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EVIDENCE Witnesses: A Qualified Reporter's Privilege

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EVIDENCE

Witnesses: A Qualified Reporters' Privilege

CODE SECTION:	O.C.G.A. § 24-9-30 (new)
BILL NUMBER:	SB 636
ACT NUMBER:	753
SUMMARY:	The Act provides a qualified privilege against compelled disclosure of information for those who gather and disseminate news. The privilege applies only in proceedings in which the one asserting the privilege is not a party. The privilege is not absolute; to overcome the privilege the party seeking the information must show that the information sought is material and relevant, cannot be reasonably obtained by alternative means, and is necessary to the proper preparation or presentation of the case of the party seeking the information.
EFFECTIVE DATE:	March 13, 1990

History

The holding of the Georgia Supreme Court in *Howard v. Savannah College of Art and Design, Inc.*,[1] decided January 11, 1990, was the catalyst of the Georgia Press Association's (GPA) lobby for a statutory reporters' privilege.[2] The issue in *Howard* was whether a reporter has a privilege against compelled disclosure of information gathered in the process of news reporting.[3] Upon hearing oral argument, Justice Weltner stated that any reporters' privilege would have to come from the

1. 259 Ga. 795, 387 S.E.2d 332 (1990).

2. Telephone interview with Kathy Chaffin, Executive Director, Georgia Press Association (GPA) (Apr. 18, 1990) [hereinafter Chaffin Interview].

3. *See* Brief of Petitioner, Supplemental Brief of Petitioner, Brief of Respondent, Supplemental Brief of Respondent, Howard v. Savannah College of Art and Design, Inc., 259 Ga. 795, 387 S.E.2d 332 (1990) (available in Georgia State University College of Law Library) [hereinafter *Howard* Briefs].

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Legislature.[4] The published opinion held that Georgia courts were not to recognize a reporters' privilege.[5]

Before *Howard*, when newspapers and reporters resisted disclosure of information in their files, the parties seeking the information often accepted the position taken by the media.[6] State trial courts had recognized a qualified reporters' privilege in some cases.[7] However, reporters in Georgia were not protected by a statutory privilege or a common law qualified privilege established by appellate decision.[8] *Howard* eliminated whatever protection had been available and sent the message that newspapers and reporters could no longer refuse to disclose file information. In response, the GPA pushed for legislation which would protect the news media.[9]

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4. *See* Wood, *High Court Takes the Hard Line*, Fulton Co. Daily Rep., Nov. 17, 1989, at 5, col. 1 [hereinafter *High Court*]. *See also* Wood, *Weltner: No Shield for News Media*, Fulton Co. Daily Rep., Jan. 23, 1990, at 7, col. 1 [hereinafter *No Shield*].

5. Howard v. Savannah College of Art and Design, Inc., 259 Ga. 795, 796, 387 S.E.2d 332 (1990). Justice Weltner wrote the three paragraph opinion, stating: "The trial court held: 'Georgia has no statutory qualified privilege .... [She] has no qualified reporter's privilege under the law of this state.' This holding is correct." *Id.*

6. Telephone interview with James B. Ellington, attorney for GPA (Mar. 23, 1990) [hereinafter Ellington Interview].

In some instances, the acceptance of nondisclosure may have been compelled by a lack of resources necessary to pursue discovery. In other instances, the information sought simply may not have been critical to the party's case. Telephone interview with David E. Hudson, General Counsel for GPA (Apr. 18, 1990) [hereinafter Hudson Interview].

Kathy Chaffin, the Executive Director of the GPA, also stated that the most common problem that existed before *Howard* was the burden of subpoenas on small weekly newspapers. For example, criminal defense attorneys might request production of all articles published covering a particular case. Even though the back issues of the newspapers are available to the public, the small newspapers would often be required to produce the requested documents. Such a request could place a serious burden on a small business with a limited staff. The monetary compensation for copying costs provided by the requesting party did not lessen the burden of having to designate an employee to search past publications for certain articles. Chaffin Interview, *supra* note 2.

