REPORTER'S PRIVILEGE: 1ST CIR.

The Reporters Committee for Freedom of the Press

A chapter from our comprehensive compendium of information on the reporter's privilege —the right not to be compelled to testify or disclose sources and information in court — in each state and federal circuit.

The complete project can be viewed at
www.rcfp.org/privilege

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The Reporter's Privilege Compendium: An Introduction

Since the first edition of this guide was published in 2002, it would be difficult to say that things have gotten better for reporters faced with subpoenas. Judith Miller spent 85 days in jail in 2005 for refusing to disclose her sources in the controversy over the outing of CIA operative Valerie Plame. Freelance videographer Josh Wolf was released after 226 days in jail for refusing to testify about what he saw at a political protest. And at the time of this writing, former *USA Today* reporter Toni Locy is appealing her contempt conviction, which was set to cost her as much as $5,000 a day, for not revealing her sources for a story on the anthrax investigations.

This recent round of controversies underscores a problem that journalists have faced for decades: give up your source or pay the price: either jail or heavy fines. Most states and federal circuits have some sort of reporter's privilege —the right to refuse to testify —that allows journalists to keep their sources confidential. But in every jurisdiction, the parameters of that right are different. Sometimes, the privilege is based on a statute enacted by the legislature —a shield law. In others, courts have found the privilege based on a constitutional right. Some privileges cover non-confidential information, some don't. Freelancers are covered in some states, but not others.

In addition, many reporters don't work with attorneys who are familiar with this topic. Even attorneys who handle a newspaper's libel suits may not be familiar with the law on the reporter's privilege in the state. Because of these difficulties, reporters and their lawyers often don't have access to the best information on how to fight a subpoena. The Reporters Committee for Freedom of the Press decided that something could be done about this, and thus this project was born. Compiled by lawyers who have handled these cases an d helped shape the law in their states and federal circuits, this guide is meant to help both journalists who want to know more about the reporter's privilege and lawyers who need to know the ins and outs of getting a subpoena quashed.

Journalists should note that reading this guide is not meant as a substitute for working with a licensed attorney in your state when you try to have a subpoena quashed. You should always consult an attorney before trying to negotiate with a party who wants to obtain your testimony or when appearing in court to get a subpoena quashed or testifying. If your news organization does not have an attorney, or if you are not affiliated with an established organization, the Reporters Committee can help you try to find an attorney in your area.

Above the law?

Outside of journalism circles, the reporter's privilege suffers from an image problem. Critics often look at reporter's shield laws and think that journalists are declaring that they are "above the law," violating the understood standard that a court is entitled to "every man's evidence," as courts themselves often say.

But courts have always recognized the concept of "privileges," allowing certain individuals to refuse to testify, out of an acknowledgment that there are societal interests that can trump the demand for all evidence. Journalists need to emphasize to both the courts and the public that they are not above the law, but that instead they must be able to remain independent, so that they can maintain their traditional role as neutral watchdogs and objective observers. When reporters are called into court to testify for or against a party, their credibility is harmed. Potential sources come to see them as agents of the state, or supporters of criminal defendants, or as advocates for one side or the other in civil disputes.

Critics also contend that exempting journalists from the duty to testify will be detrimental to the administration of justice, and will result in criminals going free for a lack of evidence. But 35 states and the District of Columbia have shield laws, and the Department of Justice imposes restrictions on federal agents and prosecutors who wish to subpoena journalists, and yet there has been no indication that the courts have stopped working or that justice has suffered.

Courts in Maryland, in fact, have managed to function with a reporter's shield law for more than a century. In 1896, after a reporter was jailed for refusing to disclose a source, a Baltimore journalists' club persuaded the General Assembly to enact legislation that would protect them from having to reveal sources' identities in court. The statute has been amended a few times —mainly to cover more types of information and include broadcast journalists once that medium was created. But the state has never had the need to rescind the protection.

And the privilege made news internationally in December 2002 when the appeals court of the United Nations International Criminal Tribunal decided that a qualified reporter's privilege should be applied to protect war correspondents from being forced to provide evidence in prosecutions before the tribunal.

The hows & whys of the reporter's privilege

In the course of gathering news, journalists frequently rely on confidential sources. Many sources claim that they will be subject to retribution for exposing matters of public importance to the press unless their identity remains confidential.

Doctor-patient, lawyer-client and priest-penitent relationships have long been privileged, allowing recipients to withhold confidential information learned in their professional capacity. However, the reporter's privilege is much less developed, and journalists are frequently asked to reveal confidential sources and information they have obtained during newsgathering to attorneys, the government and courts. These "requests" usually come from attorneys for the government or private litigants as demands called subpoenas.

In the most recent phase of a five-year study on the incidence of subpoenas served on the news media, *Agents of Discovery*, The Reporters Committee for Freedom of the Press reported that 1,326 subpoenas were served on 440 news organizations in 1999. Forty-six percent of all news media responding said they received at least one subpoena during 1999.

In criminal cases, prosecutors argue that reporters, like other citizens, are obligated to provide relevant evidence concerning the commission of a crime. Criminal defendants argue that a journalist has information that is essential to their defense, and that the Sixth Amendment right to a fair trial outweighs any First Amendment right that the reporter may have. Civil litigants may have no constitutional interest to assert, but will argue that nevertheless they are entitled to all evidence relevant to their case.

When reporters challenge subpoenas, they argue that they must be able to promise confidentiality in order to obtain information on matters of public importance. Forced disclosure of confidential or unpublished sources and information will cause individuals to re-

fuse to talk to reporters, resulting in a "chilling effect" on the free flow of information and the public's right to know.

When asked to produce their notes, documents, or other unpublished material obtained during news gathering, journalists argue that these subpoenas intrude on the editorial process, and thus violate their First Amendment right to speak without fear of state interference. Some litigants who request information from the media are simply lazy. Rather than investigating to find appropriate witnesses, these litigants find it simpler and cheaper to compel journalists to reveal their sources or to hand over information.

But journalists also have legitimate reasons to oppose subpoenas over published, non-confidential information. Responding to such subpoenas consumes staff time and resources that should be used for reporting and editing.

If a court challenge to a subpoena is not resolved in the reporter's favor, he or she is caught between betraying a source or risking a contempt of court citation, which most likely will include a fine or jail time.

Most journalists feel an obligation to protect their confidential sources even if threatened with jail time. When appeals have been exhausted, the decision to reveal a source is a difficult question of journalism ethics, further complicated by the possibility that a confidential source whose identity is revealed may try to sue the reporter and his or her news organization under a theory of promissory estoppel, similar to breach of contract. The U.S. Supreme Court has held that such suits do not violate the First Amendment rights of the media. (*Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991))

The sources of the reporter's privilege

First Amendment protection. The U.S. Supreme Court last considered a constitutionally based reporter's privilege in 1972 in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Justice Byron White, joined by three other justices, wrote the opinion for the Court, holding that the First Amendment does not protect a journalist who has actually witnessed criminal activity from revealing his or her information to a grand jury. However a concurring opinion by Justice Lewis Powell and a dissenting opinion by Justice Potter Stewart recognized a qualified privilege for reporters. The privilege as described by Stewart weighs the First Amendment rights of reporters against the subpoenaing party's need for disclosure. When balancing these interests, courts should consider whether the information is relevant and material to the party's case, whether there is a compelling and overriding interest in obtaining the information, and whether the information could be obtained from any source other than the media. In some cases, courts require that a journalist show that he or she promised a source confidentiality.

Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dissented from the Court's opinion and said that the First Amendment provided journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority. Although the high court has not revisited the issue, almost all the federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege.

However, some courts, including the federal appeals court in New Orleans (5th Cir.), have recently interpreted *Branzburg* as holding that the First Amendment protects the media from subpoenas only when the subpoenas are being used to harass the press. (*United States v. Smith*, 135 F.3d 963 (5th Cir. 1998)).

State constitutions, common law and court rules. Many states have recognized a reporter's privilege based on state law. For example, New York's highest court recognized a qualified reporter's privilege under its own state constitution, protecting both confidential and non-confidential materials. (*O'Neill v. Oakgrove Construction Inc.*, 71 N.Y.S.2d 521 (1988)). Others states base a reporter's privilege on common law. Before the state enacted a shield law in 2007, the Supreme Court in Washington state recognized a qualified reporter's privilege in civil cases, later extending it to criminal trials. (*Senear v. Daily Journal-American*, 97 Wash.2d 148, 641 P.2d 1180 (1982), *on remand*, 8 Media L. Rep. 2489 (Wash. Super. Ct. 1982)). And in a third option, courts can create their own rules of procedure. The Utah Supreme Court adopted a reporter's privilege in its court rules in 2008, as did the New Mexico high court years before.

Even in the absence of an applicable shield law or court-recognized privilege, journalists occasionally have been successful in persuading courts to quash subpoenas based on generally-applicable protections such as state and federal rules of evidence, which allow the quashing of subpoenas for information that is not relevant or where the effort to produce it would be too cumbersome.

