

Fall 2014

New Laws Protecting Texas Newsrooms

By Laura Lee Prather¹

Over the last three legislative sessions, newsrooms have gained significantly greater protections under Texas law.² On May 13, 2009, Texas became the 37th state to enact a reporter's privilege protecting sources and information gathered during the newsgathering process. During the next session (2011), the Texas legislature joined 27 other states in adopting an Anti-SLAPP statute aimed at providing a mechanism for early dismissal of meritless lawsuits brought against those who exercise their free speech rights. And, finally this last session (2013), Texas became the 32nd state to enact a retraction statute enabling publishers to correct their mistakes in a timely manner and limit their litigation exposure in so doing. This trifecta of First Amendment advances makes Texas one of the best states in the nation to be a journalist or media organization.

*Reporter's Privilege*³ (effective May 13, 2009)

The Texas Free Flow of Information Act (also known as the Texas reporter's privilege) is a qualified privilege with separate civil and criminal sections. The civil section applies to confidential and non-confidential sources, journalist's work product and published and unpublished materials. In order to require a reporter to testify or produce materials, the party issuing the subpoena must meet the following three-part test: (1) the party must have exhausted all reasonable efforts to get the information elsewhere, (2) the information must be relevant and material to the proper administration of justice, and (3) the information sought must be essential to the maintenance of the claim or defense of the person asking for it.

The criminal section, on the other hand, is separated into three parts with different tests applying to various sources and information. When a confidential source is involved, there is an absolute privilege except when: (1) the journalist was an eyewitness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere. Further, a journalist can be compelled to give up a confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. With regard to unpublished materials (i.e., work product) in the criminal setting, the same three-part test as the civil arena applies. Published materials are not covered specifically by the statute but rather are governed by existing common law.

The Texas reporter's privilege also has a few unique aspects, including: (1) with criminal subpoenas, the elected district attorney is required to sign all subpoenas issued to journalists, (2) also with criminal subpoenas, the subpoenaing party is required to pay the journalist a reasonable fee for the journalist's time and costs incurred in responding to the subpoena (the calculation of cost is based on the cost provision in the Texas Public Information Act), and (3) finally, there is a provision making broadcasts self-authenticating, like newspaper articles, so that a reporter will not have to be put on the stand solely for the purpose of authenticating a broadcast tape. With more and more newspapers putting video footage on their websites, this addition will help newspapers as well as broadcasters throughout Texas.

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² None of these bills could have become law were it not for the passionate sponsors, Chairman Todd Hunter (R-Corpus Christi) and Sen. Rodney Ellis (D-Houston), who have worked tirelessly to enhance the free speech rights of all Texas citizens. We applaud their efforts.

³ Texas Civil Practice & Remedies Code §§22.021-22.027 and Texas Code of Criminal Procedure, Arts. 38.11 and 38.111.



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Anti-SLAPP Statute⁴ (effective June 17, 2011)

The Texas Anti-SLAPP statute⁵ is one of the strongest in the nation. It was passed during the 2011 legislative session and further strengthened and clarified during the 2013 session. The statute allows a judge to dismiss meritless lawsuits (including claims and counterclaims) filed against one who speaks out about a "matter of public concern" (which is defined expansively) within the first 60-90 days after the case was filed.⁶ Once an Anti-SLAPP motion is filed, discovery is stayed unless there is a showing of good cause and the judge orders discovery, but it is still limited to what is necessary to address the motion.

In order to obtain a dismissal under the Anti-SLAPP statute, one must establish, by a preponderance of the evidence, that the lawsuit was filed in response to the exercise of one's First Amendment rights. Then, the burden shifts to the plaintiff to establish, by clear and specific evidence, that they have support for each essential element of their claim. In addition, the court can dismiss the case, if the moving party establishes a valid defense to the claim.

If the Anti-SLAPP motion is denied, one can file an immediate interlocutory appeal which is to be handled on an expedited basis and during which the entire underlying proceeding is stayed.

Finally, there is a mandatory fee shifting provision if an Anti-SLAPP motion is granted so the person or entity wrongfully filing a lawsuit must pay the defense costs. There is also a discretionary fee award if the court finds the Anti-SLAPP motion was frivolous or brought solely for the purpose of delay.

Retraction Statute⁷ (effective June 14, 2013)

The Texas Retraction Statute encourages one to come forward in a timely manner if a mistake has been made in a publication and give the publisher the opportunity to correct the mistake. In order to be considered timely, one must make a retraction request during the period of limitations; however, to be able to request exemplary damages, the request must be made within 90 days of learning about the publication. There are specific parameters that must be followed in requesting a retraction, including who to notify, how to notify, the request must state, with particularity, what is alleged to be false, and when and where the publication was made (if known).

Then, the statute gives the publisher the option of correcting the mistake by publishing a correction, an apology or the requester's own statement of facts or summary thereof. To comply with the statute, the publisher must correct the mistake within 30 days of receiving the request and in the same manner and medium as the original publication or, if that is not possible, in a prominent manner and medium intended to reach the same audience as the original mistaken publication reached. If the original publication was over the internet, the retraction has to be permanently attached to the original article.

One can still sue after a retraction is run; however, the damages will be mitigated by the retraction, and if the publisher complies with the statute by running a retraction, one cannot get exemplary damages without a showing of actual malice. Also, if a lawsuit is filed without previously asking for a retraction, the publisher can get the case abated for 60 days in order to have an opportunity to cure the mistake, and all deadlines in the case are stayed during the abatement period.

⁴ The Texas Anti-SLAPP Statute is codified at Texas Civil Practice & Remedies Code, Chapter 27.

⁵ The acronym "SLAPP" stands for "Strategic Lawsuit Against Public Participation" and is a lawsuit aimed at those people who are speaking out about matters of public concern, petitioning their government for redress of grievances or exercising their First Amendment right of association.

⁶ There are a few exemptions: for enforcement actions brought by the State or law enforcement, for commercial speech, the sale of insurance products or services and for wrongful death and bodily injury lawsuits. The statute also does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

⁷ The Texas Retraction Statute is codified at Texas Civil Practice & Remedies Code, §§73.051-.062.