CASE NOTES

PRIVILEGES—IOWA RECOGNIZES A QUALIFIED TESTIMONIAL PRIVILEGE FOR NEWSPERSONS IN CIVIL LITIGATION—*Winegard v. Oxberger* (Iowa 1977).

A reporter for the Des Moines Register and Tribune Company wrote two articles[1] concerning a dissolution of marriage proceeding instituted by plaintiff's common-law wife.[2] The reporter based these articles on information obtained from an appeal by plaintiff to the United States District Court for the Southern District of Iowa and from a confidential source. Based on statements in these articles attributed to the attorney for plaintiff's wife, plaintiff filed a libel suit against the attorney's law firm for invasion of privacy[3] and defamation of character. Plaintiff deposed the reporter in an attempt to obtain from her information gathered and notes made in preparation of the articles. The reporter testified that the articles were true and correct to the best of her knowledge. However, she refused to answer questions concerning the identity of or conversations with her sources, the preparation of the articles and the procedures followed in editing them, claiming a testimonial privilege under the first amendment to the United States Constitution[4] and article 1, section 7, of the Iowa Constitution.[5] Plaintiff then filed a request for admission[6] directed at the attorney. In his response, the attorney admitted having conversed with the reporter about plaintiff's federal court action, but denied having made the statements attributed to him in the articles. Plaintiff also filed a motion to compel discovery[7] and a separate motion to sequester[8]

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1. Des Moines Tribune, Jan. 8, 1975, at p. 3, col. 6; Des Moines Register, Jan. 9, 1975, at p. 3, col. 7. A similar article appeared at The HAWKEYE, Jan. 9, 1975 at ____, col. ____.

2. Winegard v. Winegard, Equity No. 647 (Dist. Ct., Des Moines County, Iowa, Feb. 6, 1973). The Des Moines County District Court held that a common-law marriage existed between plaintiff, John R. Winegard, and Sally Ann Winegard. *But see* In Re Marriage of Winegard, 257 N.W.2d 609, 617 (Iowa 1977). (The Iowa Supreme Court noted that the district court's determination of existence of common-law marriage may be appealed).

3. Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977) (Summary judgment granted defendants on invasion of privacy claim).

4. U.S.CONST. amend. I reads:

> 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.

5. IOWA CONST. art. 1, § 7 provides in part: "Every person may speak, write, and publish his sentiments on all subjects . . . ."

6. Pursuant to IOWA R. CIV. P. 127 plaintiff, John R. Winegard, filed a request for admission directed at the attorney representing plaintiff's common-law wife.

7. IOWA R. CIV. P. 134(a)(2) provides in part: "If a deponent fails to answer a question . . . the discovering party may move for an order compelling an answer. . . . In ruling on such a motion, the court may make such protective order. . . ."

8. Winegard filed a motion to sequester and motion to strike from the record the findings of facts and conclusions of law issued by the District Court for Des Moines County and the application for interlocutory appeal. Plaintiff claimed that IOWA CODE § 598.26 (1973) prohibited

all records pertaining to the dissolution of marriage action.

The reporter applied for a protective order[9] quashing the deposition-related subpoena. The District Court for Polk County, with defendant, Judge Leo Oxberger, presiding, denied both the motion to sequester and the motion to compel discovery. Plaintiff appealed these rulings claiming defendant exceeded his proper jurisdiction and acted illegally in overruling the motions. On appeal, *held*, writ sustained. The fact that an opinion on an appeal in a connected case unavoidably portrayed the entire factual situation which inhered to the sequestration issue rendered such motion moot. As to the motion to compel discovery, however, plaintiff has met the burden of establishing that the information sought is critical to the invasion of privacy and defamation action, that no other reasonable means were available to obtain the information and that it does not appear from the record that the action is patently frivolous. Based on these facts, defendant exceeded his jurisdiction in overruling plaintiff's motion to compel discovery. *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 98 S.Ct. 2234 (1978).

Winegard v. Oxberger[10] is a case of first impression in Iowa concerning the extent to which the first amendment protects the confidentiality of a newsperson's sources and information in civil litigation.[11] *Winegard* considers

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dissemination of these materials. Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 98 S.Ct. 2234 (1978).

Section 598.26 (1973) provides in part: "The record and evidence in all cases where a marriage dissolution is sought shall be closed to all but the court and its officers, and access thereto shall be refused until a decree of dissolution has entered."

9. The reporter, Diane Graham, filed an application for protective order pursuant to IOWA R. CIV. P. 123 on March 5, 1975. 258 N.W.2d at 849 (actual date obtained from court file). This rule provides in part:

> Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

10. 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 98 S.Ct. 2234 (1978).

11. *Id.* at 849. The fact that *Winegard* stems from a civil action is significant in the examination of competing interests. The majority of courts consider compelled testimony less appropriate in civil cases than in criminal cases. *See, e.g.*, Gilbert v. Allied Chemical Corp., 411 F. Supp. 505, 510 (E.D. Va. 1976). *But see* Eckhart and McKey, *Caldero v. Tribune Publishing Company: substantive and remedial aspects of First Amendment protection for a reporter's confidential sources*, 14 IDAHO L. REV. 21, 110 (1977) (criticizes this distinction).