7. In Carver v. State, 258 Ga. 385, 388, 369 S.E.2d 471, 473–74 (1988), the Superior Court of Hall County applied a balancing test which considered the criminal defendant's interest in obtaining the information contained in the reporter's file, the unavailability of the information from any other source, and the burden and degree of intrusion on the newspaper in producing the information sought by the criminal defendant. Also, Judge Osgood O. Williams of the Superior Court of Fulton County recognized a qualified privilege in State v. Little, Case No. Z00554 (Super. Ct. of Fulton County filed Mar. 28, 1989). The information sought from the reporter in *Little* concerned his interviews with known witnesses, and thus, although unpublished, was not confidential. In considering whether a privilege should protect the reporter from compelled testimony, the court considered the three factors now found in Georgia Code section 24-9-30. The court granted the reporter's motion to quash the subpoena, finding the privilege had not been overcome. State v. Little, Case No. Z00554 (Super. Ct. of Fulton County).

8. Hudson Interview, *supra* note 6.

9. *Id.* The *Vaughn* decision was also a precipitating factor. *See infra* notes 20–22 and accompanying text. The news media in Georgia had not felt comfortable without a

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Proponents of a reporters' privilege argue that the privilege is based on the first amendment freedom-of-press clause.[10] Not only is the press to have freedom to speak, but also freedom to gather information.[11] Proponents contend that if a source of information cannot rely on a reporter's ability to prevent disclosure, the reporter may not be able to gather information.[12] They claim that compelling disclosure of unpublished material or confidential sources chills the free flow of information to the public.[13] Proponents argue that the reporters' privilege nurtures a healthy democracy by contributing to an informed public.[14]

The privilege arises in contexts involving interests other than the first amendment interest in an informed public, however. The competing interests include: (1) a criminal defendant's interest in acquittal, (2) the state's interest in law enforcement, and (3) a civil litigant's interest in discovering information relevant to his claim or defense. Georgia case law prior to the Act demonstrates the tension that exists between first amendment interests and these other competing interests.

The strongest competing interest is that of a criminal defendant who seeks acquittal. In *Hurst v. State*,[15] the appellate court found the criminal defendant's right to compulsory process in his defense against a murder charge outweighed any first amendment interests.[16] In a criminal case

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statutory privilege for some time before *Vaughn* and *Howard*. However, it was after the *Vaughn* decision that the GPA specifically requested Mr. Hudson to draft a statute. Hudson Interview, *supra* note 6. After *Howard*, the GPA decided to push for passage of the bill during the 1990 legislative session. Chaffin Interview, *supra* note 2. The GPA asked Senator C. Donald Johnson to sponsor the bill. Telephone interview with Senator C. Donald Johnson, Senate District No. 47, sponsor of SB 636 (Mar. 23, 1990) [hereinafter Johnson Interview].

10. *See* Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 325 (1970).

11. *See* Note, *A Press Privilege for the Worst of Times*, 75 GEO. L.J. 361, 366–67 (1986) (proposing that the press should receive protection from compelled disclosure of the information it gathers because of the special role it serves as "watchdog" of the three official branches of government). *See also* Note, *supra* note 10, at 326–29 (proposing that the right of the press to gather information without the chilling effect of compelled disclosure is necessary to support the inherent presumption of a democratic government, that citizens make informed decisions; arguing that without a protected, free press, citizens are not well informed).

12. *See* Note, *Free Press Privacy and Privilege: Protection of Researcher-Subject Communications*, 17 GA. L. REV. 1009, 1026 (1983) (disclosure threatens the source's expectation of privacy and inhibits the free flow of information to the public via the reporter).

13. Note, *supra* note 10, at 329–34.

14. *Id.*

15. 160 Ga. App. 830, 287 S.E.2d 677 (1982).

16. Hurst v. State, 160 Ga. App. 830, 287 S.E.2d 677 (1982). The defendant in *Hurst* appealed his conviction of voluntary manslaughter based on an indictment for murder. At trial, the defendant sought to impeach an eyewitness with testimony of a reporter who had interviewed the eyewitness after the killing and written an article. The reporter

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involving a less serious offense, however, the same appellate court reached a different conclusion. In *Carver v. State*,[17] the court protected a newspaper's interest in nondisclosure of photographs taken during a Ku Klux Klan demonstration, even though the criminal defendant claimed the photographs were relevant to his defense.[18] The contrasting results in *Hurst* and *Carver* indicate that the courts were balancing competing interests before *Howard*.[19]

Another competing interest is the state's interest in law enforcement. In the leading and unusual case of *Vaughn v. State*,[20] the court found the state's interest in law enforcement outweighed the first amendment interests. In *Vaughn*, a reporter was subpoenaed by the grand jury to testify in the case of "Carlos."[21] "Carlos" was the fictitious name used

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asserted the first amendment to avoid testifying. The trial court ordered that the reporter could be compelled to testify only if the defendant first tried to accomplish his purpose of impeachment by calling two other persons who were present when the interview took place. The Georgia Court of Appeals reversed, finding that the criminal defendant's sixth amendment right to compulsory process outweighed the first amendment interests. *Id.*

17. 185 Ga. App. 436, 364 S.E.2d 877 (1987), *aff'd* 258 Ga. 385, 369 S.E.2d 471 (1988).

18. Carver v. State, 185 Ga. App. 436, 364 S.E.2d 877 (1987), *aff'd* 258 Ga. 385, 369 S.E.2d 471 (1988). The defendant in *Carver* was indicted and found guilty of making a terroristic threat. Carver was a "Great Titan" in the Ku Klux Klan and the offense took place during a demonstration in Gainesville, Georgia. The local newspaper covered the event and took numerous photographs before and after Carver's criminal act.

Carver sought the photographs, which he contended were necessary for impeachment of the State's witnesses. The newspaper moved to quash, and the trial court responded with a compromise. Although there were some 215 negatives, the newspaper was required to produce for in camera inspection only those which depicted Carver or his victim. Finding the photographs irrelevant, the court protected the newspaper's interest in nondisclosure.

Over strong dissent by Judge Beasley, who argued that under *Hurst* the "newspaper had no privilege which would guard these photographs from production for the purposes advanced here," the court of appeals upheld the trial court's decision. 185 Ga. App. at 442, 364 S.E.2d at 882. The decision was affirmed by the supreme court, which found "no error in the ... holding that Carver failed to show he was denied *material exculpatory* information from the files of *The Times*." 258 Ga. at 386, 369 S.E.2d at 472 (emphasis added).

19. *Hurst* and *Carver* may be distinguished on their facts. Hurst was charged with the serious offense of murder, and the reporter involved was covering a past event at the time she interviewed the eyewitness. "Great Titan" Carver was charged with merely threatening to commit a crime against another, and the newspaper was covering a present political event, a Klan demonstration. In *Carver*, the balance favored the public's interest in information concerning the realm of political ideas. In *Hurst*, the accused's interest in acquittal on a murder charge overshadowed the lesser interest in shielding a reporter from giving trial testimony. *Hurst*, 160 Ga. App. 830, 287 S.E.2d 677. *Carver*, 185 Ga. App. 436, 364 S.E.2d 877.

20. 259 Ga. 325, 381 S.E.2d 30 (1989).

21. Vaughn v. State, 259 Ga. 325, 381 S.E.2d 30 (1989). Vaughn wrote for the Clayton News/Daily which published the article, intending to inform the public of the seriousness of the drug trafficking problem in Clayton County. Vaughn stated he had interviewed "Carlos" under a promise of confidentiality. When Vaughn refused to identify "Carlos" during the grand jury proceeding, and after a hearing before a superior court judge, he was found in contempt and sentenced to ten days in jail. *Id.*

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in the reporter's article, "Confessions of a Dope Dealer." The reporter argued that he was entitled to protect the confidentiality of his source, but the court declined to recognize any such right.[22] The strong statement by the Georgia Supreme Court in *Vaughn*, along with the *Howard* decision, prompted the GPA to draft a statutory privilege and find a sponsor.[23]

The weakest competing interest is a civil litigant's interest in discovery of information helpful to his claim or defense. *Howard v. Savannah College of Art and Design, Inc.*[24] arose in such a context. The reporter in *Howard* resisted disclosure of information from her files, claiming a privilege.[25] The Georgia Supreme Court refused to recognize her claim of privilege.[26] After *Howard*, reporters' files received only the nominal protection of the discovery rules of the Georgia Civil Practice Act. The decision, as well as comments made by the court during oral argument,[27] placed the responsibility for change upon the General Assembly.