Statutory protection. In addition to case law, 35 states and the District of Columbia have enacted statutes —shield laws —that give journalists some form of privilege against compelled production of confidential or unpublished information. The laws vary in detail and scope from state to state, but generally give greater protection to journalists than the state or federal constitution, according to many courts.

However, shield laws usually have specific limits that exclude some journalists or certain material from coverage. For instance, many of the statutes define "journalist" in a way that only protects those who work full-time for a newspaper or broadcast station. Freelance writers, book authors, Internet journalists, and many others are left in the cold, and have to rely on the First Amendment for protection. Broad exceptions for eyewitness testimony or for libel defendants also can remove protection from journalists, even though these situations often show the greatest need for a reporter's privilege.

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

A subpoena is a notice that you have been called to appear at a trial, deposition or other court proceeding to answer questions or to supply specified documents. A court may later order you to do so and impose a sanction if you fail to comply.

Do I have to respond to a subpoena?

In a word, yes.

Ignoring a subpoena is a bad idea. Failure to respond can lead to charges of contempt of court, fines, and in some cases, jail time. Even a court in another state may, under some circumstances, have authority to order you to comply with a subpoena.

What are my options?

Your first response to a subpoena should be to discuss it with an attorney if at all possible. Under no circumstances should you comply with a subpoena without first consulting a lawyer. It is imperative that your editor or your news organization's legal counsel be advised as soon as you have been served.

Sometimes the person who subpoenaed you can be persuaded to withdraw it. Some attorneys use subpoenas to conduct "fishing expeditions," broad nets cast out just to see if anything comes back. When they learn that they will have to fight a motion to quash their subpoenas, lawyers sometimes drop their demands altogether or agree to settle for less than what they originally asked for, such as an affidavit attesting to the accuracy of a story rather than in-court testimony.

Some news organizations, particularly broadcasters whose aired videotape is subpoenaed, have deflected burdensome demands by agreeing to comply, but charging the subpoenaing party an appropriate fee for research time, tape duplication and the like.

If the person who subpoenaed you won't withdraw it, you may have to fight the subpoena in court. Your lawyer will file a motion to quash, which asks the judge to rule that you don't have to comply with the subpoena.

If the court grants your motion, you're off the hook —unless that order is itself appealed. If your motion isn't granted, the court will usually order you to comply, or at the very least to disclose the demanded materials to the court so the judge may inspect them and determine whether any of the materials must be disclosed to the party seeking them. That order can itself be appealed to a higher court. If all appeals are unsuccessful, you could face sanctions if you continue to defy the court's order. Sanctions may include fines imposed on your station or newspaper or on you personally, or imprisonment.

In many cases a party may subpoena you only to intimidate you, or gamble that you will not exercise your rights. By consulting a lawyer and your editors, you can decide whether to seek to quash the subpoena or to comply with it. This decision should be made with full knowledge of your rights under the First Amendment, common law, state constitution or statute.

They won't drop it. I want to fight it. Do I have a chance?

This is a complicated question.

If your state has a shield law, your lawyer must determine whether it will apply to you, to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, or if your situation seems to fall outside its scope, the state's courts may have recognized some common law or constitutional privilege that will protect you. Each state is different, and many courts do not recognize the privilege in certain situations.

Whether or not a statutory or other privilege protects you in a particular situation may depend on a number of factors. For example, some shield laws provide absolute protection in some circumstances, but most offer only a qualified privilege. A qualified privilege generally creates a presumption that you will not have to comply with a subpoena, but it can be overcome if the subpoenaing party can show that information in your possession is essential to the case, goes to the heart of the matter before the court, and cannot be obtained from an alternative, non-journalist source.

Some shield laws protect only journalists who work full-time for a newspaper, news magazine, broadcaster or cablecaster. Freelancers, book authors, scholarly researchers and other "non-professional" journalists may not be covered by some statutes.

Other factors that may determine the scope of the privilege include whether the underlying proceeding is criminal or civil, whether the identity of a confidential source or other confidential information is involved, and whether you or your employer is already a party to the underlying case, such as a defendant in a libel suit.

The decision to fight may not be yours alone. The lawyer may have to consider your news organization's policy for complying with subpoenas and for revealing unpublished information or source names. If a subpoena requests only published or broadcast material, your newspaper or station may elect to turn over copies of these materials without dispute. If the materials sought are unpublished, such as notes or outtakes, or concern confidential sources, it is unlikely that your employer has a policy to turn over these materials —at least without first contesting the subpoena.

Every journalist should be familiar with his or her news organization's policy on retaining notes, tapes and drafts of articles. You should follow the rules and do so consistently. If your news organization has no formal policy, talk to your editors about establishing one. Never destroy notes, tapes, drafts or other documents once you have been served with a subpoena.

In some situations, your news organization may not agree that sources or materials should be withheld, and may try to persuade you to reveal the information. If the interests of the organization differ from yours, it may be appropriate for you to seek separate counsel.

Can a judge examine the information before ordering me to comply with a subpoena?

Some states require or at least allow judges to order journalists to disclose subpoenaed information to them before revealing it to the subpoenaing party. This process, called *in camera* review, allows a judge to examine all the material requested and determine whether it is sufficiently important to the case to justify compelled production. The state outlines will discuss what is required or allowed in your state.

Does federal or state law apply to my case?

A majority of the subpoenas served on reporters arise in state cases, with only eight percent coming in federal cases, according to the Reporters Committee's 1999 subpoena survey, *Agents of Discovery.*

State trial courts follow the interpretation of state constitutional, statutory or common law from the state's highest court to address the issue. When applying a First Amendment privilege, state courts may rely on the rulings of the United States Supreme Court as well as the state's highest court.

Subpoenas in cases brought in federal courts present more complicated questions. Each state has at least one federal court. When a federal district court is asked to quash a subpoena, it may apply federal law, the law of the state in which the federal court sits, or even the law of another state. For example, if a journalist from one state is subpoenaed to testify in a court in another state, the enforcing court will apply the state's "choice of law" rules to decide which law applies.

Federal precedent includes First Amendment or federal common law protection as interpreted by the United States Supreme Court, rulings of the federal circuit court of appeals for the district court's circuit, or earlier decisions by that same district court. There is no federal shield law, although as of May 2008 a bill had passed the House and was moving to the Senate floor.

The federal district court will apply the state courts' interpretation of state law in most circumstances. In the absence of precedent from the state's courts, the federal district court will follow prior federal court interpretations of the state's law. In actions involving both federal and state law, courts differ on whether federal or state law will apply.

Twelve federal circuits cover the United States. Each circuit has one circuit (appellate) court, and a number of district (trial) courts. The circuit courts must follow precedent established by the U.S. Supreme Court, but are not bound by other circuits' decisions.

Are there any limits on subpoenas from federal agents or prosecutors?

Ever since 1973, the Attorney General of the United States has followed a set of guidelines limiting the circumstances in which any agents or employees of the Department of Justice, including federal prosecutors and FBI agents, may issue subpoenas to members of the news media or subpoena journalists' telephone records from third parties. *(28 C.F.R. 50.10)*

Under the guidelines, prosecutors and agents must obtain permission from the Attorney General before subpoenaing a member of the news media. Generally, they must exhaust alternative sources for information before doing so. The guidelines encourage negotiation with the news media to avoid unnecessary conflicts, and specify that subpoenas should not be used to obtain "peripheral, nonessential or speculative" information.

In addition, journalists should not be questioned or arrested by Justice employees without the prior approval of the Attorney General (unless "exigent circumstances preclude prior approval") and agents are not allowed to seek an arrest warrant against a journalist or present evidence to a grand jury against a journalist without the same approval.

Employees who violate these guidelines may receive an administrative reprimand, but violation does not automatically render the subpoena invalid or give a journalist the right to sue the Justice Department.

The guidelines do not apply to government agencies that are not part of the federal Department of Justice. Thus agencies like the National Labor Relations Board are not required to obtain the Attorney General's permission before serving a subpoena upon a member of the news media.

Do the news media have any protection against search warrants?

Subpoenas are not the only tool used to obtain information from the news media. Sometimes police and prosecutors use search warrants, allowing investigators to enter newsrooms and search for evidence directly rather than merely demanding that journalists release it.

The U.S. Supreme Court held that such searches do not violate the First Amendment. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Congress responded by passing the federal Privacy Protection Act in 1980. *(42 U.S.C. 2000aa)*

In general, the Act prohibits both federal and state officers and employees from searching or seizing journalists' "work product" or "documentary materials" in their possession. The Act provides limited exceptions that allow the government to search for certain types of national security information, child pornography, evidence that the journalists themselves have committed a crime, or materials that must be immediately seized to prevent death or serious bodily injury. "Documentary materials" may also be seized if there is reason to believe that they would be destroyed in the time it took to obtain them using a subpoena, or if a court has ordered disclosure, the news organization has refused and all other remedies have been exhausted.

Even though the Privacy Protection Act applies to state law enforcement officers as well as federal authorities, many states, including California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas and Washington, have their own statutes providing similar or even greater protection. *(See section IX.A. in the state outlines.)* Other states, such as Wisconsin, require that search warrants for documents be directed only at parties suspected of being "concerned in the commission" of a crime, which generally exempts journalists.

