient quantum of evidence, the court is not required to order disclosure.").

[29] The guarantee of a free press derives from the First Amendment (U.S. CONST. amend. I.) and Articles 2 & 40 of the Maryland Declaration of Rights. It has been said that the First Amendment guarantee of a free press is "…not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[30] 150 Md. App. 581, 822 A.2d 537 (2003).

[31] 170 Md. App. 520, 907 A.2d 855 (2006), *cert. granted*, 396 Md. 11, 912 A.2d 648 (2006), *appeal dismissed, as moot prior to oral argument*, 397 Md. 396, 918 A.2d 468 (2007). A third case, *Bice*, 1994 WL 555379, 22 Media L. Rep. 1966 (Md. Cir. Ct. 1994), was a trial court opinion.

[32] *Hartley*, 150 Md. App. at 603, 822 A.2d at 550.

[33] Ruben Castenada reported for *The Washington Post*, Eric Hartley reported for *The Prince George's Journal*, and Gregory C. Johnson reported for *The Gazette Newspapers*. *Id.* at 584, 822 A.2d at 539.

[34] *Id.*

[35] Although the *Hartley* court referred to the reporters as "the source" of the information, this is technically incorrect. Officer Brian Lott was "the source" of the statements in question. The reporters merely overheard Officer Lott's statements. By "source," the *Hartley* court means the reporter personally observed the information. *Id.* at 601-02, 822 A.2d at 549.

112(c)(1) or (2), the court was persuaded that Prince George's County satisfied the prerequisites of Section 9-112(d).[36]

A. Prince George's County Submitted No Evidence in Support of Its Position

The alternative ruling, however, was contrary to Section 9-112(d) because Prince George's County did not introduce any evidence in support of its position.[37] Counsel for Prince George's County merely made unsubstantiated oral representations to the trial court.[38] "At the hearing, appellant's counsel *represented to the circuit court* that the internal affairs investigator questioned everyone at the courthouse who might have heard the statement."[39]

Section 9-112(d)(1) provides that the reporter's qualified privilege can only be overcome with *clear and convincing evidence* from the party seeking disclosure.[40] Unsubstantiated allegations of an attorney are not evidence.[41] In their appellate briefs, two of the reporters emphasized the lack of evidence submitted by Prince George's County,[42] but the *Hartley* court ignored this point and did not explain how Prince George's County satisfied the prerequisites of Section 9-112(d) without submitting any evidence to support its position.

B. Prince George's County Did Not Exhaust Alternate Means

Section 9-112(d)(1)(ii) requires clear and convincing evidence that "[t]he news or information could not, with due diligence, be obtained by any alternate means." The reporters argued that Prince George's County should be required to receive Officer Lott's testimony before taking testimony from the reporters, as Officer Lott may admit to the

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[36] *Hartley*, 150 Md. App. at 602-03, 822 A.2d at 550.

[37] *See* Brief of Appellees Ruben Castaneda and Gregory C. Johnson at 11, Prince George's County v. Hartley, 150 Md. App. 581, 822 A.2d 537 (2003) (No. 2660, Sept. Term, 2001).

[38] *Hartley*, 150 Md. App. at 597, 822 A.2d at 546.

[39] *Id.* (emphasis supplied).

[40] The "clear and convincing evidence" required by Section 9-112(d)(1) is a "'heightened standard' . . . [that] requires 'a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in a criminal case.'" 1986 Mercedes Benz 560 CE v. State, 334 Md. 264, 283, 638 A.2d 1164, 1173 (1994) (quoting Berkey v. Delia, 287 Md. 302, 318, 413 A.2d 170, 177 (1980)).

[41] *See* Heard v. Foxshire Assoc., LLC, 145 Md. App. 695, 707, 806 A.2d 348, 355 (2002) (unsworn statements by attorney were merely argument and not evidence); *see also* Simpson v. State, 121 Md. App. 263, 278, 708 A.2d 1126, 1133 (1998) (allegations in State's pleadings are not evidence).

[42] *See* Brief of Appellees Ruben Castaneda and Gregory C. Johnson at 11, Prince George's County v. Hartley, 150 Md. App. 581, 822 A.2d 537 (2003) (No. 2660, Sept. Term, 2001).

statements.[43] In a footnote, the *Hartley* court dismissed this argument, speculating that "[i]t is most unlikely that Lott would testify that he made such a statement."[44]

The court's conclusion was conjecture. Knowing that three reporters overheard his statement, Officer Lott may have decided that admitting to an inappropriate remark, and facing possible sanction from the police department, was a lesser evil than criminal indictment for perjury. Section 9-112 places the burden on the party seeking the information to demonstrate it could not, with due diligence, obtain the information by alternate means.[45] A decision compatible with the prerequisites of Section 9-112 would have found that Prince George's County failed to meet its burden without taking Officer Lott's testimony.

C. Personal Observations of a Journalist Are Entitled to the Privileges

The *Hartley* court held that Section 9-112 does not apply when a reporter is the "source" of the news, and stated:

> The legislature, however, made no change to the principle that a news reporter who personally observes a situation is the "source" of the information. Because none of the appellees is the "source" of information protected by the Shield Law, and because all of the appellees have "communicated" what they claim to have witnessed, neither C.L. § 9-112(c)(1) nor C.L. § 9-112(c)(2) is applicable to the case at bar.[46]

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[43] *See* Brief of Appellees Ruben Castaneda and Gregory C. Johnson at 11, Prince George's County v. Hartley, 150 Md. App. 581, 822 A.2d 537 (2003)(No. 2660).

[44] *Hartley*, 150 Md. App. at 597 n.10, 822 A.2d at 547 n.10.