12. *See, .g.*, Ex Parte Lawrence, 116 Cal. 298, 48 P. 124 (1897); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1891); Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936). The common law recognized a limited number of relationships which gave rise to a privileged communication. These included (1) attorney-client; (2) husband-wife; (3) informer-government; (4) Juror-Juror. Various courts have expanded this list to include physician-patient and priest-penitent. Generally, courts viewed privileges as often interfering with the administration of justice, therefore, the trend was to restrict rather than expand the number of privileged relationships. For an excellent discussion on the lack of newsperson common law privileges, see D'Alembert, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969); Note, *Chipping*

the claim that "freedom of the press" necessitates granting newspersons a qualified privilege from compelled disclosure of their confidential sources and information. Newspersons unsuccessfully argued the need for such a privilege at common law.[12] However, many legislatures have enacted statutes[13] which confer either an absolute or qualified privilege to newspersons in response to the judicial hesitancy.[14] Iowa does not have a statutory privilege for newspersons,[15] therefore this analysis of the *Winegard* case will be largely confined to a constitutionally based privilege.

Winegard involves a complex factual background from which the constitutional issue emerges.[16] The factual background, however, will have its greatest impact on the application of the qualified privilege. For this reason,

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Away At the First Amendment; Newspapermen Must Disclose Sources, 7 AKRON L. REV. 129 (1973).

13. Statutes which protect a newsperson's confidential sources from compulsory disclosure are commonly known as "shield laws." The following states have enacted such legislation: ALA. CODE tit. 7, § 370 (1960); ALASKA STAT. § 09.25.150 (1973); ARIZ. REV. STAT. § 12-2237 (Supp. 1977); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West Evid. Supp. 1978); DEL. CODE tit. 10, §§ 4320-26 (1974); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1977); KY. REV. STAT. § 421.100 (Supp. 1976); LA. REV. STAT. ANN. §§ 45.1451-54 (West Supp. 1977); MD. ANN. CODE art. 35 § 2 (1972); MICH. STAT. ANN. § 28-945(1) (1972); MINN. STAT. ANN. §§ 595. 021-025 (West Supp. 1977); MONT. REV. CODE ANN. § 93704(8) (Supp. 1977); NEB. REV. STAT. § 20-144-147 (Supp. 1977); NEB. REV. STAT. § 49.275 (1975); N.J. STAT. ANN. § 2A:84A-21-29 (Supp. 1977); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1977); N.D. CENT. CODE ANN. §§ 31-01 to 06.2 (Supp. 1977); OHIO REV. CODE ANN. § 2739.04 (Baldwin Supp. 1977); OKLA. STAT. ANN. tit. 12, § 385.1 (West Supp. 1977); ORE. REV. STAT. §§ 44.410-.540 (1975); PA. STAT. ANN. tit. 28, § 330 (Purdon Supp. 1977-78); R.I. GEN. LAWS §§ 9-19.1-1 to .3 (Supp. 1976); TENN. CODE ANN. § 24-113 (Supp. 1977). Under some statutes, a reporter is afforded an absolute privilege. *See, e.g.*, ALA. CODE tit. 7, § 370 (1960); CAL. EVID. CODE § 1070 (West Evid. Supp. 1978); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1977); NEV. REV. STAT. § 49.275 (1975); TENN. CODE ANN. § 24-113 (Supp. 1977). Other states place a limitation upon the exercise of the privilege. *See, e.g.*, ALASKA STAT. § 09.250.50 (1973) (privilege yields if a miscarriage of justice would result or if contrary to public interest); ARK. STAT. ANN. § 43-917 (1964) (no privilege if bad faith with malice shown and publication not in the interest of public welfare); LA. REV. STAT. ANN. §§ 45.1451-.1454 (West Supp. 1977) (disclosure permitted when essential to public interest); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975) (privilege available unless disclosure essential to prevent injustice); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1977) (privilege exists unless general or specific law to contrary exists); N.D. CENT. CODE §§ 31-01 to 06.2 (Supp. 1977) (no privilege if failure to disclose would cause miscarriage of justice); OKLA. STAT. ANN. tit. 12, §§ 385.1-.3 (West Supp. 1976-77) (privileges available unless relevant to significant issue in action and no alternate source exists). Moreover, in some states only the source of the reporters information is protected. *See, e.g.*, ILL. STAT. ANN. ch. 51 §§ 111-19 (Smith-Hurd Supp. 1977); PA. STAT. ANN. tit. 28, § 330 (Purdon Supp. 1977-78). For an excellent discussion of the extent of protection afforded newspersons under these statutes, *see* D'Alemberte, *supra* note 12; Comment, *Branzburg v. Hayes: A Need For Statutory Protection of News Sources*, 61 KY. L.J. 551 (1973); Note, *State Newsman's Privilege Statutes: A Critical Analysis*, 49 NOTRE DAME L. REV. 150 (1973).

14. *See* Eckhart and McKey, *supra* note 11, at 61.

15. 258 N.W.2d at 850 (court recognizes that Iowa does not have a statutory privilege for newspersons).

16. The factual background supplied by the court in Winegard v. Oxberger can be supplemented by Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977); In Re Marriage of Winegard, 257 N.W.2d 609, 610-13 (Iowa 1977).

a lengthy recitation of the factual setting is omitted and reference to specific facts is made throughout the analysis.