If law enforcement officers appear with a warrant and threaten to search your newsroom unless you hand over specific materials to them, contact your organization's attorney *immediately*. Ask the officers to delay the search until you have had an opportunity to confer with your lawyer. If the search proceeds, staff photographers or a camera crew should record it.

Although the news organization staff may not impede the search, they are not required to assist with it. But keep in mind that the warrant will probably list specific items to be seized, and you may decide it is preferable to turn over a particular item rather than to allow police to ransack desks and file cabinets or seize computers.

After the search is over, immediately consult your attorney about filing a suit in either federal or state court. It is important to move quickly, because you may be able to obtain emergency review by a judge in a matter of hours. This could result in your seized materials being taken from the law enforcement officials and kept under seal until the dispute is resolved.

Another option allows you to assert your claim in an administrative proceeding, which may eventually lead to sanctions against the official who violated the act. You would not receive damages, however. Your attorney can help you decide which forum will offer the best remedy in your situation.

Whichever option you choose, a full hearing will vindicate your rights in nearly every case, and you will be entitled to get your materials back, and in some cases, monetary damages including your attorney's fees.

The Reporter's Privilege Compendium: A User's Guide

This project is the most detailed examination available of the reporter's privilege in every state and federal circuit. It is presented primarily as an Internet document (found at www.rcfp.org/privilege) for greater flexibility in how it can be used. Printouts of individual state and circuit chapters are made available for readers' convenience.

Every state and federal section is based on the same standard outline. The outline starts with the basics of the privilege, then the procedure and law for quashing a subpoena, and concludes with appeals and a handful of other issues.

There will be some variations on the standard outline from state to state. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

For our many readers who are not lawyers. This project is primarily here to allow lawyers to fight subpoenas issued to journalists, but it is also designed to help journalists understand the reporter's privilege. (Journalists should *not* assume that use of this book will take the place of consulting an attorney before dealing with a subpoena. You should contact a lawyer if you have been served with a subpoena.) Although the guides were written by lawyers, we hope they are useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a legal citation for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 F.2d 456 means the case could be found in the Federal Reports, second series, volume 123, starting at page 456. In most states, the cites will be to the official reporter of state court decisions or to the West Publishers regional reporter that covers that state.

Note that the complete citation for a case is often given only once, and subsequent cites look like this: "*Jackson* at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Because this outlines were written for each state, yet searches and comparisons result in various states and sections being taken out of the sequence in which they were written, it may not always be clear what these second references refer to. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively. You may have to work backwards through that state's outline to find the first reference in some cases.

We have encouraged the authors to avoid "legalese" to make this guide more accessible to everyone. But many of the issues are necessarily technical and procedural, and removing all the legalese would make the guides less useful to lawyers who are trying to get subpoenas quashed.

Updates. This project was first posted to the Web in December 2002. The last major update of all chapters was completed in September 2007. As the outlines are updated, the copyright notice on the bottom of the page will reflect the date of the update. All outlines will not be updated on the same schedule.

REPORTER'S PRIVILEGE COMPENDIUM

1ST CIR.

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I. Introduction: History & Background

The First Circuit, which is comprised of Massachusetts, Maine, New Hampshire, Puerto Rico, and Rhode Island, recognizes a qualified privilege for reporters. Application of the privilege is determined on a case-by-case basis, with the courts balancing the potential harm to the free flow of information and First Amendment interests against the requesting party's asserted need for the requested information.

Within the First Circuit, only Rhode Island has a statute protecting reporters from being compelled to disclose confidential sources. The shield law, called the "Newsman's Privilege Act," provides a qualified privilege for reporters that applies only to confidential sources and information. R.I. Gen. Laws §9-19.1-1, *et seq*.

II. Authority for and source of the right

The qualified reporter's privilege has primarily developed in the First Circuit post-*Branzberg*. *See Branzburg v. Hayes*, 408 U.S. 665 (1972). The privilege is grounded in First Amendment concerns rather than federal common law.

III. Scope of protection

A. Generally

In determining whether to apply a qualified reporter's privilege to the facts and circumstances of a particular case, the courts balance the First Amendment interests against the asserted needs of the requesting party. The courts recognize the impact that disclosure of confidential information and sources will have on the media's First Amendment interests and its ability to newsgather and on the free flow of information. However, the First Circuit courts do not always protect such sources or information from disclosure. As to non-confidential information and sources, the courts have viewed the First Amendment interests as present but more elusive. The First Circuit has noted, "a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly compelled." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 715 (1st Cir. 1998).

B. Absolute or qualified privilege

The reporter's privilege is qualified in all circumstances.

C. Type of case

1. Civil

When determining whether a reporter's privilege is available, the courts in civil cases employ a balancing test weighing the effects of disclosure on First Amendment interests and the free flow of information against the interest of the party seeking disclosure of the reporter's information or source. In balancing the interests asserted, courts have looked to whether the information sought is available from other sources. Where there has been no expectation of confidentiality as to the information or source, the courts have found the First Amendment interests to be less weighty. The party seeking disclosure from the reporter must establish the relevance of the information sought and make a prima facie case showing that the claim is not frivolous and that the party is not merely on a "fishing expedition." The burden then shifts to the reporter to establish the need to preserve the privilege. *See generally In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980).

2. Criminal

The courts in criminal cases employ a balancing test in evaluating a reporter's privilege, weighing the effects of disclosure on the reporter's First Amendment interest against the fair administration of justice, including the

criminal defendant's Fifth and Sixth Amendment rights. Where there is no legitimate expectation of confidentiality as to the information or source, the courts are not inclined to recognize that disclosure can have a chilling effect on First Amendment interests. However, in weighing interests, the courts have recognized factors which go beyond the protection of confidential sources or information, including whether disclosure will occasion an undue intrusion into the editorial or news gathering process, the danger that the media will be perceived as a research tool for either party, the disincentive to compile and preserve investigative materials, and the cost of compliance. The First Circuit courts have given equal consideration to prosecutors' and defense attorneys' requests for information falling under the reporter's privilege. However, when parties have sought protected information in order to impeach witnesses, the courts have generally not ordered disclosure prior to trial. Instead, the courts have waited until it was more certain that the matter would go to trial, and then determined whether to order disclosure of the information.

Under Federal Rule of Criminal Procedure 17(c), the party moving to obtain the information must demonstrate the need for the evidence, as well as its admissibility. Specifically, the moving party must show that the information sought is: (1) both evidentiary and relevant; (2) not otherwise obtainable reasonably in advance of trial by other means (the moving party must exercise "due diligence" in trying to obtain the information by other means); (3) necessary for the proper preparation for trial, such that failure to obtain the information might unreasonably delay the trial; and (4) required in good faith and not requested as a "general fishing expedition." *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1179 (1st Cir. 1988) quoting *U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974). These requirements have been reduced to the following three hurdles: (1) relevancy, (2) admissibility, and (3) specificity. *Nixon*, 418 U.S. at 700.

3. Grand jury

In *Branzberg v. Hayes*, the Supreme Court held that "newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation." 408 U.S. 665, 685 (1972). The Court reasoned that the necessity of providing grand juries with all available information to facilitate the proper administration of justice outweighs the First Amendment interest asserted by reporters. *Id.* at 686-87.

Prior to *Branzberg*, the First Circuit courts had decided two cases in which grand juries sought confidential information from "reporters" in the course of investigating crimes. In both cases, the courts compelled the disclosure of the information.

In *U.S. v. Doe (In the matter of Falk)* ("Falk"), a professor was subpoenaed to testify before a grand jury that was investigating crimes related to the release and dissemination of the Pentagon Papers. 332 F. Supp. 938 (D. Mass. 1971). The professor was a writer who claimed that he relied on individuals' trust in order to obtain confidential information from them. The court held that the reporter's privilege extended to academics in their writing; however, it required the professor to disclose his sources of information, because he did not have a highly confidential relationship with his contacts and because the request was limited, reasonable, and intended to aid the grand jury in a very specific investigation.

In *U.S. v. Doe (Appeal of Popkin)* ("Popkin"), the appellant was a professor who had written numerous articles on the Vietnam war. 460 F.2d 328 (1st Cir. 1972). He also was subpoenaed by a grand jury to provide information that he had obtained in his scholarly capacity regarding the Pentagon Papers. The First Circuit affirmed the district court's decision to hold him in civil contempt for failing to answer certain questions regarding his sources. In this case, the court found the professor not to be protected by the reporter's privilege because he had obtained this information during conversations with other professors and not in his capacity as an information gatherer and reporter.

In *Cusumano v. Microsoft Corp.*, the First Circuit refused to compel an academic to reveal the sources for his publications, despite the fact that the information was relevant and important to an antitrust case, since the information could be available through other sources. 162 F.3d 708, 716 (1st Cir. 1998). Although *Cusumano* did not involve a grand jury proceeding, this request took place during pre-trial discovery in the Department of Justice's antitrust case against Microsoft.