[45] MD. CODE ANN., CTS. & JUD. PROC. §9-112(d)(1)(ii). No Maryland case has defined the meaning of "with due diligence." Courts in other jurisdictions, however, have suggested the moving party must meet a high burden in order to protect First Amendment rights. *See, e.g.,* Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) ("the obligation is clearly very substantial . . . an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"); Shoen v. Shoen, 5 F.3d 1289, 1296 (9th Cir. 1993) ("requesting party must demonstrate that she has exhausted all reasonable alternative means for obtaining the information"); Hutira v. Islamic Republic of Iran, 211 F. Supp. 2d 115, 122 (D.C. 2002) (even though the party seeking disclosure "may have considerable difficulty obtaining the information," she still must attempt "to obtain the information elsewhere").

[46] *Hartley*, 150 Md. App. at 602, 822 A.2d at 549. The court in *Hartley* also noted: "We agree with that analysis, which comports to the general rule dating to 1742 that 'the public has a right to every man's evidence.'" *Id.* at 593, 822 A.2d at 544. The First Amendment and Maryland's press shield law, however, did not exist in 1742. Thus, the public now has a more limited right to evidence discovered by the press and protected by the First Amendment or shielded under Maryland law. Furthermore, as Justice Stewart pointed out in his dissent in *Branzburg*: ". . . the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment, the Fourth Amendment and the evidentiary privileges of common law." 408 U.S. at 737 (footnotes omitted).

That ruling, however, was contrary to Section 9-112. First, the press shield law is not waived even if the source, news, or information is "communicated."[47] Second, Section 9-112 makes no distinction as to whether or not the reporter "personally observed" the news or information sought in the subpoena. It simply provides an absolute privilege as to the *source* of *any* news or information[48] and a qualified privilege for "*any* news or information."[49] The use of the modifier "any" in Section 9-112(c)(1) and (2) makes it clear that the absolute privilege applied to the source of *all* news or information and the qualified privilege applies to *all* unpublished news or information.[50] To restrict the

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[47] *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-112(e) ("If any person described in subsection (b) of this section disseminates a source of nay news or information, or any portion of the news or information procured while pursuing an activity described in subsection (b) of this section, the protection from compelled disclosure under this section is not waived by the person").

The Floor Report for Senate Bill 87 (the current Section 9-112) specifically discussed the waiver issue:

> Third, the bill provides that the protection from compelled disclosure is not waived by dissemination of a source, or of any portion of news or information procured while pursuing professional activities. This provision specifically addresses the ruling of the Court of Appeals in Tofani v. State, 465 A.2d 413 (1983). In that case, the Court ruled that since Tofani had identified some of her sources in her stories, she had waived her shield law protection and could be compelled to reveal information from those sources.

While the *Hartley* court did not discuss this issue, what it may have meant regarding the "communication" (*i.e.*, publication) of Lott's statements is that Section 9-112(c)(2) extends the qualified privilege only to unpublished news or information ("but which is not so communicated . . ."). One interpretation may be that the "communicated" information is not subject to the qualified privilege of Section 9-112(c).

The Preamble for the statute, however, specifically expressed the intent to grant the qualified privilege to both published and unpublished information ("whether published or unpublished, transmitted or not transmitted . . ."). A review of the Bill File for Senate Bill 87 provides no explanation as to what the Legislature meant by the "but which is not so communicated" phrase, but the most logical interpretation is that the actual publication is not privileged and can be discovered, but any other information is subject to the qualified privilege. Such an interpretation would be consistent with Section 9-112(e) and the Preamble to the statute. Similarly, courts in other jurisdictions have held that while the publication itself may not privileged, efforts simply to verify a published quotation or statement are not permitted due to their intrusion on a free press. *See, e.g.*, Parsons v. Watson, 778 F. Supp. 214, 217 (D. Del. 1991); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982). Nor is discovery designed to question the veracity or competence of the reporter, editorial bias, etc., permitted. *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974); *In re* Consumers Union, 495 F. Supp. 582, 585 (S.D.N.Y. 1980).

[48] *See* Section 9-112(c)(1) & (d)(2).

[49] Section 9-112(c)(2) (emphasis added).

[50] Section 9-112(c)(1)-(2).

scope of Section 9-112(c)(1) and (2) only to "news or information not personally observed by the newsperson" would be equivalent to reading the word "any" out of the statute.

Further, to restrict Section 9-112(c)(2) only to news or information not personally observed by a newsperson would essentially eviscerate the privileges of Section 9-112. For example, it is not uncommon for a reporter to go undercover in pursuit of a story.[51] In doing so, the reporter becomes the "source" of what he or she uncovers according to the *Hartley* court.[52] Nor is it uncommon for reporters to observe or overhear a newsworthy matter while performing their normal duties, which would also qualify the reporters as a "source" based on the *Hartley* definition.[53] According to *Hartley*, any time a reporter simply interviews someone, the reporter is the "source" of information regarding what the interviewee said.[54] A court applying the *Hartley* rule would decline to extend the qualified privilege to information gathered by a reporter in such a situation.[55] None of these results follow from the language of Section 9-112(c) or the intent of the General Assembly in re-enacting the current version of the press shield law.[56]

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[51] *See* Food Lion, Inc. v. Capital Cities, 194 F.3d 505, 525 (1999) ("ABC's undercover reporters presented themselves to Food Lion, representing all . . . matters falsely."); Sussman v. ABC, Inc., 186 F.3d 1200, 1201 (1999) (ABC's undercover reporter made videotapes that were challenged under federal wiretapping statutes); UnitedStates v. Wilson, 636 F.2d 225, 226 (1980) ("An undercover investigation by a Kansas City newspaper reporter revealed Wilson's use of secretaries for his business and Wilson was charged in a six count indictment.").