The court in *Winegard* began its analysis by conclusively establishing that a constitutionally based newsperson's privilege actually exists.[17] The court noted that even though *Branzburg v. Hayes*[18] did not reach the "specifics" of the case at hand, the court therein cited with approval the United States Supreme Court's assertion that freedom of the press is a "fundamental personal right."[19] The *Winegard* court further bolstered this assertion with a similar citation from *Schneider v. State of New Jersey.*[20] Arguably, if freedom of the press is secured to "all persons" in this context, the *Winegard* court seems to reiterate the *Branzburg* conclusion that newsperson's have no *special* privilege.[21] Yet the court in *Winegard* stated that there is a "constitutionally based *newsperson's* privilege."[22] As such, the only reasonable conclusion is that the Iowa court, when confronted with this issue, will afford a privilege not only to professional newspeople, but to all individuals who have expressed themselves in written form. Indeed, the *Branzburg* court identified, as a practical defect in the application of a qualified privilege, the difficulty of defining the categories of newspersons who qualify for the privilege.[23] Perhaps the Iowa court has effectively resolved this dilemma by implicitly stating that all individuals who express themselves in written form enjoy a qualified privilege.

The *Winegard* court's recognition of a constitutionally based newsperson privilege has a strong foundation.[24] However, a court which recognizes a news-

17. 258 N.W.2d at 849-50.

18. 408 U.S. 665 (1972). In *Branzburg*, the United States Supreme Court reviewed three cases: Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), *cert. granted, sub nom.*, Branzburg v. Hayes, 402 U.S. 942 (1971); In Re Pappas, 358 Mass. 614, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971). The cases involved grand jury investigation of activities and ideas of political and social dissidents. In each of the cases, the Court held that the first amendment right to gather news was outweighed by the interests of the government in securing an effective judicial system. For a discussion of the facts in *Branzburg*, *see* Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 831 (1974).

19. 258 N.W.2d at 850.

20. 308 U.S. 147, 161 (1939).

21. In *Branzburg*, the Supreme Court specifically addressed the assertion that newspersons should have a special privilege with the following language:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

408 U.S. at 689-90.

22. 258 N.W.2d at 850.

23. 408 U.S. at 704.

24. *See, e.g.*, United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976), *modified* 561 F.2d 539 (1977) (first amendment protected reporters who attended union meeting against disclosure); Poirier v. Carson, 537 F.2d 823 (5th Cir. 1976) (first amendment held to protect against disclosure of sources during discovery in a 42 U.S.C. § 1983 action); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) (requiring disclosure notwithstanding first

person's privilege must first acknowledge that the concept of "freedom of the press" includes freedom to gather news.[25] Newspersons contend that a compelled disclosure of sources and information abridges freedom of the press because it has a "chilling effect" on the willingness of potential sources to come forward with information, thereby restraining the flow of news to the public.[26] This reasoning provides the basis for the claim that, in addition to the private interest of the newsperson, the public also has an interest in protecting confidential information.[27] Notwithstanding its recognition of a qualified newsperson privilege, the court in *Winegard* noticeably omits the step of finding freedom to gather news to be included within the "freedom of the press" concept.

Courts which recognize such a privilege must also consider the implications of the Supreme Court's disinclination in *Branzburg* to interpret the first amendment as granting newspersons a qualified privilege.[28] The decision in

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amendment because information sought went to the heart of the matter); Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (first amendment held to protect against disclosure in civil rights action); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir.), *cert. denied*, 409 U.S. 1125 (1972) (first amendment held to protect against disclosure by defendant in libel action by public official); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976) (first amendment held to protect against disclosure of confidential sources during discovery in a libel action); Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976) (first amendment protected against discovery of confidential information about Kepone held by third party); Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (first amendment held to protect against disclosure of confidential materials in civil action arising out of Watergate); Spiva v. Francouer, 39 Fla. Supp. 49 (Cir. Ct. 1973).

25. In order to assert a constitutional privilege, newspersons necessarily were required to define what aspect of "freedom of the press" is affected by compelled disclosure of confidential information. The Supreme Court in *Branzburg* recognized news gathering as protected by the first amendment:

> We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

26. Murasky, *supra* note 18, at 851; Comment, *The Journalistic Privilege: Newsgathering Versus The Public's Need to Know*, 10 IDAHO L. REV. 235, 241 (1974); Note, *The Rights of the Public And The Press To Gather Information*, 87 HARV. L. REV. 1505 (1974) [hereinafter cited as *Rights of the Press*]; Comment, *Newsgathering: Second Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440 (1975) [hereinafter cited as *Newsgathering*]. The protection of the free flow of information is often considered the basic objective of the first amendment. *See also* A. CHAFEE, FREE SPEECH IN THE UNITED STATES 6 (1941); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-15 (1966); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 88-89 (1948).

27. *See, e.g., Rights of the Press, supra* note 26; *Newsgathering, supra* note 26. The Second Circuit identified a related public interest as the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfiltered debate over controversial matters. Baker v. F & F Investment, 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

28. The vast majority of courts have felt compelled to address the Supreme Court's decision in *Branzburg*. *See* note 24 *supra*.

Branzburg rejected a newspersons' qualified privilege for a number of reasons. First, the Court reasoned that if confidential sources were as sensitive as claimed, then only an absolute privilege would suffice to avoid the "chilling effect" of compelled disclosure.[29] Secondly, the Court indicated that the administration of a qualified privilege would present "practical and conceptual difficulties of a high order."[30] Finally, the Court recognized that because of the peculiar function of the grand jury, it must be free to make its own determination of the need for evidence.[31]

Courts which recognize a qualified privilege have focused on the confusion of the *Branzburg* holding and distinguish the facts of the case being considered from those of *Branzburg*.[32] Much of the confusion since *Branzburg* centers around the proper weight to be accorded the majority opinion. The dissent by Justice Stewart clearly adopts a qualified privilege for newspersons.[33] Furthermore, there is a persuasive argument that Justice Powell's concurring opinion conforms to a privilege approach.[34] As such, several commentators have concluded that a plurality of the Supreme Court Justices which heard the *Branzburg* case accept a qualified privilege.[35] An alternative approach to a direct confrontation with *Branzburg* is to either distinguish the case on a civil-criminal basis[36] or to distinguish it by emphasizing that *Branzburg* is limited in application to grand jury proceedings.[37] The *Winegard* court accepted the proposition that *Branzburg* is limited to its factual setting.[38]

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29. Branzburg v. Hayes, 408 U.S. 665, 702 (1972).