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22. *Id.* Vaughn contended that both the federal and state constitutions afforded him the right to protect the confidentiality of his source. The court cited *Branzburg v. Hayes*, 408 U.S. 665 (1972), as denying Vaughn any such right under the federal Constitution and then "decline[d] to interpret the Constitution of Georgia to afford any greater right . . . ." *Id.* at 326, 381 S.E.2d at 31.

Justice Gregory dissented. He argued that, under the facts of the case, the interest of the people in the free flow of information outweighed any state interest in law enforcement. Justice Gregory distinguished the realm of ideas from factual detail, finding the balancing of interests tipped toward the first amendment interests because "Vaughn was emersed in the milieu of ideas." *Id.* at 327–29, 381 S.E.2d at 32–34.

Justice Gregory also noted that *Vaughn* did not involve the rights of an accused, implying that protection afforded to newspaper files and confidential sources should vary according to the context in which such information is sought. *Id.* at 328, 381 S.E.2d at 33.

23. Chaffin Interview, *supra* note 2.

24. 259 Ga. 795, 796, 387 S.E.2d 332 (1990).

25. Howard v. Savannah College of Art and Design, Inc., 259 Ga. 795, 387 S.E.2d 332 (1990). Ms. Howard worked for the Savannah News-Press as a reporter for the arts and entertainment section. In the course of her job as a reporter, she had gathered information on the Savannah College of Art and Design (SCAD). Two women who were raped in the dormitory of the college brought suits against SCAD, alleging negligence in security. Ms. Howard became involved when the father of one of the women came into the newspaper office. Ms. Howard contacted the plaintiffs' attorney, who, during the course of the conversation, mentioned she was having difficulty obtaining financial information on SCAD. Ms. Howard provided SCAD's 1986 financial statement from her file.

After learning that Ms. Howard had provided the financial statement, SCAD noticed her deposition. Ms. Howard testified at deposition about the financial statement, but refused to answer any other questions, claiming a first amendment privilege. Although the deposition testimony was somewhat unclear as to whether she had given any other information to the plaintiffs' attorney, Ms. Howard's position on appeal of the granted motion to compel was that she had not shared any information with the plaintiffs' attorney other than the financial statement. *Howard* Briefs, *supra* note 3.

26. *Howard*, 259 Ga. at 796, 387 S.E.2d at 332.

27. *See supra* note 4 and accompanying text.

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The Act adds a new section to the rules of evidence concerning witnesses.[28] The Act defines who has the privilege, what is to be protected by the privilege, and when the privilege applies. To compel disclosure, the moving party must either show that the privilege has been waived or prove the three factors which overcome the privilege.[29]

Having been in Washington at the time of Watergate, the sponsor of the bill recognized the need for protection of reporters' materials and sources.[30] During consideration of the bill in the Senate Committee on Judiciary, the sponsor explained to the members the impact of the *Howard* decision.[31] The purpose of the bill was to protect newspaper files from being "the first source of information for parties seeking information."[32] "'It requires lawyers to do their homework [in discovery] without rifling through reporters' files.'"[33]

One member of the committee expressed concern that the privilege would give an unfair advantage to a news media defendant in a defamation suit.[34] However, the privilege by its express terms applies only in a proceeding "where the one asserting the privilege is not a party."[35]

The Senate Committee on Judiciary also addressed the issue of whether the privilege should belong to the confidential source rather

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28. The Act provides:

> Any person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:
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> (1) Is material and relevant;
>
> (2) Cannot be reasonably obtained by alternative means; and
>
> (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

O.C.G.A. § 24-9-30 (Supp. 1990). David E. Hudson, General Counsel for GPA, drafted the bill. Hudson Interview, *supra* note 6.

29. O.G.C.A. § 24-9-30 (Supp. 1990). *See infra* note 70 and accompanying text for discussion on burden of proof.

30. Johnson Interview, *supra* note 9.

31. *Id.*

32. *Id.*

33. Lundy, *Reporters' Shield Considered*, Fulton Co. Daily Rep., Feb. 14, 1990, at 4, col. 1 (quoting Senator C. Donald Johnson) [hereinafter *Reporters' Shield*].