[52] *See Hartley*, 150 Md. App. at 593-94, 822 A.2d at 544 (citing Alexander v. Chicago Park District, 548 F. Supp. 277, 278 (N.D. Ill. 1982) (holding that news reporters held no privilege to avoid testifying about events they personally observed during an investigation)).

[53] *See Hartley*, 150 Md. App. at 593, 822 A.2d at 544 (citing Dillon v. San Francisco, 748 F. Supp. 722, 726 (N.D. Cal. 1990) (holding that a cameraman cannot refuse to testify about an incident that the cameraman personally observed while filming a different story)).

[54] *See Hartley*, 150 Md. App. at 581, 822 A.2d at 537.

[55] *See id*.

[56] The preamble to Chapter 113 of the 1988 Laws of Maryland articulates the purpose of the 1988 re-enactment of Section 9-112:

> WHEREAS, It is the intention of the General Assembly to grant the news media an unqualified privilege not to reveal sources of information, and a qualified privilege not to disclose information, whether published or unpublished, transmitted or not transmitted; and
>
> WHEREAS, The General Assembly grants these privileges to the news media to promote the overall freedom of this State's gatherers and disseminators of information, to give the news media a *free and unfettered* flow of information, to perpetuate the necessarily confidential relationship between news gatherers and their sources of information, and to protect the public interest . . . .

1988 Md. Laws 2059 (emphasis added).

In discussing its holding that the press shield law does not apply when the reporter is the "source" of the information, the *Hartley* court relied on the 1972 decision in *Lightman v. State*.[57] *Lightman* involved a newspaper reporter who, while preparing a story on illegal drug traffic in Ocean City, Maryland, reportedly observed marijuana use at a pipe shop.[58] In response to a grand jury subpoena, the reporter was asked to state the location of the pipe shop.[59] The reporter refused, stating that to disclose the location would lead to the disclosure of the source of his story, *i.e.*, the pipe shop owner and the source were protected pursuant to the 1972 version of Section 9-112.[60]

In 1972, Section 9-112 only provided a privilege for the source of information, not "any news or information" as the current statute provides.[61] Accordingly, *Lightman* held:

> Where a newsman, by dint of his own investigative efforts, personally observes conduct constituting the commission of criminal activities by persons at a particular location, the newsman, and not the persons observed, is the "source" of the news or information in the sense contemplated by the statute. To conclude otherwise in such circumstances would be *to insulate the news itself from disclosure and not merely the source . . . .*[62]

Essentially, *Hartley* found that the 1988 re-enactment of Section 9-112 did not affect the *Lightman* holding.[63] *Lightman,* however, was overruled in 1988 because the current version of Section 9-112 provides for a qualified privilege of the *news itself* regardless of whether the reporter "personally observed" it.[64]

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[57] *Hartley*, 150 Md. App. at 600-01, 822 A.2d 548-49 (citing Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (1972)).

[58] *Lightman*, 15 Md. App. at 714, 294 A.2d at 151.

[59] *Id.* at 714-15, 294 A.2d at 151.

[60] *Id.* at 715-16, 294 A.2d at 151-52.

[61] *See id.* at 717-18, 294 A.2d at 153. *See also* MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2010).

[62] *Lightman*, 15 Md. App. at 725, 294 A.2d at 156-57 (emphasis added).

[63] *Hartley*, 150 Md. App. at 601-02, 882 A.2d at 549.

[64] *Id.* at 602, 822 A.2d at 549**.** The *Hartley* court cited seven of out-of-state cases it represented found consistent with its holding. *Hartley* at 593, 822 A.2d at 544. All cases, however, are inapposite to MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2010). For example, *State v. Knutson*, 523 N.W.2d 909 (Minn. Ct. App. 1994) noted that, unlike Maryland, Minnesota's press shield law applies to a reporter's sources, not to unpublished information that does not identify a source. 523 N.W.2d at 912.

Furthermore, in *State v. Turner*, 550 N.W.2d 622 (Minn. 1996), the Minnesota Supreme Court refused to find that the Minnesota Constitution provided more protection to the press than the United States Constitution and following the *Branzburg* plurality opinion, held that that a reporter may be compelled to testify to events he personally observed. *Id.* at 628. The *Ziegler*, *Alexander*, and *Dillon* courts, lacking federal press shield law, also relied on the

III. *FORENSIC ADVISORS V. MATRIXX INITIATIVES*

At issue in *Forensic Advisors v. Matrixx Initiatives* was a subpoena issued by Matrixx Initiatives, Inc. ("Matrixx") in August 2004 to Maryland-based Forensic Advisors, Inc., ("Forensic Advisors") a publisher of a non-party financial newsletter, *The Eyeshade Report*. Matrixx brought a defamation suit in Arizona against several pseudonymous Internet-message-board posters.[65] While Forensic Advisors did not post anything on the Internet regarding Matrixx, they expressed concerns regarding Matrixx's accounting and business operations and noted reports of possible health risks of some of its Zicam® homeopathic cold-remedy products.[66] In 2009, the FDA issued a press release advising consumers not to use certain Zicam® cold-remedy products "because they are associated with the loss of sense of smell, anosmia. Anosmia may be long-lasting or permanent."[67]

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plurality opinion in *Branzburg*. *See* In re: Ziegler, 550 F. Supp. 530 (W.D.N.Y. 1982); Alexander v. Chi. Park Dist., 548 F.Supp. 277 (N.D. Ill. 1982); Dillon v. S.F., 748 F. Supp. 722 (N.D. Cal. 1990). *Compare with supra* text accompanying note 4 (discussing Maryland's codification of Justice Stewart's dissent in *Branzburg*).