30. *Id.* at 703-04.

31. *Id.* at 701-02.

32. *See, e.g.*, note 24 *supra.*

33. Significant developments, 53 B.U.L. Rev. 497, 504 (1973). Justice Stewart stated in his dissent 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 obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

408 U.S. at 743.

34. *See* Gilbert v. Allied Chemical Corp., 411 F. Supp. 505, 509 (E.D. Va. 1976); Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsman*, 26 Hastings L. J. 709, 716 (1975). Indeed, Justice Powell states that a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony will be dependent on the facts of each case. Branzburg v. Hayes, 408 U.S. 665, 710 (1972).

35. *See* Goodale, *supra* note 34.

36. *See, e.g.*, Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Loadholtz v. Flieds, 389 F. Supp. 1299, 1301 (M.D. Fla. 1975); Democratic National Committee v. McCord, 356 F. Supp. 1394, 1397 (D.D.C. 1973); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 83 (E.D.N.Y. 1975).

37. In *Baker* the court aptly points out that "the [*Branzburg*] Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us." Baker v. F & F Investment, 470 F.2d 778, 784-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

38. 258 N.W.2d at 849. (court states that *Branzburg* does not reach the specifics of the subject presently before the court).

While the majority of cases which stem from a civil proceeding recognize a constitutionally based newsperson's privilege, there is a strand of cases which deviate from this mainstream.[39] For instance, in *Caldero v. Tribune Publishing Company,*[40] the Idaho Supreme Court held that once a plaintiff has pled a prima facie case based on a newspaper article, relying in part on a confidential source, he is automatically entitled to discover the identity of that source.[41]

Caldero is significant in that it stems from a libel action with facts similar to *Winegard,* yet it rejects the assertion that first amendment rights are involved.[42] However, as will be discussed in the following paragraphs, the reasoning employed by the Idaho court does not provide a viable alternative to the qualified privilege recognized in *Winegard.*

The majority opinion[43] in *Caldero* rejected both an absolute and qualified first amendment privilege for newspersons.[44] The Idaho court reasoned that the statutory duty[45] requiring a witness lawfully served with a subpoena to appear and answer all pertinent questions is without exception for newspersons.[46] Furthermore, the court noted that the general trend in the law of evidence has been that new testimonial privileges are disfavored because they obstruct the search for truth.[47]

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39. *See* Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791, *cert. denied,* 434 U.S. 930 (1977); Dow Jones & Co., Inc. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973); State v. Buchanan, 250 Or. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968).

40. 98 Idaho 288, 562 P.2d 791, *cert. denied,* 434 U.S. 930 (1977).

41. *Id.; see* Eckhart and McKey, *supra* note 11, at 23.

42. Eckhart and McKey, *supra* note 11, at 24. The *Caldero* decision stems from a libel action brought against the Lewiston Morning Tribune based on an article which allegedly contained "an unfair, false and malicious account" of an incident involving Michael Caldero while he was employed as an undercover agent. Plaintiff subsequently amended his complaint to include an invasion of privacy action against the reporter who wrote the article. During the deposition of the reporter, plaintiff sought the identity of a "police expert" who allegedly made the defamatory statements. For a complete statement of the factual background, *see* Eckhart and McKey, *supra* note 11, at 25-34.

43. The *Caldero* court split their decision three-to-two, with Justice Shepard writing for the majority; Justices Donaldson and Bakes each wrote dissenting opinions. It is interesting to note that both dissenting opinions set forth a qualified privilege similar to the *Winegard* court. 98 Idaho at ____, 562 P.2d at 801-12. *See* Eckhart and McKey, *supra* note 11, at 30-34.

44. Eckhart and McKey, *supra* note 11, at 31.

45. The Idaho court noted that appellant falls within the clear requirement of Idaho law that he appear and testify. These pertinent sections provide in part:

> All persons, without exception, otherwise than is specified at the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perception to others, may be witnesses.

IDAHO CODE § 9-201 (1947).

> A witness, served with a subpoena, must attend at the time appointed, with any papers under his control, required by the subpoena, and answer all pertinent and legal questions, and, unless sooner discharged, must remain until the testimony is closed.

IDAHO CODE § 9-1301 (1947).

46. Caldero v. Tribune Publishing Co., 98 Idaho 288, ____, 562 P.2d 791, 793, *cert. denied,* 434 U.S. 930 (1977).

47. *Id.* at 794.

