COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

MIDDLESEX DIVISION

COMMONWEALTH	)	
v.	)	No. 0751-CR-0927
MARILYN DEVANEY	)	

MOTION OF *WATERTOWN TAB & PRESS*
AND REPORTER JILLIAN FENNIMORE
TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

The Watertown TAB & Press and its reporter, Jillian Fennimore, hereby move to quash the defendant's subpoena for Fennimore's trial testimony, and for a protective order permitting her to cover this criminal trial of a prominent local official.

The subpoena to Fennimore must be quashed for at least three reasons:

First, reporter Fennimore has no direct knowledge of the underlying incident, and no relevant evidence that cannot be obtained from direct witnesses.

Second, the subpoena is unduly burdensome on Fennimore and her newspaper (and, by extension, the public interest), because it has the effect of preventing her – the reporter with the most extensive knowledge of these proceedings – from reporting to the public about this criminal trial.

Third, Massachusetts common law, as well as free-press principles under the First Amendment and Art. 16 of the Massachusetts Declaration of Rights, require that the subpoena be set aside under these circumstances, because Fennimore's testimony is not critical to the case and alternative sources of information are available to the defendant.

Factual Background

One year ago, newspaper reporter Jillian Fennimore broke the story that Waltham, Mass., police had charged Governor's Councilor and Watertown Town Councilor Marilyn Devaney with a felony assault and battery charge. Since then, Fennimore has been the lead reporter covering this matter for the *Watertown TAB & Press*. **Fennimore is not a party to this case, and has no personal knowledge of the incident.** Rather, her news articles have relied on the traditional tools of journalism: official police reports, interviews with witnesses, and other shoe-leather reporting.

Nevertheless, two days before trial, counsel for defendant Devaney subpoenaed Fennimore to testify at trial, with two consequences:

- First, that Fennimore is needlessly drawn into the midst of this criminal case merely because she had the temerity to report about it for the local newspaper; and

- Second, that Fennimore, as a sequestered witness, will likely be prevented from covering the trial, thereby preventing the community newspaper from providing its readers with coverage prepared by the reporter most intimately familiar with the proceedings.

Legal Argument

I. Reporter Fennimore is Not a Percipient Witness to the Felony Alleged, and Has No Relevant First-hand Information.

It is undisputed that Jillian Fennimore did not witness the incident alleged to constitute an assault and battery. Rather, her knowledge about the incident arose entirely out of newsgathering activities that are protected under the First Amendment of the United States Constitution and Article 16 of the Massachusetts Declaration of Rights.[1]

[1] The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Similarly, Article 16 of the Massachusetts Declaration of Rights states that "[t]he liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged."

Those include her reporting on the contents of police reports (see Exhibits A and B) and interviews with the defendant and other witnesses to the alleged incident.

In conversations with reporter Fennimore's counsel, the defendant's counsel has suggested that Ms. Fennimore's testimony is needed because her account of a witness's testimony is at odds from other testimony from that or other witnesses. But Ms. Fennimore's testimony is not necessary on that point. Pursuant to Mass. Gen. Laws c.233, sec. 79D, newspaper articles are self-authenticating, so the witnesses – who are available to testify at trial – can be cross-examined based on those articles themselves.

Defendant's counsel has also suggested that reporter Fennimore's testimony is necessary to explain how she obtained a supplementary police report that bears the legend, "Not for public release" (see Exhibit B hereto). It is unclear what inference counsel is hoping to draw, however, as there is nothing suspicious or unusual about a reporter obtaining a public document. Police incident and arrest reports are routinely available as public records under Massachusetts law, *see* G.L. c.66, sec. 10(a) (specifically including "crime, incident or miscellaneous reports" of municipal police as among those records that are presumptively available to the public); G.L. c.41, sec. 98F, and there would be no grounds for the police to withhold the supplementary report.

II. This Court May Quash the Subpoena Because it Unreasonably Interferes With Fennimore's Constitutionally Protected Newsgathering Activities.

The Supreme Judicial Court has long held that when faced with a subpoena issued to a media entity, a "judge must 'consider the effect of compelled disclosure on values underlying the First Amendment and art. 16.'" Matter of John Doe Grand Jury Investigation, 410 Mass. 596, 598 (1991) (affirming order quashing grand jury subpoenas

to reporters), quoting Petition for the Promulgation of Rules, 395 Mass. 164, 170-171 (1985). Under the required analysis, a media entity faced with a subpoena must first "make some showing that the asserted damage to the free flow of information is more than speculative or theoretical." Petition for Promulgation of Rules, 395 Mass. at 172. Once this showing is made, the Court must balance this threat against the defendant's need for the information. Matter of John Doe Grand Jury Investigation, 410 Mass. at 600. In assessing the defendant's asserted interest, the Court should consider the pertinence of the information to the matter at issue, as well as "the availability of alternative remedies to compelled disclosure," Petition for Promulgation of Rules, 395 Mass. at 171, and whether the defendant has availed itself of any such other means that may exist. Sinnott v. Boston Retirement Bd., 402 Mass. 581, 587 (1988).