The *Hartley* court also relied on *Bell v. Des Moines*, 412 N.W.2d 585 (Iowa 1987), whereby the *Bell* court reversed and remanded a trial court ruling permitting discovery of news footage. The court held that the footage was presumptively privileged and the party seeking the footage failed to establish the footage was necessary to its case or that it had exhausted other sources for the information. *Id.* at 588. In contrast, the *Hartley* Court rejected the alternative source rule. 150 Md. App. at 592-93, 822 A.2d at 543-44.

Finally, in Bartlett v. Superior Court, 150 Ariz. 178, 722 P.2d 346 (Ct. App. 1986) the court held that a party in a personal injury suit resulting from an auto accident was entitled to a news station's videotape of the accident because, unlike Maryland's press shield law, Arizona's press shield law only protects against disclosure of confidential sources. *Bartlett*, 150 Ariz. at 183, 722 P.2d at 351.

[65] 170 Md. App. at 532, 907 A.2d at 861.

[66] *Id.* at 524, 907 A.2d at 857. Matrixx is publicly traded on the NASDAQ as MTXX. *Id.* at 523, 907 A.2d at 857.

[67] Press Release, U.S. Food and Drug Admin., FDA Advises Consumers Not To Use Certain Zicam Cold Remedies: Intranasal Zinc Product Linked to Loss of Sense of Smell (June 16, 2009), http://www.fda.gov/Newsevents/Newsroom/PressAnnouncements/ucm167065.htm. Matrixx's stock priced declined 70% on the day of the FDA press release. *See, e.g.*, Susan Heavey, "Zicam Recall Could Cost $10 Million, Shrink Company," Reuters, June 18, 2009, http://www.reuters.com/article/2009/06/18/us-matrixx-zicam-idUSTRE55H43Z20090618. In a warning letter addressed to Matrixx that same day, the FDA stated: "We are not aware of any data establishing that the Zicam Cold Remedy intranasal products are generally recognized as *safe and effective* for the uses identified in their labeling." Letter, U.S. Food and Drug Admin. (June 16, 2009), http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm166909.htm (emphasis added). The FDA noted that it had received 130 complaints indicating loss of smell resulting from Zicam® product usage, and discovered Matrixx failed to inform the FDA of an additional 800 complaints of Zicam induced anosmia. *Id.* In a subsequent filing with the U.S. Securities and Exchange Commission ("SEC"), Matrixx admitted receiving approximately 2,000 anosmia-related complaints from consumers from the time Zicam intranasal products were put on the market

The subpoena at issue, the second subpoena Matrixx issued to Forensic Advisors, sought, *inter alia*, information regarding Forensic Advisors' sources and subscribers.[68] Matrixx claimed it needed the information because some of the pseudonymous Internet posters made references to a Forensic Advisors' report.[69]

On appeal, Forensic Advisors argued, *inter alia*, that it was entitled to the "news media shield" of Section 9-112 and that Matrixx had not satisfied the requirements of Section 9-112(d), and therefore, the trial court erred in denying its motion to quash the second subpoena.[70] Forensic Advisors also maintained that the First Amendment guarantees the right to speak anonymously, and that Matrixx should not be allowed to conduct discovery that might lead to the identity of anonymous speakers without first demonstrating that it has a legitimate case and that its rights, on balance, outweigh the rights of the anonymous speakers.[71] The Court of Appeals of Maryland subsequently adopted this position in an unrelated case, *Independent News v. Brodie*.[72]

The *Forensic Advisors* court did not address the Internet posters' First Amendment right to speak anonymously, but found that financial newsletters like *The Eyeshade Report* are entitled to the news media shield privilege.[73] Nonetheless, the *Forensic Advisors* court refused to quash the subpoena "because it is clear that the subpoenas issued to appellants seek *much more information* than is subject to protection under the statute."[74] The court held that Forensic Advisors first must respond

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in 1999 through July 7, 2009. *See* Matrixx Initiatives, Inc., Current Report (Form 8-K) (Nov.19, 2009).

[68] *Forensic Advisors*, 170 Md. App. at 525-26, 907 A.2d at 858-59.

[69] *Id.* at 528, 907 A.2d at 859. *See also* Brief for the Appellees at 6-7 Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., 170 Md. App. 520, 907 A.2d 855 (2006) (No. 02621, Sept. Term, 2004), 2005 WL 2705524 at *6-7.

[70] Brief for the Appellants at 28-31, Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., 170 Md. App. 520, 907 A.2d 855 (2006) (No. 02621, Sept. Term, 2004), 2005 WL 2705523 at *28-31.

[71] Brief for the Appellants, Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., 170 Md. App. 520, 907 A.2d 855 (2006) (No. 02621, Sept. Term, 2004).

[72] 407 Md. 415, 966 A.2d 432 (2009).

[73] *Forensic Advisors*, 170 Md. App. at 535, 907 A.2d at 863. The *Matrixx* court cited *Summit Technology v. Healthcare Capital*, 141 F.R.D. 381 (D. Mass. 1992), as consistent with its holding that financial newsletters met the definition of "news media" per Section 9-112(a)(9). But, in this era of Internet blogging, the question of "who is a reporter" undoubtedly will be contested in multiple courts in the future. While no court has yet established a universally accepted definition, at least three U.S. Courts of Appeals have considered the question and all arrived at a similar conclusion, *i.e.*, investigative journalists who intend to distribute the results of their investigation to the public from the inception of their investigation are entitled to the privilege regardless of their medium of distribution. *See* von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987), *cert denied*, 481 U.S. 1015 (1987); Shoen v. Shoen, 5 F.3d 1289 (1993), *appeal after remand*, 48 F.3d 412 (9th Cir. 1995); *In re* Madden, 151 F.3d 125 (3d Cir. 1998).