The Idaho court then proceeded to examine the history of a newsperson's privilege. In the examination, both *Garland v. Torre*[48] and *Branzburg* were read to the effect that no privilege exists.[49] In an effort to support this interpretation, the court relied heavily on two state court decisions[50] which refused to recognize a privilege. In addition, the court distinguished, on their facts, those cases which have recognized a constitutional privilege.[51] Finally, the court stated, rather enigmatically, that it rejected the premise that "the public's right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public."[52]

The reasoning of *Caldero* has been severly criticized as clearly inconsistent with the overwhelming majority of cases in this area.[53] Furthermore, criticism of the court's incomplete analysis of Idaho's testimonial duty,[54] ineffective factual distinctions of *Cervantes v. Time, Inc.*[55] and *Baker v. F & F Investment*[56] and unique reading of *Branzburg*[57] effectively removes the *Caldero* opinion from consideration as a possible alternative to the *Winegard* holding.[58]

After recognizing a constitutional privilege for newspersons, the *Winegard* court quickly pointed out that the privilege is not unlimited.[59] As noted by the court, fundamental rights can be impaired if there is a "compelling need."[60] The court initiated the examination of whether there was a countervailing interest in the case at hand by examining the premise that the public has a right to every persons' evidence.[61] This premise has often been used as the foundation for the concept of compelled testimony.[62] With the foregoing in mind, the *Winegard* court presented a barrage of support for

48. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

49. 98 Idaho at ___, 562 P.2d at 794-97.

50. Dow Jones & Co., Inc. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973); State v. Buchanan, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

51. Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (involved federal court action with the laws of two states applicable; journalist not a party); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir.), *cert. denied*, 409 U.S. 1125 (1972) (noted that court stated in dicta that weight of decisional authority holds newsmen do not have a first amendment privilege).

52. 98 Idaho at ___, 562 P.2d at 801.

53. Eckhart and McKey, *supra* note 11, at 120.

54. *Id.* at 121.

55. Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir.), *cert. denied*, 409 U.S. 1125 (1972).

56. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). *See* Eckhart and McKey, *supra* note 11, at 124-25.

57. Eckhart and McKey, *supra* note 11, at 123.

58. Generally, commentators view the existence of a qualified testimonial privilege for newspersons to be preferrable to its absence. *See, e.g.*, Goodale, *supra* note 34, at 742-43; Eckhart and McKey, *supra* note 11.

59. Winegard v. Oxberger, 258 N.W.2d 847, 850 (Iowa 1977), *cert. denied*, 98 S.Ct. 2234 (1978).

60. *Id.*

61. *Id.*

62. *See, e.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); Branzburg v. Hayes, 408 U.S. 665, 688-90 (1972).

the assertion that compelled testimony is necessary for the effective functioning of the courts.[63] Finally, on the basis of the above concepts, the court held in *Winegard* that "an undiluted compelling state interest existed in the situation at hand, and that such an interest subordinated a newsperson's privilege to withhold confidential information."[64] This language, in and of itself, reveals the intention of the Iowa Supreme Court to test the purity of the individual litigant's private interest in the compulsory testimony.

The *Winegard* court set forth the following standard which must be met before newspersons will be required to testify about confidential information:

(1) The information must be necessary or critical to the case in which the reporter testimony is sought. That is, the information sought should go to the heart of the questioner's claim.

(2) Other reasonable means available by which to obtain the information sought must have been exhausted.

(3) That it does not appear from the record that the action or defense is patently frivolous.[65]

Two aspects of the test are immediately clear to even the most casual reader: the burden of proof rests with the party seeking to force disclosure,[66] and, absent specific guidelines which indicate when the burden is met, the newsperson as well as his source may not know if the confidential information will be protected. Thus, the haunting statement in *Branzburg* that only an absolute privilege will suffice for sensitive sources[67] may prove true unless the legal parameters of protection are clarified. Clearly, in each case the factual background of the controversy will determine whether the newsperson will be compelled to breach a promise of confidentiality. In this respect an examination of each element in the test may prove helpful.

The first element of the test requires that the information sought be necessary or critical to the involved cause of action or defense pled. This standard was first set forth in *Garland v. Torre*[68] wherein the court held that the identity of the newsperson's source "went to the heart of plaintiff's claim."[69] In this case, actress Judy Garland brought an action against CBS for breach of contract and defamation of character based on statements which had been published by Marie Torre in the New York Herald Tribune. In her column, Miss Torre attributed to a CBS "network executive" several statements about plaintiff which were allegedly false and highly damaging to her professional reputation. Plaintiff had taken depositions of two CBS executives in an unsuccessful attempt to learn the identity of the "network execu-

63. 258 N.W.2d at 851-52.

64. *Id.* at 852.

65. *Id.*

66. The focus of the *Winegard* test is on the compelling state interest asserted by the party seeking disclosure. The determination of the degree in which the interest is "compelling" will be determined by the qualified privilege.

67. *See* note 29 *supra.*

68. 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

69. *Id.* at 550.

tive" who allegedly made the defamatory statements. Thereafter, plaintiff deposed Miss Torre and upon her refusal to identify the source of her information, plaintiff sought to compel discovery.[70] The contoversy culminated in an appeal to the Second Circuit with Miss Torre claiming a constitutional privilege.