Enforcement of the subpoena in this case poses a threat to the free flow of information that is more than "speculative or theoretical." Petition for Promulgation of Rules, 395 Mass. at 172. Ms. Fennimore and other *Watertown TAB & Press* reporters routinely report on criminal matters and interview individuals with knowledge of alleged crimes. If the defendant is permitted to subpoena Ms. Fennimore to testify in this action, it would send the message that if a reporter conducts routine reporting about an alleged crime by a public official, she does so only at the risk of being called to testify in court about her activities – without the subpoenaing party having to show any substantial need for the testimony. The consequence in this case is particularly dire, because if Ms. Fennimore, like other witnesses, is sequestered during the trial, she is essentially disqualified from reporting on this matter, and the newspaper is penalized by having to send an additional reporter to cover the trial. Such a rule would have a chilling effect on

reporting about public issues, in derogation of the express purposes of the First Amendment.

Recognizing the burden that such a rule would impose, the Supreme Judicial Court requires that trial courts, like this one, balance the defendant's need for a reporter's testimony against the threat to the free flow of information. Matter of John Doe Grand Jury Investigation, 410 Mass. at 600. In assessing the defendant's asserted interest, the Court should consider the pertinence of the information to the matter at issue, as well as "the availability of alternative remedies to compelled disclosure." Petition for Promulgation of Rules, 395 Mass. at 171.

Here, as noted above, the defendant does not need the testimony of the reporter, because she can directly examine and cross-examine the individuals interviewed in the newspaper accounts. Any testimony by Ms. Fennimore regarding her interviews would be not only duplicative, but also inadmissible hearsay. Accordingly, the defendant has "alternative remedies to compelled disclosure" available, and the Court should quash the subpoena. Petition for Promulgation of Rules, 395 Mass. at 171.

III. Massachusetts Recognizes a Qualified Reporter's Privilege Against Disclosure of the Information Sought from Reporter Fennimore.

Requiring Ms. Fennimore to testify in these circumstances would constitute an unwarranted intrusion into newsgathering activities protected by the First Amendment and Article XVI of the Massachusetts Declaration of Rights. As the Supreme Judicial Court held in Petition for the Promulgation of Rules, 395 Mass. 164 (1985), the First Amendment provides "'[s]ome protection' ... for 'any person' who gathers information and prepares it for expression." Moreover, a judge has authority to prevent "harassing" of reporters, Matter of Roche, 381 Mass. 624, 637 (1980); "frivolous inquiries," Dow Jones

& Co. v. Superior Court, 364 Mass. 317, 322 (1973); and "unnecessary" or "irrelevant" inquiries, Matter of Pappas, 358 Mass. 604, 610 (1971), aff'd sub nom. Branzburg v. Hayes, 408 U.S. 665 (1972).

The Supreme Judicial Court has also noted that in cases, like this one, "where the reporter has no personal knowledge of the events about which he is called to disclose information," it is appropriate for a court to be guided, by analogy, by the regulatory guidelines set down by the United States Department of Justice for subpoenaing of reporters by federal prosecutors. Petition for Promulgation of Rules, 395 Mass. at 172. Those guidelines are designed "to protect freedom of the press" and "news gathering functions." 28 C.F.R. 50.10(m). They require that, before proceeding with a subpoena against the news media, there "should be reasonable grounds to believe, based on information obtained from nonmedia sources, ... that the information sought is essential" to the proceeding. 28 C.F.R. 50.10(f)(1). "The subpoena should not be used to obtain peripheral, nonessential, or speculative information." Id. Alternative nonmedia sources should be exhausted before the press is subpoenaed. 28 C.F.R. 50.10(f)(3). Even requests for testimony relating to "publicly disclosed information" should be denied where they would be the equivalent of harassment. 28 C.F.R. 50.10(f)(5).

Ms. Fennimore is a news reporter with no connection to the matters at issue in this case. If criminal defendants were permitted to subpoena her and reporters like her to testify with respect to any matter as to which such reporters have written a news brief or article, the reporters would be significantly hindered from performing their protected function of reporting news for the public. To be sure, there may be circumstances when a case can be made for the need to impose such a burden on a reporter, such as where the

reporter possesses information that is critical to a criminal investigation, unavailable from any alternative source, and all other means of obtaining the information have been exhausted. But this is not such a case, nor does it come anywhere close. Here, this Court should quash the subpoena to Ms. Fennimore because "the public interest in encouraging the dissemination of information" outweighs any need for the testimony of this witness. Matter of John Doe Grand Jury Investigation, 410 Mass. 596, 602 (1991).

Conclusion

FOR THE FOREGOING REASONS, Jillian Fennimore and the Watertown TAB & Press request that this Court quash the subpoena to Ms. Fennimore, issue a protective order freeing her from testifying in this case, and permit her to engage in her constitutionally protection function of attending the criminal trial and reporting on the court proceedings.

Respectfully submitted,

THE WATERTOWN TAB & PRESS and
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Date: May 1, 2008