[74] *Forensic Advisors*, 170 Md. App. at 535, 907 A.2d at 863 (emphasis added).

and object to the discovery "on a question-by-question basis" and, thereafter, the court would review whether the press shield privileges applied.[75]

A. Matrixx Submitted No Evidence in Support of Its Position

Just as in *Hartley*, the *Forensic Advisors* decision was contrary to Section 9-112 because the court relied on unsubstantiated representations in Matrixx's brief rather than the "clear and convincing evidence" required by Section 9-112(d)(1).[76] Matrixx made no showing that the information sought was relevant to a significant legal issue because it did not produce any of the alleged defamatory statements at issue.[77] Nor did Matrixx produce any evidence of a link between Forensic Advisors' report and the alleged defamatory Internet postings.[78] Matrixx also failed to show that the information could not be obtained by alternate means or demonstrate that there was an overriding public interest in disclosure.[79]

B. The Qualified Privilege Extends to Any Unpublished News or Information

The court gave no explanation, guidelines, or indication as to what information sought by Matrixx constituted "much more information than is subject to protection" pursuant to the press shield statute.[80] This may be because the ruling is inconsistent with the statute as the qualified privilege of Section 9-112(c)(2) extends to "*any*" unpublished news or information. There is no such thing as "much more information" than

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[75] *Id*. at 535, 907 A.2d at 864. The court declined to consider Forensic Advisors' argument that none of the claims in Matrixx's complaint stated a ground upon which relief could be granted, holding that "[t]his argument . . . was not presented to [the trial court]." *Id.* at 533, 907 A.2d at 862. This is incorrect, however, as more than half of Forensic Advisors' opening trial brief (pp. 7-23) dealt with deficiencies in Matrixx's complaint and case. The "significant legal issue" requirement of Section 9-112(d)(1)(i) necessitates establishing that the underlying lawsuit is legitimate because a legal issue would be moot, not significant, if a complaint were legally deficient or the underlying lawsuit were meritless. *See id*. at 528-29, 907 A.2d at 860.

[76] MD. CODE ANN., CTS. & JUD. PROC. § 9-112(d)(1) (West 2010).

[77] *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-112(d)(1)(i) (West 2010).

[78] *Forensic Advisors*, 170 Md. App. at 526-27, 907 A.2d at 858-59.

[79] MD. CODE ANN., CTS. & JUD. PROC. § 9-112(d)(1)(ii-iii) (West 2010). Matrixx submitted only six exhibits in support of its opposition to the motion to quash the subpoena. The exhibits included a copy of Forensic Advisors' report on Matrixx dated August 26, 2003 (E108-131); the subpoena at issue (E132-138); an affidavit of service of the subpoena (E139); and three letters between counsel for Matrixx and Forensic Advisors discussing the subpoena at issue. *See Forensic Advisors*, 170 Md. App. at 524-28, 907 A.2d at 857-59. Matrixx's only witness was its process server who testified regarding a dispute concerning whether the subpoena was properly served. *See id*. at 525, A.2d at 858. Matrixx proffered no additional witnesses or exhibits.

[80] *Forensic Advisors*, 170 Md. App. at 535, 907 A.2d at 863.

"any . . . information."[81] The legislature could hardly be more all-encompassing than extending the privilege to "*any*" unpublished news or information.[82]

C. The Burden is on the Party Seeking Information to Meet the Requirements of Section 9-112(d)(1)(ii)

The finding that a reporter must first respond and object to the discovery "on a question-by-question basis,"[83] and, thereafter, the court will review whether the press shield privileges apply is contrary to the language and legislative intent of the press shield law. First, Section 9-112 does not mandate proceeding on a question-by-question basis.[84] Rather, Section 9-112(d)(1)(ii) places the burden on the party seeking information to demonstrate by clear and convincing evidence, *inter alia*, that the "information could not, with due diligence, be obtained by any alternate means . . . ." The plaintiff's burden is triggered by the reporter filing a motion to quash the subpoena.[85] Second, requiring the reporter to respond initially on a question-by-question basis before moving to quash the subpoena defeats the General Assembly's intent to allows journalists to disseminate information to the public in a "*free and unfettered*" manner.[86]

Third, if journalists were forced to attend depositions or otherwise respond to discovery on a question-by-question basis before the party seeking information demonstrated it can meet the requirements of Section

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[81] *See id.*, 907 A.2d at 863. Section 9-112(c)(2), extends the qualified privilege to "[a]ny news or information procured by the person while employed by the news media, in the course of pursuing a professional activity . . . ." MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c)(2) (West 2010). This suggests that if a reporter has any information procured while not employed by the news media, it may be discoverable. *See id*. This was not an issue in *Forensic Advisors*, however, because the reporter was employed by Forensic Advisors during the relevant period. *See Forensic Advisors*, 170 Md. App. at 526-27, 907 A.2d at 858-59.

[82] *See supra* notes 49-62 and accompanying text (discussing the use of the modifier "any" in Section 9-112(c)(1) & (2)).

[83] *Forensic Advisors*, 170 Md. App. at 535, 907 A.2d at 864.

[84] *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2010).