Judge (now Justice) Stewart accepted the journalist's argument that compulsory disclosure of confidential news sources may abridge freedom of the press. However, he concluded that first amendment considerations must yield to "a paramount public interest in the fair administration of justice."[71] In determining that the identity of the CBS executive went to the heart of plaintiff's libel action, the court stated that it was not faced with a situation where the identity was of doubtful relevance or materiality.[72] In fact, according to Judge Stewart, the disclosure of the confidential informant bore directly on the major thrust of plaintiff's claim.[73]

The language of *Garland* is often quoted, but rarely explicated, by courts recognizing a qualified privilege.[74] However, the need for a clarification of the standard that "the information sought must go to the heart of plaintiff's claim" was satisfied in *Carey v. Hume.*[75]

In *Carey,* appellee brought a libel action based on a newspaper article containing statements allegedly damaging to his reputation. The article stated that United Mine Worker's Union counsel, Ed Carey, was observed removing boxes of documents from the union president's office. The article also mentioned that Carey subsequently filed an official complaint with the police alleging that burglars had stolen a box of "miscellaneous items" from union headquarters. In response to a demand for retraction, the newspaper indicated that the account was based on information supplied by a number of eyewitnesses employed at the union headquarters.[76]

Appellee sought to compel disclosure after an unsuccessful attempt to discover the identity of the union employee. The court found that the identity of the source went to the heart of appellee's claim because it would be exceedingly difficult for Carey to produce evidence beyond his own testimony that

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70. *Id.* at 547. Throughout this analysis, both federal and state court decisions are indiscriminately cited for various propositions. Because the reasoning of the *Winegard* decision is at issue, this author does not feel the need to discriminate. Furthermore, absent statutory considerations, state courts have not discriminated on the basis of federal vs. state court decisions. A clear example of the similarity of issues and procedural aspects of the cases can be gleaned from a comparision of the IOWA R. CIV. P. 134 and FED. R. CIV. P. 37, both entitled Failure to Make Discovery. FED. R. CIV. P. 37 provides in part: "If a deponent fails to answer a question propounded or submitted . . . the discovering party may move for an order compelling an answer. . . . If the court denies the motion in whole or in part, it may make such protective order [as is permitted]. . . ." For comparison purposes, *see* note 7 *supra.*

71. Garland v. Torre, 259 F.2d 545, 549 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

72. *Id.* at 549-50.

73. Goodale, *supra* note 34, at 738.

74. United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976), *modified* 561 F.2d 539 (1977); Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973).

75. Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), *cert. dismissed,* 417 U.S. 938 (1974).

76. *Id.* at 633.

he did not remove the documents.[77] Moreover, since it was the appellee's burden to show malice or reckless disregard for the truth on the part of the newspaper, knowledge of the confidential source could lead to proof that the reporter who wrote the story either had no reliable source, or, if she had a source, that she had recklessly relied on the same.[78] Discovery of the identity of the confidential source, therefore, was the necessary first step in meeting plaintiff's burden of proof. This reasoning provides ample support for the conclusion that most courts will recognize the necessity of a reporter disclosing his source where the truth of the questioned statement is involved in a libel action.

The issue of compelled disclosure of a confidential source has been considered in cases other than those stemming from a libel action.[79] As a general rule, compelled disclosure has been denied where the newsperson or his newspaper are not defendants in the action.[80] More has been required to compel disclosure than satisfaction of the relevancy standard contemplated by the Federal Rules of Civil Procedure.[81] In fact, it is clear that in compelled disclosure cases the information sought must be central as well as relevant to plaintiff's cause of action.[82]

In *Winegard*, plaintiff's cause of action was based on statements attributed to Stephen Schalk, the attorney for plaintiff's common-law wife.[83] Plaintiff initiated his defamation and invasion of privacy action against Schalk's law firm and not the Des Moines Register or Diane Graham, the newsperson who prepared the story. In this sense, because most libel actions of this nature are initiated directly against the newspaper and/or newsperson, the factual setting in *Winegard* is distinguishable from the majority of libel cases involving a newsperson's privilege.[84] However, in response to a request for admis-

77. *Id.* at 636-37.

78. *Id.* at 637.

79. Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975); Spiva v. Francouer, 39 Fla. Supp. 49 (Cir. Ct. 1973).

80. *Id.*

81. In Loadholtz v. Fields, 389 F. Supp. 1299, 1301 (M.D. Fla. 1975) the court points out that the Second Circuit in Baker v. F & F Investment rejected the notion that wide open discovery rules in the Federal Rules of Civil Procedure justified disclosure of a newsperson's confidential source. In Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 82 (E.D. N.Y. 1975) the court rejected the use of broad discovery where newsperson rights are involved. The court referred specifically to FED. R. CIV. P. 26 (b)(1) (appears reasonably calculated to lead to discovery of admissible evidence) and FED. R. EVID. 401 (the fact sought has tendency to make cause of action more probable than not).

82. Carey v. Hume, 492 F.2d 631, 636 n.9 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974) (citing Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973)).

83. 258 N.W.2d at 848-49. Mr. Schalk represented Sally Ann Winegard in Winegard v. Winegard, Equity No. 647 (Dist. Ct., Des Moines County, Iowa, February 6, 1973).

84. The vast majority of libel actions are initiated either against the newspaper or reporter publishing the article. Furthermore, the *Winegard* facts are unique in that the alleged source of information was named in the article. *But see* Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975) (distinction held "utterly irrelevant" to the "chilling effect").

sion, Schalk denied having made the statements attributed to him in the articles.[85] From a procedural standpoint, Schalk's denial made the substance and the source of what was said to Graham even more critical than the need presented in *Garland* or *Carey*[86] because the plaintiff in *Winegard* had to establish that he had brought his cause of action against the proper defendant. However, even though Graham's deposition was necessary and critical to plaintiff's action, many of the questions asked her may not have been. During Graham's deposition, plaintiff posed several questions which went beyond the scope of what was said to Graham and by whom.[87] For example, in her brief, Graham objected on the grounds of relevancy to the questions which concerned the editorial process which she normally follows in preparing articles and news accounts.[88] The *Winegard* court responded to these objections by concluding that it was satisfied with plaintiff's "basic discovery objective."[89] The court also added that resolution of the relevancy of discovery-related questions would be left to the trial court; however, the court further emphasized that the trial court, in determining the appropriateness of the questions, should also be guided by the "necessary and critical" standard which is peculiar to actions of this nature.[90]