Kathy Chaffin was present at the meeting of the Senate Committee on Judiciary and explained to the Senators the difficulties of small newspapers meeting production requests from lawyers. Chaffin Interview, *supra* note 2.

34. Johnson Interview, *supra* note 9.

35. O.C.G.A. § 24-9-30 (Supp. 1990).

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than the reporter.[36] By requiring the privilege to belong to the source, however, confidentiality would be destroyed by the mere assertion of the privilege. Thus, the Senate committee agreed that, to further the first amendment interests, the privilege must belong to the newsperson.[37]

The sponsor of the bill addressed the Senate, again mentioning the *Howard* and *Vaughn* decisions.[38] In support of the bill, he stated the need for a statutory enactment to preserve the status quo, to allow trial courts to balance the first amendment interest in the free flow of information against the interests of the litigants in discovery.[39] Referring to Watergate, he stressed the importance of protecting reporters' ability to gather information.[40] There was no discussion from the Senate floor regarding the possible tension between the first amendment interest and the criminal defendant's right to compulsory process or the state's interest in law enforcement.[41]

The House Committee on Judiciary proposed two changes to the bill; these proposed changes were incorporated into the bill as passed.[42] The bill as introduced gave the qualified privilege to "[a]ny person, company, or other entity engaged in the gathering *or* dissemination of news for the public . . . ."[43] The House committee amendment substituted "and" for "or," narrowing the scope of coverage.[44] A person or entity which gathers, but does not disseminate, news would not receive the protection of the privilege. The privilege is to protect only those who serve the public by providing information.[45]

The second change involved one of the three proof requirements needed to overcome the privilege. The bill as introduced required the information sought to be "highly material and relevant" in order to overcome the privilege.[46] The House amendment deleted "highly."[47] The deletion was intended to avoid ambiguity more than to change the

36. Senator Gary Parker, Senate District No. 15, raised this question in the meeting of the Senate Committee on Judiciary. *Reporters' Shield, supra* note 33. Most of the members of the Senate Committee on Judiciary are attorneys, more familiar with the attorney-client privilege which belongs to the client. Johnson Interview, *supra* note 9.

37. Johnson Interview, *supra* note 9.

38. *Id.*

39. *Id.*

40. *Id. See* Capital Newsbriefs, *Reporters Would Get Protection with 'Deep Throat' Bill*, Atlanta J. & Const., Feb. 16, 1990, at C 3, col. 5.

41. Johnson Interview, *supra* note 9.

42. Final Composite Status Sheet, Mar. 9, 1990.

43. SB 636, as introduced, 1990 Ga. Gen. Assem. (emphasis added).

44. SB 636 (HCA), 1990 Ga. Gen. Assem.

45. Johnson Interview, *supra* note 9. Entitlement to the privilege rests on news dissemination; the *function* newspapers and reporters perform, in providing information to the public, is the basis of their privilege. *Id.*

46. SB 636, as introduced, 1990 Ga. Gen. Assem.

47. SB 636 (HCA), 1990 Ga. Gen. Assem.

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meaning.[48] Judges are accustomed to assessing whether evidence is material and relevant.[49] The word "highly" was thought to be confusing and unnecessary, although admittedly deleting "highly" might be interpreted as giving less protection to the newspapers' files.[50]

The Georgia Press Association was the only group lobbying for the bill.[51] There was essentially no opposition.[52] Questions from the floors of the Senate and House showed an interest in understanding exactly what the privilege meant, rather than demonstrating a vigorous opposition to the bill.[53] A few Legislators did not agree that first amendment values were related to a testimonial privilege for reporters, but the bill passed by a comfortable margin.[54]

The Act may be divided into four sections: (1) *who* is to be protected by the privilege, (2) *what* is to be protected by the privilege, (3) *when* the privilege is to apply, and (4) ways to overcome the privilege. Regarding *who* is to have the privilege, "[a]ny person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast . . ." is entitled to the statutory privilege.[55] The bill's sponsor intended the privilege to apply to any person or entity providing information to the public, regardless of the size or importance of that person or entity.[56]

Regarding *what* is to be protected by the privilege, "any information, document, or item obtained or prepared in the gathering or dissemination of news . . ." is protected against disclosure.[57] The Act does not expressly mention the source of information. The Act was intended, however, to

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48. Johnson Interview, *supra* note 9. Senator Johnson explained the change in the language by drawing an analogy between "highly relevant" and "relevant" and "highly pregnant" and "pregnant," indicating that "highly relevant" is really nothing more than "relevant." *Id.*

49. Hudson Interview, *supra* note 6. Mr. Hudson, who drafted the bill, attended the meeting of the House Committee on Judiciary. The Representatives believed that because Georgia case law providing a basis for interpreting "material and relevant" already existed, the statute should track that language. *Id.*

50. Johnson Interview, *supra* note 9.

51. *Id.*

52. *Id.* Jett Tony, lobbyist for the Georgia Trial Lawyer's Association (GTLA), was present at the meeting of the Senate Committee on Judiciary when the bill was discussed. Mr. Tony acquiesced in Senator Johnson's statement to the committee that GTLA did not oppose the bill. *Id.*

53. *Id.*

54. The bill passed the Senate 41-0 and the House 107-4.

55. O.C.G.A. § 24-9-30 (Supp. 1990).

56. Johnson Interview, *supra* note 9. When asked if the lonely pamphleteer handing out single sheets of paper on the street corner would be a person entitled to the privilege, just as surely as a reporter for the *Atlanta Journal-Constitution*, Mr. Johnson answered that the size of the newspaper should not matter, as long as its purpose is to provide information to the public. *Id.*

57. O.C.G.A. § 24-9-30 (Supp. 1990).

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protect both the identity of the informant and the information received from the informant.[58]

Also, the express language of the Act does not distinguish between nonconfidential and confidential information. One of the practices which led to the bill's introduction involved litigants using newspaper files as an easy means of producing nonconfidential information for claims or defenses.[59] Nonconfidential information is intended to fall within the privilege.[60]

Regarding *when* the privilege applies, "in any proceeding where the one asserting the privilege is not a party . . ." the privilege is available.[61] The omission of "civil" before "proceeding" was intended by the drafter.[62] As for the legislative intent, although the *Howard* case involved civil litigation, mention of *Vaughn* from the well of the Senate,[63] and numerous other references to that case,[64] support the position that the Legislators considered application of the privilege in criminal proceedings as well. Yet there was no discussion of the possible infringements on the competing interests of the criminal defendant and law enforcement.[65] However, because the privilege is qualified, rather than absolute, the availability of the privilege does not necessarily guarantee that a reporter will be permitted to resist disclosure.

There are two ways to overcome the privilege. First, the privilege holder may waive the privilege.[66] Publication may be regarded as waiver, but not in the same sense that publication of documents protected by the attorney-client privilege is waiver.[67] Reporters' sources often rely on the reporter to protect from publication a portion of the information provided.[68] Interpreting the statute to permit publication of a portion of the information gathered to serve as a waiver as to all of the information gathered on the same subject matter would chill the free flow of information to the public.[69]

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58. Johnson Interview, *supra* note 9.

59. *See supra* notes 6, 32—33 and accompanying text.

60. Johnson Interview, *supra* note 9.

61. O.C.G.A. § 24-9-30 (Supp. 1990).

62. Ellington Interview, *supra* note 6. The sponsor of the bill also intended the privilege to apply in both criminal and civil cases. Johnson Interview, *supra* note 9.

63. Johnson Interview, *supra* note 9.

64. See *High Court, supra* note 4; *No Shield, supra* note 4; *Reporters' Shield, supra* note 33. Also, the *Howard* decision, which O.C.G.A. § 24-9-30 was intended to reverse, expressly mentions *Vaughn*. Howard v. Savannah College of Art and Design, Inc., 259 Ga. 795, 387 S.E.2d 332 (1990).

65. Johnson Interview, *supra* note 9.

66. O.C.G.A. § 24-9-30 (Supp. 1990). *See supra* note 28 for text of statute.

67. *See e.g., In re* Von Bulow, 828 F.2d 94 (1987). A client who discloses part of a communication protected by the attorney-client privilege waives the privilege for the entire communication. This rule is referred to as "the fairness doctrine." *Id.*

68. *See supra* text accompanying notes 10—14.

69. *Id.*

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The privilege may also be overcome by showing "that what is sought: (1) Is material and relevant; (2) Cannot be reasonably obtained by alternative means; and (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item."[70] These requirements originated in a United States Supreme Court case[71] and have been adopted by many lower courts.[72] Although the language of the statute is not identical to the language adopted in the 11th Circuit by judicial decision,[73] it is very close.[74]

Conclusion

Justice Weltner's statement in November of 1989, that any reporters' privilege would have to come from the Georgia General Assembly, turned out to be prophetic. The privilege may be considered necessary because of the important function the press serves in the free flow of information to the public, or because the press is the "watchdog" of the government. Regardless of the reason, it now exists. Georgia has a statutory qualified reporters' privilege.

Within weeks after the Governor signed the statute into law, the new statutory reporters' privilege was asserted in both state and federal courts.[75] Problems in application of the statute may result from tension

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70. O.C.G.A. § 24-9-30 (Supp. 1990). Although the statute does not expressly state who has the burden of proof, the drafter intended that the moving party have the burden of proof. Hudson Interview, *supra* note 6. The statute is to protect newspaper files from being "the first source of information." Johnson Interview, *supra* note 9. That purpose would not be served if newspapers or reporters were required to shoulder the burden of proof as to these three factors. Also, the House Committee on Judiciary considered the federal rule in the 11th Circuit. *See infra* note 74. The federal rule provides that the moving party bears the burden of proof. *See infra* note 73.

71. Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting) (discussing the proof required to defeat the reporters' privilege against compelled disclosure). Justice Powell's concurring opinion in *Branzburg* advocated use of a balancing approach on a case-by-case basis. *Id.* at 710.

72. Note, *supra* note 11, at 361 n.3 (the lower courts have used the three proof requirements as relevant factors in ad hoc balancing).

73. *See* United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) ("[I]nformation may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources.").

74. Hudson Interview, *supra* note 6. Part of the discussion in the meeting of the House Committee on Judiciary centered on the privilege recognized in the federal courts in Georgia. *Id.*

75. Lundy, *Reporter's Shield Passes First Test*, Fulton Co. Daily Rep., Mar. 30, 1990, at 2–3. A death row inmate, seeking a new trial in state court based on possible violations of his attorney-client privilege by law enforcement officials, subpoenaed the reporter who wrote an article concerning possible wire-tapping at the Douglas County jail. The reporter's subpoena was not quashed, and the reporter had to take the stand, but objections to questions concerning nonpublished information were sustained on the

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between the first amendment values and the competing interests of litigants and law enforcement. For example, although nonconfidential as well as confidential information falls within the privilege,[76] in a balancing of interests, the first amendment interest in protecting nonconfidential information may not be as strong as it would be for confidential information. The competing interests of the criminal defendant, of law enforcement, or of legitimate, compelling discovery needs in civil litigation may sometimes outweigh first amendment interests, when the information desired is nonconfidential.[77] With time, case law should define the parameters of the new statutory privilege with more certainty.

S. Dewberry

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basis of O.C.G.A. § 24-9-30. The litigant seeking the information did not meet his burden of proving that the information was not reasonably available by alternative means, since he did not show efforts to trace the ex-deputies to question them concerning the information they might have given the reporter. *Id.*

Code section 24-9-30 also received review in *Izbicki v. Ridgeview Institute*, No. 1:89-CV-306-RCF (N.D. Ga. Mar. 27, 1990), a diversity case in federal district court. Okrasinski, *Freeman Reviews Reporter's Shield*, Fulton Co. Daily Rep., Mar. 30, 1990, at 5.

The "reporters' shield" was again asserted in state court, this time to quash a subpoena. Langford, *Reporters Shield Survives Second Test*, Fulton Co. Daily Rep., Apr. 17, 1990, at 2, col. 1.

76. *See supra* text accompanying note 60.

77. *See supra* text accompanying notes 10—25.

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