[85] *Hartley*, 150 Md. App. 581, 603, 822 A.2d 537, 550 (2003) (the court acknowledged that Section 9-112 "is essentially a codification of the factors discussed in the *Branzburg* [*i.e.*, Justice Stewart's] dissent." In *Branzburg*, Justice Stewart noted that the requirements a party seeking discovery must meet are triggered once the reporter moves to quash the subpoena. 408 U.S. 665, 743 (1972) ("Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena . . . ,"). Even in non-reporter cases, First Amendment considerations require allowing the interested party to file a motion to quash. *See, e.g.*, *Brodie*, 407 Md. at 457, 966 A.2d at 457 ("a trial court . . . should . . . withhold action to afford the anonymous posters a reasonable opportunity to file and serve opposition to the application . . . . "). *See also* Solers, Inc. v. Doe, 977 A.2d. 941, 955 (D.C. 2009) (". . . the court should delay action to allow [the recipient] a reasonable opportunity to file a motion to quash the subpoena.").

[86] 1988 Md. Laws 2059, *supra* note 56.

9-112(d)(1), then there is little downside to serving discovery subpoenas on reporters in the hope of possibly eliciting some information. The party seeking information would thereby be using the journalists as cheap investigators. Justice Stewart expressed a similar concern in his dissent in *Branzburg*,[87] as did the Reporters Committee for Freedom of the Press in its testimony to the Maryland House Judiciary Committee in favor of the current version of Section 9-112.[88]

Fourth, requiring a reporter to respond initially to a subpoena on a question-by-question basis will only increase the distraction resulting from the subpoena and possibly stop a reporter's investigation in its tracks.[89] As one court noted:

> The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted (citations omitted). Moreover, because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a nonparty would be widespread if not restricted. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of

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[87] *Branzburg,* 408 U.S. at 744, n. 34 (Stewart, J., dissenting) ("If this requirement [*i.e*., probable cause that the newsman has information that is clearly relevant to a specific probable violation of criminal law] is not met, then the government will basically be allowed to undertake a "fishing expedition" at the expense of the press.").

[88] Ms. Janet Kirtley, Executive Director of the Reporters Committee for Freedom of the Press, stated:

> There also is no current safeguard in Maryland law to deter those with subpoena power from exploiting journalist as cheap investigators. Cavalier use of subpoenas by lazy government officials or litigants is deterred by the requirement that alternative sources of information be pursued with due diligence *before a journalist is subpoenaed*.

Statement of the Reporters Committee for Freedom of the Press Regarding Senate Bill No. 87 before the Maryland House Judiciary Committee, March 8, 1988, p. 6 (emphasis supplied).

[89] For example, as *Forbes* magazine reported, Forensic Advisors used to publish approximately 70 reports a year. *See* MacDonald, Elizabeth, *Legal Congestion*, *FORBES*, Dec. 12, 2005, *available at* http://www.forbes.com/forbes/2005/1212/060.html. If 70 companies a year served two subpoenas each on a one-person newsletter like *Forensic Advisors* (two subpoenas were served in the *Matrixx* case), the reporter would spend 140 days a year (2 x 70, *i.e*., more than half the business days in a year) attending depositions, responding to document requests, etc. This would defeat the General Assembly's intent ". . . to give the news media a *free and unfettered* flow of information . . . ." Pmbl. to ch. 113 of 1988 Md. Laws, *supra* note 56. Further, a media company may be forced, due to ethical reasons, to remove a reporter from an investigation once he testifies pursuant to a subpoena.

> newsgathering activity, would be particularly inimical to the vigor of a free press.[90]

Fifth, a subpoena may be used by the target of a reporter's investigation to harass or intimidate the reporter from continuing his investigation or to retaliate for past stories. Requiring every subpoenaed reporter to appear, produce records, and answer or object to inquiries on a question-by-question basis enhances the possibility that a subpoena would be used for ulterior motives (*e.g.*, "send a message" to the reporter that he might be added as a defendant in a lawsuit).

Sixth, requiring a reporter to appear and respond prior to the showing mandated by Section 9-112(d)(1) may give the appearance that the reporter is a tool of the party seeking the information. This may deter current or future sources from communicating with the reporter.[91] Seventh, requiring a reporter to respond on a question-by-question basis adds to the time and expense involved in journalistic pursuits. As one court noted, the "frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees."[92] In this era of shrinking profits, personnel, and outright closures of media organizations, lost time and increased legal fees are legitimate concerns.

The Court of Appeals of Maryland granted Forensic Advisors' petition for *writ of certiorari*.[93] Rather than present an argument, however, Matrixx dismissed its subpoena and the underlying suit in the Arizona court just weeks before briefs were due in Maryland. Matrixx then moved the Court of Appeals of Maryland to dismiss the appeal as moot due to dismissal of its underlying case. The Court of Appeals dismissed the appeal as moot over Forensic Advisors' request to hear the case despite the dismissal due to the public interest involved and as an issue capable of repetition but escaping review.[94]

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[90] O'Neil v. Oakgrove Constr. Co., 523 N.E.2d 277, 279 (N.Y. 1988).

[91] *See, e.g.,* Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 35 (2d Cir. 1999) ("Permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties"); *Branzburg*, 408 U.S. at 731 (Stewart, J., dissenting) ("[S]ources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because of uncertainty about exercise of the power [to subpoena] will lead to self-censorship.").

[92] U.S. v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).

[93] *Forensic Advisors*, 170 Md. App. 520, 907 A.2d 855, *cert. granted*, 396 Md. 11, 912 A.2d 648 (2006).

[94] *Forensic Advisors*, 170 Md. App. 520, 907 A.2d 855, *appeal dismissed, as moot prior to oral argument*, 397 Md. 396, 918 A.2d 468 (2007).

IV. LESSONS FROM *HARTLEY* AND *FORENSIC ADVISORS*

The takeaway from *Hartley* and *Forensic Advisors* is that courts reviewing Maryland's press shield law may have difficulty reconciling the court decisions with Section 9-112. While the statute is straightforward, the Court of Special Appeals of Maryland's application has been anything but.[95]

Since *Hartley* and *Forensic Advisors* are the only appellate decisions in Maryland interpreting the 1988 re-enactment of the press shield law, advocates of free press and free speech should be concerned that those decisions may be relied upon by other courts. The concern is only heightened when these decisions are viewed in light of some other peculiarities of Maryland law. For example, per *Forensic Advisors*, if the target of an embarrassing or critical news article wants to retaliate or possibly prevent publication, the target may file a John Doe defamation suit in any state, not name the reporter as a party, and serve multiple subpoenas on the reporter, asking for a voluminous amount of information.

In accord with *Forensic Advisors*, the target need not present any evidence that a John Doe defamed him, that he suffered any damages, or that John Doe even exists. All that is required is that the target make unsubstantiated allegations in a brief. Under this scenario, the target can serve multiple subpoenas on the reporter, which will not be quashed provided the subpoenas cross that undefined threshold into "*much more information* than is subject to protection under the statute."[96] In this manner, the target can tie the reporter up in depositions or court and convey the message that there may be more litigation to come (*e.g.*, naming the reporter as a defendant).

The advantages of not naming the reporter as a party are at least three-fold. First, the target does not risk the possibility of the reporter moving to dismiss the suit pursuant to Maryland's anti-SLAPP[97] statute.[98]

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[95] For an example of a straightforward application of the statute to the facts, see the trial court opinion in *Bice v. Bernstein*, 1994 WL 555379, 22 Media L. Rep. 1966 (Md. Cir. Ct. 1994).

[96] *Forensic Advisors*, 170 Md. App. at 535, 907 A.2d at 863 (emphasis added).

[97] "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation." The term was first coined by George W. Pring and Penelope Canan of the University of Denver. *See* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBLEMS 506 (1988); George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989). The term originally referred to meritless defamation lawsuits usually brought by well-financed plaintiffs against less well-financed defendants who had attempted to petition the government pursuant to the First Amendment in opposition to some action the plaintiff was undertaking (*e.g.*, real estate development). The term has since been expanded to include all suits wherein a plaintiff is attempting to intimidate a defendant from exercising his First Amendment rights by filing a meritless defamation suit.

Second, it denies the reporter the opportunity to use discovery to further the reporter's investigation since a non-party has no discovery rights.[99] Third, in Maryland, the reporter cannot obtain redress for the misuse of the discovery process via a suit for abuse of process because Maryland is the only state in the country that limits abuse of process suits to plaintiffs who can show they have suffered either arrest or seizure of property.[100]

The *Hartley* and *Forensic Advisors* decisions also encourage anyone with subpoena power to use reporters as cheap investigators. This should be a troubling development for the news media. As a recent research

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See, *e.g.*, Global Telemedia Int'l v. Does 1 through 35, 132 F. Supp. 2d 1261, 1265 (C.D. Cal. 2001).

The issue of SLAPP suits has been the subject of numerous books and articles. A small sampling includes: LAWRENCE SOLEY, CENSORSHIP, INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES (Monthly Review Press 2002); GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996); MICHELANGELO Delfino & MARY E. DAY, BE CAREFUL WHO YOU SLAPP (MoBeta Publishing 2002); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace,* 49 DUKE L. J. 855 (2000); Joshua R. Furman, *Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 SEATTLE U. L. REV. 213, 217 (2001).

The problem of SLAPP suits is so pervasive that Maryland and 25 other states have enacted some type of anti-SLAPP legislation. For a list of the 25 other states with anti-SLAPP legislation, see The First Amendment Center's website, *available at* http://www.firstamendmentcenter.org/about.aspx?id=13565. In addition, Colorado and West Virginia have case law deterrents. *See* Webb v. Fury, 282 S.E. 2d 28 (W. Va. 1981); Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (1984). Federal anti-SLAPP legislation was introduced in December 2009. At the time of this writing, the bill had four sponsors in the House of Representatives, but has not yet been passed by the House. *See* The Citizen Participation Act, H.R. 4364, 111th Cong. (2009).

[98] *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2010).

[99] *See* MD. RULES 2-401 and 3-401 (West 2010).

[100] *See* One Thousand Fleet Ltd. v. Guerriero, 346 Md. 29, 694 A.2d 952 (1997). Contrary to the assertions of the *One Thousand Fleet* court, no other state limits abuse of process claims to only instances of arrest of seizure of property. *See* Jeffrey J. Utermohle, *Look What They Done to My Tort, Ma*, 32 U. BALT. L. REV. 1, 26-30 (2002). While Maryland's restrictions on abuse of process suits may violate Article 19 of the Maryland Declaration of Rights and the Petition Clause of the First Amendment, to date no reported decision has discussed this issue. The "Petition Clause" refers to the last section of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. art. I. Art. 19 of the Maryland Declaration of Rights provides:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

MD. CODE ANN., CONST. art. 19 (West 2010).

report noted, "amid catastrophic revenue declines, media companies struggling to stay afloat have less money to throw into court fights to enforce their journalistic rights."[101] With revenues falling precipitously, the news media can hardly afford receipt of an increasing number of subpoenas.[102]

The situation may be even grimmer for a non-reporter critic. After all, if a journalist cannot quash a subpoena even with the privileges of Section 9-112, what chance does a non-newsperson critic have of protecting his or her First Amendment rights?

All may not be lost, however, for the non-reporter critic. The non-reporter critic could argue that the subpoena implicates the First Amendment because the critic exercised his or her First Amendment right of free speech by speaking critically of the target. Such a subpoena requires examination under "the much more exacting scrutiny required by the First Amendment" because it deals with issues "within the protective umbrella of the First Amendment."[103]

In *Lubin v. Agora*, the Court of Appeals of Maryland quashed a subpoena from Maryland's Securities Commissioner that sought a list of subscribers from Agora, a financial publishing company.[104] The court reasoned that "Agora's subscribers may be discouraged from reading its materials if they are interviewed by government personnel investigating potential securities violations, even if the readers are told that, individually, they are not under investigation."[105] Similarly, the service of a subpoena on a non-party critic by a civil defamation plaintiff may discourage the non-party from further exercise of its First Amendment rights of free speech and may be an effort to retaliate for past critical comments, even if the critic is not named as a party.[106]

Further, discovery requests that may chill First Amendment rights require a court to balance the First Amendment interest of the recipient against the interest of the requesting party, as in the recently decided case of *Independent Newspapers v. Brodie*.[107] In *Brodie*, the court held that before a defamation plaintiff may conduct discovery relating to First Amendment rights of anonymous speakers, the plaintiff must establish that it has a *prima facie* case.[108] The court then must balance the First

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101 *See* Peter Katel, *Press Freedom*, CQ RESEARCH, Feb. 5, 2010, at 97.

102 *See id.*

103 Lubin v. Agora, 389 Md. 1, 16, 22, 882 A.2d 833, 842, 846 (2005).

104 *Id*. at 27, 882 A.2d at 849.

105 *Id*. at 22, 882 A.2d at 846.

106 *Agora* was decided before the Court of Special Appeals decision in *Matrixx*, but the *Matrixx* court made no reference to it. *See Matrixx*, 170 Md. App. 520, 907 A.2d 855.

107 407 Md. 415, 966 A.2d 432 (2009).

108 *Brodie*, 407 Md. at 441-42, 966 A.2d at 448. The *Brodie* court defined a *prima facie* case as follows:

Amendment rights of the anonymous speaker "against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure . . . ."[109] The *Brodie* and *Agora* decisions provide a basis for a non-reporter critic to quash a subpoena by a target of criticism despite the rulings in *Hartley* and *Forensic Advisors*. In light of the decisions in *Hartley* and *Forensic Advisors*, journalists would be well-advised to cite *Brodie* and *Agora* in support of their efforts to quash a subpoena.

V. CONCLUSION

In commenting on the *Forensic Advisors* case, *The Wall Street Journal* noted that the result "probably will let the next Jeff Skilling[110] sleep a bit better at night."[111]

While neither *Forensic Advisors* nor *Hartley* were decided pursuant to the provisions of the press shield statute,[112] the concern is that trial courts and the intermediate appellate courts may follow the decisions.[113] Free press and free speech advocates should hope that in future cases the Court of Appeals of Maryland will issue a *writ of certiorari* on its own initiative prior to consideration of reporter subpoena cases by the Court of Special

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> To establish a prima facie case of defamation, then, the plaintiff must show: "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." Offen v. Brenner, 402 Md. at 191, 935 A.2d 719 at 723-24 (2007). In the case of defamation per quod, extrinsic facts must be alleged in the complaint to establish the defamatory character of the words or conduct . . . .

Id.

[109] *Brodie*, 407 Md. at 456, 966 A.2d at 457 (emphasis supplied).

[110] Jeffrey Skilling is the former President and CEO of Enron Corp. In 2006, he was convicted of multiple federal felony charges related to Enron's financial collapse. *See* Mark Sherman, *High court hears ex-Enron CEO Skillings Appeal*, THE ASSOCIATED PRESS (Mar. 1, 2010, 3:39 PM), *available at* http://finance.yahoo.com/news/High-court-hears-exEnron-CEO-apf-692969977.html?x=0&sec=topStories&pos=5&asset=&ccode=.

[111] *See* Jesse Eisinger, *Long & Short: Why independent research is drying up*, WALL ST. J. (Mar. 8, 2006) *available at* http://www.post-gazette.com/pg/06067/666994-28.stm.

[112] *See Forensic Advisors*, 170 Md. App. 520, 907 A.2d 855; *Hartley*, 150 Md. App. 581, 822 A.2d 537.

[113] The author of both the *Hartley* and *Forensic Advisors* decisions, former Chief Judge of the Court of Special Appeals Joseph F. Murphy, Jr., reportedly is very influential among the Maryland judiciary. Judge Murphy was recently appointed to the Court of Appeals and is the author of the *Maryland Evidence Handbook*, which he updates annually. A December 2007 newspaper article about Judge Murphy quoted one observer as saying: "I've found myself in court when a judge doesn't know the answer to a question, and they say they're going to go research a legal issue. Later, you find out all they did is go call Judge Murphy . . . . Their version of 'research' is to call Judge Murphy for advice." *See*, Andrew A. Green, *Murphy named to Court of Appeals*, THE BALTIMORE SUN (Dec. 5, 2007), *available at* http://articles.baltimoresun.com/2007-12-05/news/0712050197_1_chief-judge-judge-murphy.

Appeals of Maryland in the hope that the issues raised herein will be addressed and resolved in accordance with Section 9-112.[114]

[114] The Court of Appeals of Maryland historically has issued a writ of *certiorari* on its own initiative prior to consideration by the Court of Special Appeals of a number of First Amendment cases. *See*, *e.g.*, *Brodie*, 407 Md. 415; 966 A.2d 432 (2009); *Agora,* 389 Md. 1, 882 A.2d 833 (2005); *WBAL-TV Div., Hearst Corp.*, 300 Md. at 238, 477 A.2d at 778; *Tofani*, 297 Md. at 168, 465 A.2d at 415.