The *Winegard* court's satisfaction with plaintiff's "basic discovery objective," when coupled with its suggestion that the trial court be guided by the "necessary and critical" standard, appears to be less demanding than the treatment other courts have afforded requests for similar information.[91] Other courts, in deciding similar cases, directly address the issues of compelled disclosure of the editorial process,[92] unpublished files[93] or confidential informants.[94] The Iowa court specifically identifies questions concerning the identity of and conversation with the confidential source as "necessary." The court, however, does not provide a much needed guideline to determine whether other questions qualify as "necessary." As such, the trial court is left without a guideline by which to judge relevancy.

After the party seeking discovery has pursuaded the court that the infor-

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85. 258 N.W.2d at 853.

86. From a procedural standpoint, it is more important to know that suit has been brought against a proper defendant than whether the statements were true or the reporter acted with malice.

87. Deposition of Diane Graham, March 1, 1975. Examples of such questions include the following: plaintiff requested information as to whether Graham was given instructions with respect to conducting her work as an employee, *id.* at 15; how she goes about preparing a story, *id.* at 32; whether she preserves her notes, *id.* at 38; whether the notes which she made are in someone else's possession, *id.* at 39.

88. Brief on behalf of the Hon. Leo Oxberger, Defendant, submitted by Diane Graham and the Des Moines Register & Tribune Company at 38, Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977).

89. 258 N.W.2d at 852.

90. *Id.*

91. *See, e.g.*, the cases cited in note 24 *supra.*

92. Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *cert. granted*, 98 S.Ct. 1483 (1978).

93. Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976).

94. Apicella v. McNeil Laboratories, 66 F.R.D. 78 (E.D.N.Y. 1975).

mation sought is critical to his claim, the party must next convince the court that the information cannot be obtained by other means.[95] The *Winegard* court considered the fact that Schalk denied having made the statements attributed to him by Graham's articles as a sufficient enough effort by the plaintiff to exhaust other plausible avenues of information.[96] The court reasoned that because Schalk and Graham were the sole participants in the phone conversation (where the statements in question were allegedly made), the only remaining person who could provide essential information to Winegard's claim was Graham.[97] As a result, the *Winegard* court concluded that while other discovery methods may have been available to plaintiff, it did not intend to dictate the discovery tactics which should have been employed by plaintiff's counsel, nor did it feel that an alternative approach would have been more fruitful.[98]

Upon attempting to extrapolate a firm guideline from the court's reasoning in *Winegard,* two problems appear. First, the court does not qualify its disinclination to dictate counsel's discovery tactics; therefore, it is not clear whether the court would consider doing so under a different factual setting. Secondly, it is unclear whether an alternate discovery approach must be "more fruitful" than the approach utilized before the reporter can successfully argue that plaintiff has failed to meet his burden.

The most reasonable interpretation of the court's disinclination to dictate counsel's discovery tactics is that where counsel has attempted to discover the information sought through an alternative source, the court will not find fault with the discovery method employed. However, where the possibility exists that the information may be gleaned from a party to the action[99] or from other available sources,[100] the court will dictate "discovery tactics." The party seeking disclosure must make a positive showing that he has attempted to exhaust other reasonable means available to obtain the information.[101]

The *Baker* court emphasized that a plaintiff must exhaust other possible means to the information sought before compelling disclosure. Indeed, it hinged its opinion and distinguished its case from *Garland* on these grounds: " . . . The facts in the *Garland* case are wholly unlike those before us. There the record revealed that Miss Garland had taken active steps independently to determine the identity of confidential news source . . . ."[102] The *Baker* court saw no reason why the defendant in its case could not be deposed in an attempt to obtain the same information which the newsperson's confiden-

95. 258 N.W.2d at 852.
96. *Id.* at 852-53.
97. *Id.* at 853.
98. *Id.*
99. Gilbert v. Allied Chemical Corporation, 411 F. Supp. 505 (E.D. Va. 1976).
100. Apicella v. McNeil Laboratories, 66 F.R.D. 78 (E.D.N.Y. 1975).
101. Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973).
102. Garland v. Torre, 259 F.2d 545, 547 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

tial source would supply.[103] While a plaintiff must exhaust other possible means to obtain the needed information, *Carey* makes it plain that a plaintiff may not be required to take active steps in pursuit of an alternate source where he does not have a reasonable basis to know where to begin.[104] The *Carey* court pointed out that, in the case at hand, it would be unreasonable for the plaintiff to depose every UMWA employee working at union headquarters.[105] On this basis, it distinguished its case from *Baker*.