D. Information and/or identity of source

The First Circuit courts may require that those seeking the identity of a reporter's source exhaust all other avenues before requiring the reporter to reveal the source. *See, e.g., Gray v. St. Martin's Press*, 221 F.3d 243, 254 (1st Cir. 2000) (applying New Hampshire's qualified reporter's privilege requiring applicants to demonstrate that they have made all reasonable efforts to obtain the identity of the source by other reasonable means); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998) (refusing to compel an academic to reveal the sources for his publications, despite the fact that the information was relevant and important to an antitrust case, since the information could be available through discovery of other resources); *Summit Tech., Inc. v . Healthcare Capital Group, Inc*., 141 F.R.D. 381, 385 (D. Mass. 1992) (holding that an investment analyst was not required to reveal the identity of his source of information until the requesting party attempted to obtain this information from other parties).

The reporter's privilege in the First Circuit extends to any discoverable information that could reveal the identity of the reporter's source. *See, e.g., Bruno & Stillman v. Globe Newspaper Co.*, 633 F. 2d 583, 593-94 (1st Cir. 1980) (protecting reporter's notes which contained the identity of certain confidential sources); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (protecting notes, tape recordings, and transcripts of interviews that would reveal sources' identities).

E. Confidential and/or non-confidential information

The First Circuit courts will give more protection to information obtained from confidential sources than information obtained from sources who were not promised confidentiality. The cases involving reporters protecting the dissemination of information obtained without a promise of confidentiality often arise in the context of "outtakes," or portions of interviews (often videotaped) that are never aired by the media. In these cases, the interviewee's identity is known, and he usually expects that the information contained in the outtakes could be publicly aired.

The First Circuit noted in *U.S. v. The LaRouche Campaign* that where "there is no confidential source or information at stake, the identification of First Amendment interests is a more elusive task." 841 F.2d 1176, 1181 (1st Cir. 1988). However, it also stated, "we discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if non-confidential, becomes routine and casually, if not cavalierly, compelled." *Id*. at 1182. The court held that in these cases, before granting access to the media's non-confidential information, courts should consider the importance of maintaining journalists' editorial discretion, the huge burden on the media of frequent subpoenas, and the fear that reporters could be forced to become "an investigative arm of the judicial system." *Id*. The First Circuit in *LaRouche* ordered an *in camera* review of the requested information; however, the court stated: "we . . . rely on sensitive district court conduct of *in camera* reviews to respond to the generalized First Amendment concerns that would be triggered by too easy and routine a resort to compelled disclosure of nonconfidential material." *Id*. at 1183.

In *Lynch v. Riddell*, a local television station interviewed a football player who was paralyzed while playing. No. 91-CV-6680, 1992 U.S. Dist. LEXIS 15725, 35 Fed. R. Serv. 2d 185 (D. Mass. 1982). After the player sued the manufacturer of his football helmet, the manufacturer subpoenaed the television station for the outtakes of its interview with the player. The federal magistrate held that the First Amendment was not implicated in this case, because neither the player nor the reporter ever intended for the player's identity or the interview itself to be confidential. The court found that "there is no basis [in] . . . Federal constitutional law . . . for the proposition that a reporter has a privilege to withhold relevant evidence in a civil case where that evidence will neither disclose a confidential source nor disclose material given by a known source in confidence." *Id*., at *8.

In *Russo v. Geagan*, spectators of a rally sought a news station's videotape of an entire rally, even though the station had only aired portions of this tape. No. 82-3823, 1983 U.S. Dist. LEXIS 18658, at *3, 35 Fed. R. Serv. 2d 1403 (D. Mass. 1983). The federal magistrate in *Russo* recognized that while the information sought was not confidential, production of a reporter's non-published materials can constitute "a significant intrusion into the newsgathering and editorial processes." *Id*. The court found that the request was not made "for the sake of exposure" or to harass a reporter or chill a particular point of view. *Id*., at *5. Since the information was clearly relevant to the requestor's lawsuit, and the information had not been obtained on the basis of a pledge of confidentiality, the court ordered the media to release the entire videotape. *Id*., at *10.

F. Published and/or non-published material

Where the information sought is the identity of a confidential source, the court does not distinguish between published and non-published materials in determining the availability of a qualified reporter's privilege to protect the source's identity.

However, where the information sought is non-published, non-confidential materials, the courts do not protect such information as broadly. In *U.S. v. The LaRouche Campaign*, the First Circuit noted that when "there is no confidential source or information at stake, the identification of First Amendment interests is a more elusive task." 841 F.2d 1176, 1181 (1st Cir. 1988). When outtakes and other non-published materials are requested, courts consider the intrusion on journalists' editorial discretion, as well as the burden on the media of responding to numerous subpoenas. *Id*. Further, courts are wary of the media becoming "an investigative arm of the government." *Id*. Courts balance these concerns against the rights and interests of the persons requesting the information. *Id*. Whenever possible, courts will conduct *in camera* reviews of materials before releasing them to the requesting party. *Id*.

G. Reporter's personal observations

There is no statutory or case law in the First Circuit specifically addressing this issue.

H. Media as a party

The privilege is available whether the reporter is a party or a non-party.

I. Defamation actions

The privilege is available in defamation as well as in non-defamation cases. Where a court determines that the identity of the source will not further the plaintiff's case, it will not be compelled. *Howard v. Antilla*, 191 F.R.D. 39 (D.N.H. 1999). In *Howard*, the court held that the identity of sources of false rumors that Antilla reported in a newspaper article were not essential to the libel suit brought by the subject of those rumors because the identities of the sources shed no light on the question of Antilla's defamatory intent. *Id*.

IV. Who is covered

The First Circuit has extended the reporter's privilege to cover parties other than those engaged in traditional journalism and reporting, such as professors and research analysts. In particular, the courts have extended the privilege to publications where the author intends, at the time of his research, to publicly disseminate the information.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

No reported First Circuit cases have specifically defined the term "reporter" for purposes of the reporter's privilege, nor has any First Circuit case distinguished between full-time and part-time "reporters" for purposes of the privilege.

b. Editor

No reported First Circuit cases addressing the reporter's privilege have specifically defined the term "editor."

c. News

The First Circuit's definition of "news" has generally revolved more around the purpose of the report, rather than the form in which it is published. Courts have looked at factors such as whether the report disseminates investigative information and whether it relates to matters of public concern. *See, e.g., Cusumano v. Microsoft Corp.*, 162 F.3d 708, 713 (1st Cir. 1998); *Summit Tech., Inc. v . Healthcare Capital Group, Inc*., 141 F.R.D. 381, 384 (D. Mass. 1992).

d. Photo journalist

No reported First Circuit cases addressing the reporter's privilege have specifically defined the term "photo journalist."

e. News organization / medium

Courts have applied the reporter's privilege to information published in a variety of media. Rather than focusing on the forum in which the information appears, the courts instead consider the information gatherer's purpose for obtaining the information. In *U.S. v. Doe* (In the matter of Falk), the court states, "In no way do [an academic writer's] facts become any less a part of the 'spectrum of available knowledge' for appearing in books and articles rather than in a newspaper. Such media are vehicles of information and opinion of a type long recognized by the Supreme Court as being within its definition of the press." 332 F. Supp. 938, 941 (D. Mass 1971), *quoting Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (internal quotes omitted). In determining whether the reporter's privilege is applicable to a particular writing, the courts consider whether the person gathering the information was "engaged in the dissemination of investigative information," and whether the information "relates to matters of public concern." *Summit Tech., Inc. v . Healthcare Capital Group, Inc*., 141 F.R.D. 381, 384 (D. Mass. 1992); *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998).

2. Others, including non-traditional news gatherers

The reporter's privilege has been extended to include research analysts and academics. *See, e.g., Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (extending the privilege to the pre-publication manuscripts of a distinguished academic); *Summit Tech., Inc. v . Healthcare Capital Group, Inc*., 141 F.R.D. 381 (D. Mass. 1992) (holding that the reporter's privilege applied to the report of an independent researcher and analyst hired by an institutional investor); *U.S. v. Doe* (In the matter of Falk), 332 F. Supp. 938 (D. Mass 1971) (finding that professors who publish books and articles are protected by the reporter's privilege).

In *Cusumano v. Microsoft Corp.*, the court held that an academic's manuscript of a forthcoming book was protected by the reporter's privilege. 162 F.3d 708, 713 (1st Cir. 1998). The court held that "[a]cademicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists," reasoning that academics are "sufficiently like journalists" for the privilege to apply. *Id*. at 714. The court stated that scholars are "information gatherers and disseminators," who require their sources to confide in them, often under agreements of confidentiality. *Id*. The court noted that forcing academics to release transcripts prior to publication would endanger "the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers." *Id*. at 713. The court further held that "the medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work. Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended 'at the inception of the newsgathering process' to use the fruits of his research 'to disseminate information to the public.'" *Id*. at 714. (Emphasis added).

The First Circuit's decision in *Cusumano* is consistent with many of the First Circuit courts' earlier decisions addressing to whom the reporter's privilege should apply. *See, e.g., Summit Tech., Inc. v . Healthcare Capital Group, Inc*., 141 F.R.D. 381, 384 (D. Mass. 1992) (finding that the reports of an investment analyst whose business was to perform independent research and analysis of publicly traded companies for institutional investors were entitled to protection under the reporter's privilege, since they involved the dissemination of investigative information to the public); *U.S. v. Doe (In the matter of Falk)*, 332 F. Supp. 938, 941 (D. Mass 1971) (holding that a professor engaged in writing articles for newspapers and magazines is afforded the protection of the reporter's privilege, since the privilege does not differentiate between information appearing in books and newspapers); *cf. U.S. v. Doe* (In the matter of Popkin), 460 F.2d 328, 334 (1st Cir. 1972) (holding that to the extent that a "scholar qua scholar" is asked about statements made to him by other scholars, he does not obtain the protection of the reporter's privilege, since extending the privilege to scholars in this capacity "would give comprehensive protection to such collateral discussions [as to] make scholars a uniquely privileged class in the broadest sense.").

However, in *In re Steinberg*, the First Circuit held that notebooks with entries that documented activity in connection with fundraising activities for a presidential campaign were not "journalistic endeavors." 837 F.2d 527, 528, n.2 (1st Cir. 1988). The court held that the notebooks were not protected by the reporter's privilege, and re-

quired the campaign worker who kept these notebooks to turn them over to the police department, which was investigating fraud and conspiracy in connection with the campaign. *Id*.

B. Whose privilege is it?

No reported First Circuit decision has specifically addressed the issue of whether the reporter or the source is the holder of the reporter's privilege, and who must assert the privilege. Most of the First Circuit cases involve a reporter asserting the privilege, where the reporter has assured the source of confidentiality. Usually, the reporter is subpoenaed to present the information in a deposition, at trial, or in a grand jury hearing, and the reporter is the party asserting the privilege.

In defamation actions where the publisher is a defendant, the publisher has asserted the privilege. *See*, *e.g*., *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 593-94 (1st Cir. 1980) (allowing *The Boston Globe* to assert the reporter's privilege). In cases where a party seeks disclosure of non-confidential, unpublished "outtakes," the media defendant is also likely to be the party asserting the privilege. *See*, *e.g*., *U.S. v. Shay* ("Shay I"), No. 92-10369, 1993 U.S. Dist. LEXIS 4438, 21 Med. L. Rep. 1415 (D. Mass. 1993) and *U.S. v. Shay* ("Shay II"), 1993 WL 263493 (D. Mass. June 30, 1993) (allowing WLVI-TV, Channel 56, to assert the reporter's privilege). *See also Holton v. Rothschild*, 108 F.R.D. 720, 722 (D. Mass. 1985) (finding that the authors, publishers, and the writings themselves are all protected under the reporter's privilege).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

In the First Circuit, there are no special processes governing the service of a subpoena on a member of the news media. Fed. R. Civ. P. 45(b) generally governs the service of subpoenas in civil cases and Fed. R. Crim. P. 17(d) governs service of subpoenas in criminal cases.

2. Deposit of security

The First Circuit does not have any specific rules requiring that the subpoenaing party deposit any security in order to procure a reporter's testimony or materials.

3. Filing of affidavit

The First Circuit does not have any rules requiring the subpoenaing party to make a sworn statement in order to procure a reporter's testimony or materials.

4. Judicial approval

The First Circuit does not have any rules requiring a judge or magistrate to approve a subpoena before a party can serve it on a reporter.

5. Service of police or other administrative subpoenas

The First Circuit does not have any special rules regarding the use and service of other administrative subpoenas.

B. How to Quash

In seeking to nullify a subpoena, the reporter must file a motion to quash or modify. Fed. R. Civ. P. 45(c) outlines the protections available to individuals who receive subpoenas in civil matters. The Rule provides that, "a party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on the subject of the subpoena." Fed. R. Civ. P. 45(c)(1). The Rules do not specifically define the term "undue burden" and leave the interpretation of this term to the court's discretion; ultimately, the question of burden is a balance between the interests of the party seeking information and the party being subpoenaed. *See Heidelberg Ams., Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 40 (1st Cir. 2003). A Massachusetts district court held that a "broad, sweeping order" for the production of "any and all" books of a corporation would be overly broad and unduly burdensome. *United Shoe Mach. Corp*., 6 F.R.D. 347 (D. Mass. 1947). In

Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998), the court recognized that, "the unwanted burden thrust upon nonparties is a factor entitled to special weight in evaluating the balance of competing needs."

As to requests for the production of documents, Rule 45(c)(2)(B) states that an individual subject to a subpoena has fourteen days after service (or until the time specified for compliance, if such time is less than fourteen days after service of the subpoena) to serve a written objection, on the opposing party. If the subpoenaed party serves a written objection, the party serving the subpoena will not have access to the information requested except by an order from the court where the subpoena was issued. If a written objection is made, the serving party may respond by moving for an order to compel the production of the information, upon notice to the subpoenaed individual.

Rule 45(c)(3) sets forth guidelines related to the court's modifying or quashing a subpoena. The court must quash or modify a subpoena if it: (1) fails to allow reasonable time for compliance; (2) requires another individual to travel more than one hundred miles from his or her residence or place of employment; (3) requests the disclosure of privileged or other protected matter; or (4) subjects the individual to an undue burden. If a subpoena requires a person who is not a party to incur substantial expense to travel more than 100 miles to attend trial, the court may protect the person subject to the subpoena by quashing or modifying the subpoena. However, if the subpoenaing party can show a substantial need for the information and can demonstrate that it cannot otherwise obtain this information without undue hardship, and the subpoenaing party agrees to reasonably compensate the subpoenaed party for his time and travel expenses, then the court may order appearance or production.

Like other motions, motions to quash are subject to Fed. R. Civ. P. 7, which sets forth the form of motions. Under Rule 7, an application to the court for an order shall be by motion which, unless made during a hearing or trial, must be in writing, and must state with particularity the grounds for the motion, as well as the relief or order sought. Pursuant to Fed. R. Civ. P. 45(d)(2), when a party withholds information subject to a subpoena on the grounds that it is privileged, this claim must be made expressly, and must be supported by a description of the nature of the documents or information not produced, sufficient to enable the subpoenaing party to contest the claim.

In criminal cases, Fed. R. Crim. P. 17 governs subpoenas and provides, as to the production of documentary evidence, that the court "on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2).

Although Rule 17 does not provide a procedure for motions to quash subpoenas seeking testimony, the courts will still consider and rule upon such motions.

1. Contact other party first

As a general practice, it can be helpful to contact the attorney who has served the subpoena. This can serve as an opportunity to narrow issues and to confirm or clarify the testimony or documents sought.

2. Filing an objection or a notice of intent

In civil cases, Fed. R. Civ. P. 45(c)(2)(B) states that once an individual is served with a subpoena seeking documents, he has fourteen days after service (or until the time specified for compliance, if such time is less than fourteen days after service of the subpoena) to serve a written objection on the opposing party. Pursuant to Rule 45(d)(2), if a reporter is withholding information under the claim that the information is privileged, the claim must be made expressly, and must be supported by a description of the nature of the information withheld. This written objection prevents the subpoenaing party from gaining access to the requested information except by court order. The serving party may respond to a written objection by moving for an order to compel the production of the information, upon notice to the subpoenaed individual.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the court which issued the subpoena.

b. Motion to compel

When subpoenaed, the reporter may but need not wait for the party that issued the subpoena to file a motion to compel before filing a motion to quash. A motion to compel is the method by which a subpoenaing party may compel production, if the reporter refuses to comply with the demands of the subpoena. Once the reporter files his objection under Fed. R. Civ. P. 45(c)(2)(B), the party issuing the subpoena may move to compel production of the requested documents.

c. Timing

The reporter should promptly move to quash or modify a subpoena. Under Fed. R. Civ. P. 45(c)(2)(B), when documents are sought in civil cases, the reporter must file a written objection to the subpoena within 14 days after service of the subpoena, or at any time before the time specified for compliance, if such time is less than 14 days from the date of service.

d. Language

Although there is no stock language to include in a motion to quash, the motion should expressly identify the area of testimony or the documents which the reporter objects to providing and the basis for asserting a qualified privilege.

e. Additional material

Although not required under any reported First Circuit decision or procedural rule, a motion to quash should be supported by a reporter's affidavit. In the affidavit, the reporter may attest to the fact that he promised the source confidentiality, that his work as a reporter depends on the ability to promise sources confidentiality, and that his career as a journalist would be compromised if he were required to reveal the confidential source.

4. In camera review

a. Necessity

In *U.S. v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988), NBC appealed a ruling from the district court of Massachusetts ordering NBC to produce outtakes of an interview with a key witness for *in camera* review. NBC argued that the district court should not have ordered *in camera* review because the defendants had not shown that the subpoenaed material was sufficiently evidentiary. *Id.* Interpreting Fed. R. Crim. P. 17(c), the First Circuit held that although NBC had raised First Amendment concerns, the balance fell in favor of the defendants because the information was not confidential. *Id.* at 1180.

b. Consequences of consent

In *U.S. v. LaRouche Campaign* 841 F.2d 1176 (1st Cir. 1988), NBC failed to comply with an order to submit outtakes of an interview with a key witness to in camera review. The Massachusetts District Court held NBC in civil contempt and fined them $500 a day. *Id.* The First Circuit held that this decision was not an abuse of discretion. *Id.*

c. Consequences of refusing

By ordering an *in camera* review, a court requires the subpoenaed party to comply with the subpoena. Thus, a reporter can be held in contempt for failing to comply with a court order for *in camera* review.

5. Briefing schedule

There is no separate briefing schedule for a motion to quash. The local rules of each district court set forth the briefing schedule for the filing of the motion. For example, the Massachusetts federal district court, in Local Rule 7.1, requires that any motion be submitted with a memorandum of reasons and supporting affidavit or documents, and that the opposition be filed within 14 days after service of the motion; a reply brief may only be filed with the court's leave.

The clerk at the court usually contacts the parties to schedule a hearing. A party may also contact the clerk to schedule a hearing date. Where the information is a pressing concern, courts will often expedite the process by scheduling a hearing immediately.

6. Amicus briefs

Amicus briefs are not routinely filed but may be accepted by the courts if they are relevant. The relevancy of a particular amicus brief is determined on a case-by-case basis. "The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Fed. R. App. Proc. 29(a) (1st Circuit Local Rules).

The First Circuit requires a party seeking to submit an amicus brief to file a motion, accompanied by the proposed brief, which sets forth his interest in the matter, the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. The motion must be filed no later than 7 days after the brief being supported is filed, or, if neither side is being supported, no later than 7 days after the appellant's or petitioner's principal brief is filed. (Fed. R. App. Proc. 29).

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

As the First Circuit stated in *Bruno & Stillman v. Globe Newspaper Co.*, "Initially each party has a burden. The plaintiff must establish the relevance of the desired information and the defendant [reporter] has the burden of establishing [the] need for preserving confidentiality." 633 F.2d 583, 597 (1st Cir. 1980). The court also must be satisfied that the claim is not frivolous or filed as a pretense for using discovery as a fishing expedition for information; therefore, the court may require the plaintiff to show that it can establish jury issues on the essential elements its underlying case. *Id*. at 597. *See also In re Special Proceedings*, 373 F.3d 37 (D.R.I. 2003). As long as the case does not appear frivolous and the desired information appears remotely relevant, the court will assess the extent to which there is a need for confidentiality. *Id*.

Under New Hampshire's qualified reporter's privilege, once the applicant shows that he has exhausted all reasonable means of identifying the source, and the reporter still fails to reveal the source's identity, it is presumed that the reporter did not have a source. *Gray v. St. Martin's Press*, 221 F.3d 243, 253 (1st Cir. 2000).

B. Elements

The First Circuit courts apply a balancing test that examines specific factors. In deciding a reporter's privilege claim, the court will balance the potential harm to the free flow of information against the asserted need for the requested information. *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 595 (1st Cir. 1980). As to subpoenas in civil matters, the court essentially applies Fed. R. Civ. P. 26 with a heightened sensitivity to any First Amendment impact that might result from the compelled disclosure of sources. *Id*. at 596. Under Rule 26, a party may obtain discovery of any matter, not privileged, that is relevant or is reasonably calculated to lead to the discovery of relevant evidence. *Id*. On the other hand, a court may issue any order which justice requires in response to a discovery request to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. *Id*. These protective orders may include limiting the scope of discovery, limiting the persons who have access to certain discovery matters, or sealing from public disclosure any information obtained during discovery. *Id*.

In criminal cases, once a reporter asserts the privilege, the moving party must meet certain elements for the court to require the media to divulge the information. *U.S. v. The LaRouche Campaign*, 841 F.2d 1176, 1179 (1st Cir. 1988). These elements are based on the requirements of Fed. R. Crim. P. 17(c). The moving party must demonstrate that: (1) the information is evidentiary and relevant; (2) the information is not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (3) the moving party cannot properly prepare for trial without this information being produced prior to trial, and the failure to obtain this information may unreasonably delay the trial; and (4) the application is made in good faith and not intended as a general "fishing expedition." *Id*. quoting *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). The courts have reduced this test to the following three hurdles: (1) relevancy; (2) admissibility; and (3) specificity. *Nixon*, 418 U.S. at 700.

If the moving party demonstrates that it can meet these elements with "sufficient likelihood," the court then assesses the potential harm to the reporter's First Amendment interests, including: the threat of administrative and

judicial intrusion into the newsgathering process; the threat of turning journalists into "an investigative arm of the judicial system;" the disincentive for the media to compile and preserve investigative material; and the burden on reporters' time and resources in responding to subpoenas. The court balances these harms against the subpoena-issuing party's interest in the privileged information. In criminal cases, this includes the defendant's constitutional rights to a fair trial under the Fifth and Sixth Amendments. *Id*. at 1182. Finally, if the court has any concerns about ordering the public release of the information, it conducts an *in camera* review to aid in its determination prior to compelling disclosure. *Id*. at 1183.

1. Relevance of material to case at bar

Under both the civil and criminal tests, the requested information must be relevant to the moving party's claim for the court to compel its disclosure. Under the civil standard, the information must be either relevant or reasonably calculated to lead to the discovery of relevant evidence. *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). Under the criminal standard, there must be a "substantial likelihood" that the information would be relevant and admissible at trial. *U.S. v. Shay* ("Shay I"), 21 Media L. Rep. 1415, 1416 (D. Mass. 1993).

2. Material unavailable from other sources

Although the First Circuit courts do not specifically require the moving party to demonstrate that he has made all reasonable efforts to obtain the information by alternative means, this can be a significant factor that the courts consider when balancing the requesting party's needs against the media's First Amendment interests. The courts have refused to compel the disclosure of confidential information where the moving party could procure this information would not be compelled through other avenues. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) citing *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 713 (1st Cir. 1998) (holding that disclosure of confidential information would not be compelled where the moving party could secure the information through other, less intrusive avenues); *Summit Tech., Inc. v. Healthcare Capital Group, Inc*., 141 F.R.D. 381, 384 (D. Mass. 1992) (refusing to require the disclosure of a source's identity where the defendant had disclosed the name of other sources, the content of his conversation with the unnamed source, and the time frame of their conversation, and where this information was sufficient for the moving party to learn the source's identity by other means).

Under New Hampshire law, which the First Circuit has applied in diversity cases involving claims arising under state law, the moving party must demonstrate that it has made "all reasonable efforts to obtain the identity of the confidential source by other reasonable means." *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 252 (1st Cir. 2000).

a. How exhaustive must search be?

Since the First Circuit does not specifically require that the moving party demonstrate that it has attempted to obtain the information by alternative means, there is no standard addressing how exhaustive a search for other means must be. However, courts will factor any search, and its extensiveness, into their consideration of the moving party's need for the information.

When the First Circuit courts apply New Hampshire's reporter's privilege, the moving party must demonstrate that it has made "all reasonable efforts" to obtain the information by alternative means. *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 252 (1st Cir. 2000).

b. What proof of search does subpoenaing party need to make?

The First Circuit does not specifically require the moving party to demonstrate that it has taken measures to obtain the information by alternative methods. The court will consider whether the party can demonstrate this as it makes its overall determination of the subpoenaing party's need for the information. However, as a general rule, where the courts find that alternative sources for the information exist and can be pursued without undue hardship, they will require the subpoenaing party to pursue those avenues first.

When the First Circuit applies New Hampshire's reporter's privilege, it is the moving party's burden to demonstrate that it has made "all reasonable efforts" to obtain the information by alternative methods.

c. Source is an eyewitness to a crime

There is no reported First Circuit decision specifically addressing this issue.

3. Balancing of interests

In both criminal and civil matters, the First Circuit courts engage in a balancing test, weighing the moving party's asserted need for the information against the media's First Amendment concerns in keeping the information confidential. Some of the factors which the court will consider in determining the moving party's need for the information include: (1) the relevancy and importance of the information; (2) whether the information is otherwise obtainable by alternative methods; (3) whether the moving party cannot properly prepare for trial without this information; and (4) whether the application is made in good faith and not intended as a general "fishing expedition." *U.S. v. The LaRouche Campaign*, 841 F.2d 1176, 1179 (1st Cir. 1988). The court will also consider the following factors concerning the subpoenaed party's First Amendment interests: (1) the chilling effect on the free flow of information between reporters and their sources; (2) the intrusion of government interfering with the newsgathering process; (3) the threat of turning journalists into "an investigative arm of the judicial system"; (4) the potential disincentive for the media to compile and preserve investigative material; and (5) the burden on reporters' time and resources in responding to subpoenas. *Id*. at 1182.

4. Subpoena not overbroad or unduly burdensome

A subpoena may be quashed if it subjects a reporter to "an undue burden" (Fed. R. Civ. P. 45(c)(3)) or if compliance with the subpoena would be "unreasonable or oppressive" (Fed. R. Crim. P. 17). Courts in the First Circuit have broad discretion to fashion appropriate remedies in response to motions to quash subpoenas. As the First Circuit stated in *Bruno & Stillman*, "[t]he court . . . has available to it a range of actions that can be tailored to the needs of sensitive balancing." *Bruno & Stillman v. Globe Newspaper Co*., 633 F.2d 583, 598 (1st Cir. 1980). The court can use its discretion to fashion creative remedies in situations where the moving party is entitled to some information, but the subpoena is overly broad. For example, the court may order *in camera* review of certain information and disclosure of other information. The court may defer disclosure of certain information until more discovery has taken place, or it may require that the moving party first resort to alternative sources. *Id*. The court can also order a deposition or other discovery, but with limited scope, and restrict the parties who may attend this deposition or access this information. The court has broad flexibility to fashion remedies to meet the needs of the particular circumstances. "Other kinds of conditions may be imposed, limited only by the needs of the situation and the ingenuity of court and counsel." *Id*.

5. Threat to human life

There is no reported First Circuit decision specifically addressing this issue.

6. Material is not cumulative

There is no reported First Circuit decision specifically addressing this issue.

7. Civil/criminal rules of procedure

Under Fed. R. Civ. P. 26, a party may obtain discovery of any matter, not privileged, that is relevant or is reasonably calculated to lead to the discovery of relevant evidence. *Id*. On the other hand, Rule 26 permits courts to issue any order which justice requires in response to a discovery request, to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. *Id*. These protective orders include limiting the scope of discovery of certain matters, restricting the persons who have access to certain discovery matters, and sealing from the public any information obtained during discovery. *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 596-97 (1st Cir. 1980).

Fed. R. Civ. P. 45 outlines the protections available to individuals subject to subpoenas. Rule 45 imposes sanctions on a subpoenaing party when it fails to take reasonable steps to ensure that a subpoena is not unduly burdensome. Under Rule 45(c)(3), a court will quash or modify a subpoena if it: (1) fails to allow reasonable time for compliance, (2) requires another individual to travel more than 100 miles from his or her residence or place of employment, (3) requests the disclosure of privileged matter, or (4) subjects the individual to an undue burden. However, upon a showing of the moving party's substantial need for the information, a court may choose to either modify or quash the subpoena.

Under Fed. R. Crim. P. 17(c), the moving party must demonstrate, among other things, that the request for information is made in *good faith* and not intended as a general "fishing expedition." *U.S. v. The LaRouche Campaign*, 821 F.2d 1176, 1179 (1st Cir. 1988).

8. Other elements

The First Circuit has not listed any other specific elements which a party must overcome in order to be protected under the reporter's privilege. Rather than requiring a party to meet specific elements, the First Circuit courts perform a general balancing test, which examines all of the surrounding factors and circumstances that indicate either the moving party's need for the information or the reporter's need to keep the information confidential.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

The First Circuit courts have not directly addressed the issue of when a reporter is deemed to have waived the privilege. However, the disclosure of a confidential source or confidential information could function as a "waiver" in that First Amendment interests in non-disclosure would be substantially diminished.

In *Fischer v. McGowan*, the Rhode Island district court addressed this issue under Rhode Island state law. 585 F. Supp. 978 (D.R.I. 1984). Rhode Island has a reporter shield law which protects reporters from being forced to reveal confidential sources of information. *Id*. at 984. However, the Rhode Island shield law does not apply to information that has already been made public, nor does it apply where the defendant asserts the privilege as a defense to a defamation action or in secret government proceedings (such as grand jury hearings). *Id*. The reporter in *Fischer* wrote an article in which he identified a general class of persons from whom he could have obtained the information. *Id*. at 985. In the article, the reporter also identified two of his sources, but he refused to name others. *Id*. The subpoenaing party claimed that the reporter waived his right to assert the privilege with respect to his unnamed sources, since he had revealed two other sources and mentioned a class of people from whom his information may have been derived. *Id*. The court rejected this argument and held that this type of "partial disclosure" does not result in a finding of waiver. *Id*. at 986.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no reported First Circuit decision specifically addressing this issue.

b. Disclosure of non-confidential source's name

There is no reported First Circuit decision specifically addressing this issue.

c. Partial disclosure of information

A reporter may disclose some information from a source or about a source without waiving the privilege. *See, e.g., Summit Tech., Inc. v . Healthcare Capital Group, Inc.*, 141 F.R.D. 381, 384 (D. Mass. 1992) (finding that the subpoenaed party's revealing the identity of certain non-confidential sources as well as the content and timing of his conversations with an unnamed source did not waive the reporter's privilege as to the unnamed source); *Fischer v. McGowan*, 585 F. Supp. 978, 987 (D.R.I. 1984) (holding that a reporter's "partial disclosure" of the identity of two sources and the class of people from whom he derived his information did not waive the privilege as to the unnamed sources under Rhode Island state law).

d. Other elements

There is no reported First Circuit decision specifically addressing this issue.

3. Agreement to partially testify act as waiver?

There is no reported First Circuit decision specifically addressing this issue.

VII. What constitutes compliance?

A. Newspaper articles

Under the Federal Rules of Evidence, newspapers and periodicals are self-authenticating and require no extrinsic evidence of authenticity. Fed. R. Evid. 902(6). In the note to paragraph 6, the authors reason that "[t]he likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them." However, on the facts of a particular case, a court may require a reporter or a custodian of records to authenticate the material. Often this matter can be negotiated by the parties.

B. Broadcast materials

There is no reported First Circuit decision specifically addressing what is required when turning over tapes of material that was aired, or who must appear as a representative or custodian of the broadcaster. This is usually a matter negotiated by the parties.

C. Testimony vs. affidavits

There is no reported First Circuit decision specifically addressing whether an affidavit can replace in-court testimony, particularly where the testimony is intended merely to confirm that an article was true and accurate as published. Depending on the nature of the testimony and the purpose for which it is sought to be introduced, the Federal Rules of Evidence addressing authentication, hearsay, and exceptions to the hearsay rule will likely determine whether live testimony subject to cross-examination is required in a particular case. This will likely vary from case to case.

D. Non-compliance remedies

The courts have broad discretion in fashioning remedies to force a reporter to comply with a valid subpoena. A court may hold the subpoenaed party in contempt for non-compliance under Fed. R. Civ. P. 45(e) and under Fed. R. Crim. P. 17(g).

1. Civil contempt

Pursuant to Fed. R. Civ. P. 45(e) and Fed. R. Crim. P. 17(e), if a reporter refuses or fails to comply with a subpoena without adequate excuse, he can be found in contempt of court. *See also Blackmer v. U.S.*, 284 U.S. 421, 438-440 (1932) (affirming contempt citation and fine imposed on a person who failed to comply with a criminal subpoena). Rule 45(e) offers only one example of an adequate excuse: excessive travel burden on a nonparty witness. However, this example is not exclusive. Because the rule states the maximum travel burden (100 miles, Fed. R. Civ. P. 45(c)(2)(B)(ii)), any subpoena demanding a nonparty witness to travel beyond that is fatally defective and cannot be enforced. *Productos Mistolin, S.A. v. Mosquera*, 141 F.R.D. 226, 229(D.P.R. 1992) (Subpoena from Florida commanding performance in Puerto Rico was facially void and unenforceable). A reporter who suspects that a subpoena is unenforceable would be wise to seek the protection of the court to avoid any potential grounds for contempt.

In *LaRouche*, the First Circuit affirmed the lower court's decision to hold a television network in civil contempt for failing to submit, for *in camera* review, outtakes of an interview with a prospective key witness. *U.S. v. The LaRouche Campaign*, 821 F.2d 1176 (1st Cir. 1988).

a. Fines

The First Circuit courts have imposed fines for failure to comply with a court order compelling the production of information. *See, e.g., U.S. v. The LaRouche Campaign*, 821 F.2d 1176 (1st Cir. 1988) (affirming the district court's decision to hold the media in civil contempt for failing to comply with a court order to submit a videotaped interview for *in camera* review).

Reporters who are held in contempt and fined for failure to comply with a subpoena may request the court to stay any penalties for contempt pending the outcome of an appeal. In such cases, the court will often expedite the appeal process. In *LaRouche*, the district court had ordered the media to submit, for *in camera* review, outtakes of a videotaped interview with a prospective key witness. *U.S. v. The LaRouche Campaign*, 821 F.2d 1176, 1179 (1st Cir. 1988). The media did not comply with this order, and the court found the network to be in civil contempt.

The court also fined the media $500 per day. *Id*. The fine was stayed pending the disposition of an expedited appeal. *Id*.

Compensatory sanctions in cases of civil contempt are limited to the loss suffered by the injured party as a result of the violation leading to contempt. *See Dystar Corp. v. Santo*, 1 F. Supp.2d 28(D.Mass. 1997). However, there is no reported First Circuit decision that limits the amount of fines that can be levied against reporters who refuse to comply with a court order to disclose information. In *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004), a reporter charged with civil contempt asserted that the $1,000 a day fine against him should be struck down for being punitive. The court rejected this charge, noting that the "obvious purpose" of the fine was to compel compliance. The court also stated that far more severe fines for civil contempt had been upheld in the First Circuit and in other circuits. *See e.g.*, *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 830 (1994), *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 801-02 (1st Cir. 1991).

b. Jail

Courts have the option of confining an unwilling witness to compel compliance *Shillitani v. United States*, 384 U.S. 364 (1966).

If the civil contemnor can demonstrate that there is no realistic possibility that continued confinement will result in a compliance, the confinement becomes punitive and the contemnor must be released. *See Matter of Federal Grand Jury February 1987 Term (Griffin)*, 677 F.Supp. 26 (D.Me. 1988).

2. Criminal contempt

Generally, 28 U.S.C. §1826(a) provides that where a witness to any proceeding before or ancillary to a court or grand jury refuses without just cause to testify or provide other information, including documents, the witness may be jailed for no longer than the life of the court proceeding or the term of the grand jury, including extensions, but in no event, for longer than eighteen months. Any appeal of such order of confinement must be disposed of as soon as practicable but not later than thirty days from the filing of the appeal.

Journalists have been sentenced to confinement in the First Circuit. In *In re Special Proceedings*, 33 Med. L. Rep. 1033, 1041(D.R.I. 2004), a reporter, held in criminal contempt for refusing to name the source from whom he had acquired a videotape subject to a protective order in a federal bribery case, was sentenced to six months home confinement. Because the federal sentencing guidelines do not prescribe a sentence for criminal contempt, the judge referenced the closest analog, 15 to 21 months for obstruction of justice. *Id.*, at 1039. Although the court stressed the seriousness of the offense, stating that it "strikes at the heart of the rule of law," the court showed leniency in consideration of the defendant reporter's serious heart and other related health problems. *Id.*, at 1038-40. Other conditions imposed on the defendant reporter's confinement included forbidding him from: engaging in any business or profession during the confinement, accessing the internet, participating in any radio or television appearances, and receiving visitors outside of certain prescribed hours. *Id..*, at 1041-42.

Because a fine for criminal contempt is intended to be punitive, as opposed to compensatory, the amount of the fine need not be commensurate with the victim's loss. *U.S. v. Kouri-Perez*, 187 F.3d 1 (1st Cir. 1999).

3. Other remedies

There is no reported First Circuit decision specifically addressing whether courts may impose remedies other than those discussed in the sections above. However, under New Hampshire common law, which the First Circuit applied in *Gray*, the court noted that, where a plaintiff had exhausted all reasonable means of identifying a source and where the defendant book author refused to reveal the identity of a source, the plaintiff would be entitled to a presumption that no source existed. *Gray v. St. Martin's Press*, 221 F.3d 243, 252 (1st Cir. 2000).

VIII. Appealing

A. Timing

1. Interlocutory appeals

Interlocutory matters are issues that arise during the course of a lawsuit which decide a particular point but do not constitute a final decision of the entire controversy. Interlocutory matters are generally not appealable, since they are not "final decisions" concluding a proceeding. Denials of a motion to quash are generally interlocutory and not appealable. *See Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421, 423 (1st Cir. 1961), *and cases cited*.

After having a motion to quash denied, if a reporter refuses to comply with a court order, the reporter can be held in contempt. The court's decision to hold a reporter in contempt is considered a final decision that can be appealed. Also, if the reporter is a party to the case, once the court decides the case, either party can appeal the court's decision, including its decision to compel (or not to compel) the reporter to produce information.

2. Expedited appeals

Appeals may be expedited, particularly when there is a pressing need for the reporter's information. First, the appealing party must file a notice of appeal with the district court. Then it may file a Motion for Expedited Appeal with the First Circuit. No specific form or language is required, except for noting in the heading: "Motion for Expedited Appeal." The Motion to Expedite should emphasize the First Amendment concerns raised and the need for prompt review to avoid any further burdening or violation of such interests. Where a reporter has been jailed for contempt, his or her appeal must be disposed of as soon as practicable but, in no event, later than thirty days from the filing of the appeal. 28 U.S.C. §1826(b).

B. Procedure

1. To whom is the appeal made?

The First Circuit has adopted Fed. R. App. P. 3(a)(1), which stipulates that notices of appeal must be filed with the district court clerk 30 days after the judgment or order appealed from is entered, in accordance with Fed. R. App. P. 4(a)(1)(A). When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 3(a)(2) If a party fails to file the appeal in a timely matter, the court may deal with the appeals as it deems appropriate. Fed. R. App. P. 4(a)(1)(B).

2. Stays pending appeal

The First Circuit follows Fed. R. App. P. 8, under which a party must ordinarily move first in the district court for a stay of the judgment or order of a district court pending appeal. This motion may be made in the Court of Appeals provided that the motion "show[s] that moving first in the district court would be impracticable ... or state[s] that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state[s] any reasons given by the district court for its action." Fed. R. App. P. 8(a)(2)(A). This motion must also include the reasons for granting the relief requested and the facts relied on, originals or copies of affidavits or other sworn statements supporting facts subject to dispute, and the relevant parts of the record. Additionally, the moving party must give reasonable notice of the motion to all parties.

Courts in the First Circuit may stay penalties for contempt pending the outcome of an appeal. In these cases, it is also likely that the court will expedite the appeal process.

In *In re Special Proceedings*, 32 Med. L. Rep. 1905 (D.R.I. 2003), the Rhode Island District Court denied a reporter's motion to stay a court order compelling him to answer a special prosecutor's questions regarding his source. The source had leaked surveillance tapes of Providence city officials indicted for extortion, bribery and other offenses in violation of a protective order prohibiting dissemination. *Id.* The court stated that "a party seeking a stay must demonstrate four things: a strong likelihood of success on the merits of its appeal; that [the party] will suffer irreparable harm if a stay is not granted; that the harm will outweigh any harm opposing parties will suffer if the stay is granted; and that the public interest would be furthered by granting the stay." *Id.*, quoting *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 804 n. 31 (1st Cir. 1991). The court found that the reporter had demonstrated neither a likelihood of success on the merits nor that granting the stay was in the public interest and denied the stay. *Id.*

After the reporter continued to conceal his source, the District Court held him in civil contempt and ordered him to pay $1,000 a day until the contempt was purged. *In re Special Proceedings*, 373 F.3d 37, 41 (1st Cir. 2004).

The reporter sought review, and the court granted a stay of the order pending expedited review. *Id.* Although the court expressed doubts about the merits of the case just as it had in the 2003 decision, they held that the First Amendment interests justified a stay. *Id.* In contrast with the motion to stay the order to compel, the court found that the interest balanced in the reporter's favor given the expedition of the appeal and the minimal risk of harm from a brief further delay. *Id.*

In *LaRouche*, the district court had ordered the media party to submit, for *in camera* review, the outtakes of a videotaped interview with a prospective key witness. *U.S. v. The LaRouche Campaign*, 821 F.2d 1176 (1st Cir. 1988). The network did not comply with this order, and the court found it to be in civil contempt. The court also fined the network $500 per day. *Id*. The fine was stayed pending the disposition of an expedited appeal. *Id*.

3. Nature of appeal

There is no reported First Circuit decision specifically addressing this issue.

4. Standard of review

In reviewing a lower court's decision on a motion to compel, the standard of review is whether the order was an abuse of discretion on the part of the court. *See e.g. U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1178 (1st Cir. 1988)

In *Bruno & Stillman*, the First Circuit stated, "While obviously the discretion of the trial judge has wide scope, it is a discretion informed by an awareness of First Amendment values and the precedential effect which [a] decision in any one case would be likely to have. Given the sensitivity of inquiry in this delicate area, detailed findings of fact and [an] explanation of the decision would be appropriate." *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 598 (1st Cir. 1980).

5. Addressing mootness questions

Where a reporter chooses to comply with a subpoena, the First Circuit has held that, in the absence of compelling circumstances such as criminal penalties, courts will not later decide whether the subpoena was valid and enforceable, since the issue became moot once the reporter complied with the subpoena. *Boston Teachers Union v. Edgar*, 787 F.2d 12, 14 (1st Cir. 1986); *U.S. v. Arthur Anderson & Co.*, 623 F.2d 720, 725 (1st Cir. 1980). The First Circuit has further held that the "capable of repetition yet evading review" exception is not available to a subpoenaed party once he has chosen to comply with a subpoena. *Id*.

6. Relief

The reporter's attorney should request the First Circuit to vacate any order requiring disclosure of confidential sources or information.

IX. Other issues

A. Newsroom searches

There is no reported First Circuit decision specifically addressing this issue.

B. Separation orders

There is no reported First Circuit decision specifically addressing this issue.

C. Third-party subpoenas

There is no reported First Circuit decision specifically addressing this issue.

D. The source's rights and interests

There is no reported First Circuit decision specifically addressing this issue.