It seems unlikely that the Iowa courts would require that the alternate discovery approach be "more fruitful" before a reporter can successfully argue that a plaintiff has failed to meet his burden under the *Winegard* test. The values resident in the protection of confidential sources certainly point toward compelled disclosure as the end, and not the beginning of the inquiry.[106] At the crux of the determination of whether the plaintiff has exhausted alternate means of obtaining confidential information is the determination of whether the information is of the same nature and content as the information within the knowledge of the newsperson.[107]

The final element of the *Winegard* test focuses on the question of whether the action or defense is not patently frivolous.[108] The *Winegard* court concluded that, from an examination of the record, the libel action against Schalk and his co-defendants cannot be deemed "facially frivolous" or "patently without merit."[109]

This element has not proved to be a substantial hurdle for litigants seeking to depose a reporter.[110] However, where a plaintiff brings his libel action against a newspaper or its reporter, he must also meet the burden of showing malice or reckless disregard on the part of the defendant.[111] Where the media defendant is able to show that the plaintiff is unlikely to meet this heavy burden, *i.e.* malice or reckless disregard, and that disclosure of a newsperson's confidential information will *not* reduce this unlikelihood, then summary judgment has been granted.[112] The effect of summary judgment is to indirectly establish that plaintiff's claim is frivolous, and thereby satisfy the second *Winegard* test.

The *Winegard* case stems from a libel action against non-media defendants. In this respect, the case is distinguishable from those cases which have

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103. *See* Carey v. Hume, 492 F.2d 631, 639 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974).

104. *Id.*

105. *Id.* at 638-39.

106. *Id.*

107. *See, e.g.*, cases cited in note 24 *supra*.

108. 258 N.W.2d at 852.

109. *Id.* at 853.

110. This point is clearly illustrated in Carey v. Hume, 492 F.2d 631, 637 (D.C. Cir. 1974) and Garland v. Torre, 259 F.2d 545, 550-51 (2d Cir. 1958).

111. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

112. *See* Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir.), *cert. denied*, 409 U.S. 1125 (1972).

granted summary judgment for media defendants. Furthermore, in Iowa, the common law of libel in actions against non-media defendants remains untouched by the constitutional considerations of *New York Times v. Sullivan*[113] and its progeny.[114] There are indications, however, that constitutional standards will eventually be applied in libel actions against non-media defendants.[115] If the *Winegard* court would have considered the statements allegedly made by the attorney to be constitutionally protected, the court could have considered plaintiff's libel action frivolous.[116] However, because the Iowa court appears to base its decision on common-law libel grounds, its reluctance to find plaintiff's claim patently frivolous is the logical outcome.

The *Winegard* court's recognition of a newsperson's qualified privilege from compelled disclosure is a positive step towards securing the "preferred position" of first amendment rights. The test employed by the Iowa Supreme Court is in keeping with strong precedent and sound legal reasoning. No doubt newspersons and their potential sources are pleased with this result.

However, the viability of the test set forth in *Winegard* will be determined by its future application. Acceptance of a qualified privilege is not enough to combat the real possibility of a "chilling effect." The Iowa courts must clarify the implications of each element in the test to quell the fears which stem from uncertainty. The Iowa Supreme Court's satisfaction with a litigant's "basic discovery objective" will result in a diluted test; a test which does not accomplish its goal.

James Fallace

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113. 376 U.S. 254 (1964).

114. Note, *Iowa Libel Law and the First Amendment: Defamation Displaced,* 62 Iowa L. Rev. 1067, 1101 (1977).

115. *Id.*

116. It is interesting to note that the Iowa Supreme Court subsequent to the *Winegard* decision held in Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977) that defendant Schalk was entitled to summary judgment with respect to the invasion of privacy claim by Winegard. In the opinion the court also holds that the statements allegedly made by Schalk were a matter of public record. *Id.* at 821-22. If the *Winegard* court would have made this determination it could have considered Schalk's statements to be privileged. *See* RESTATEMENT (SECOND) OF TORTS § 611, Comment C (1972).

FEDERAL JURISDICTION—WHERE A PLAINTIFF ASSERTS A CLAIM AGAINST A NONDIVERSE THIRD-PARTY DEFENDANT, JURISDICTION DOES NOT ACCRUE UNDER THE 28 U.S.C. § 1332 DIVERSITY STATUTE.—*Owen Equipment & Erection Co. v. Kroger* (U.S. Sup. Ct. 1978).

Kroger, a citizen of Iowa and administratrix of her husband's estate, brought a wrongful death action in the United States District Court for the District of Nebraska as the result of an accident in which her husband was electrocuted. Jurisdiction was based on diversity of citizenship.[1] The complaint alleged that the defendant, Omaha Public Power District (OPPD), was negligent in the construction, maintenance and operation of the power lines which caused Kroger's death.[2] Pursuant to rule 14(a) of the Federal Rules of Civil Procedure, OPPD impleaded Owen Equipment and Erection Company (Owen),[3] alleging that Owen was liable to OPPD for any recovery which Kroger might obtain.[4] OPPD further alleged that Owen owned and operated

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1. Jurisdiction was alleged under 28 U.S.C. § 1332 (1976), which reads in part:
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between
(1) citizens of different States
. . .
(c) For the purposes of this section . . . , a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .

2. Kroger v. Owen Equipment & Erection Co., 558 F.2d 417 (8th Cir. 1977), *rev'd*, 46 U.S.L.W. 4732 (U.S. June 21, 1978). The district court issued an unreported memorandum opinion.

3. The original complaint in impleader had named Owen Construction Co., Inc. as a third-party defendant. However, upon discovering that the corporate name was in fact Owen Equipment and Erection Company, OPPD moved for dismissal of the third-party complaint and for leave to amend the complaint in order to name Owen Equipment and Erection Company. The district court termed Owen Construction Company, Incorporated as "an Iowa corporation" and Owen Equipment and Erection Company as "a Nebraska corporation." 558 F.2d at 429.

4. FED. R. CIV. P. 14 provides in part:
(a) When Defendant May Bring In Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert