

REPORTER'S PRIVILEGE: 2ND 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 and 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 dis-

sent 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 constitu-

tional 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 sup-

porting 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

2ND CIR.

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I. Introduction: History & Background

The reporter's privilege in the Second Circuit is relatively broad. A litigant may assert the privilege in both civil and criminal cases, and when the information sought is non-confidential or confidential. The tests to overcome the privilege are somewhat more press-protective than elsewhere. The following cases define the most significant aspects of the privilege in the Second Circuit:

• *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999)

When the information sought is non-confidential, the litigant seeking the information from one who asserts the reporter's privilege under the First Amendment must demonstrate that the information: "(1) is of likely relevance; (2) to a significant issue in the case; and (3) is not reasonably obtainable from other available sources."

• *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993)

When a litigant in a criminal case seeks information from a reporter who asserts the reporter's privilege under the First Amendment, the privilege will be defeated if the reporter witnessed the crime and is asked to answer questions that directly relate to that crime. *Cutler* followed the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which held that a reporter who witnesses criminal conduct may not decline to answer questions that directly relate to the conduct the reporter observed.

• *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983)

When the reporter's privilege is asserted under the First Amendment to protect confidential information sought in civil or criminal cases (excluding criminal cases with facts that resemble *Branzburg*), the subpoenaing party must make "a clear and specific showing that the information is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources."

II. Authority for and source of the right

The reporter's privilege in the Second Circuit was developed before *Branzburg v. Hayes*. The most influential pre-*Branzburg* case in the Second Circuit was *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). In *Garland*, the Second Circuit developed a three-part test regarding disclosure of both confidential and non-confidential information: a litigant must make a *clear and specific showing* that the information sought is (1) *highly material and relevant* to the underlying claim; (2) *necessary or critical* to maintenance of the claim (the "heart of the claim" requirement); and (3) unavailable from alternative sources (the "exhaustion" requirement).

The *Garland* test still applies in the Second Circuit and some other jurisdictions (*See* 23 Wright & Miller, Federal Practice & Procedure §5426 at 788 and n. 41 (noting that the Third Circuit, Fourth Circuit, Ninth Circuit, D.C. Circuit, District Court of Nevada, and other courts have adopted the *Garland* test)) when the subpoenaing party in a civil or criminal case seeks confidential information. *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). The *Burke* court derived this test from the post-*Branzburg* cases *Baker v. F & F Investment*, 470 F.2d 778, 783-85 (2d Cir.), *aff'g* 339 F. Supp. 942 (S.D.N.Y. 1972), *cert. denied*, 411 U.S. 966 (1973) and *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7-8 (2d Cir. 1982) (per curiam). To compel disclosure of non-confidential information, litigants must demonstrate that the information is: "(1) of likely relevance; (2) to a significant issue in the case; and (3) is not reasonably obtainable from other available sources." *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1999).

III. Scope of protection

A. Generally

For a general discussion of the scope of protection, see the *Foreword* to this chapter.

B. Absolute or qualified privilege

The privilege is qualified for both confidential and non-confidential materials. *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.) *cert. denied*, 464 U.S. 816 (1983) (recognizing qualified privilege for confidential materials); *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999) (recognizing qualified privilege for non-confidential materials).

C. Type of case

1. Civil

The application of the privilege does not differ significantly if the reporter is subpoenaed in a civil case, as opposed to a criminal case. See *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) ("We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence."). The test does differ depending on whether the materials withheld are confidential or non-confidential.

In cases involving confidential materials, the three-part test outlined in *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982), controls. The *In re Petroleum* test requires the subpoenaing party to make "a clear and specific showing that the information is: [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources." *Id.*; see also *Burke*, 700 F.2d at 77; *Baker v. F & F Inv.*, 470 F.2d 778, 783-85 (2d Cir. 1972).

The test set forth in *Gonzales v. National Broadcasting Co.* governs when the information sought is non-confidential. 194 F.3d 29 (2d Cir. 1999). In *Gonzales*, plaintiffs and defendants in a civil rights litigation subpoenaed non-party NBC to disclose non-confidential video outtakes of allegedly improper traffic stops by the defendant, a Louisiana sheriff. The court held that non-confidential material receives a qualified privilege that is less protective than that for confidential materials: the subpoenaing party must demonstrate that the non-confidential information is: "[1] of likely relevance to a significant issue in the case; and [2 is] not reasonably obtainable from other available sources." *Id.*

2. Criminal

The same three-part tests that apply in civil cases also apply in criminal cases. See *supra* III.C.1. In criminal cases where the facts are similar or the same as in *Branzburg* (i.e., the reporter is a witness to criminal activity), the privilege may not provide protection. *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993); *In re Ziegler*, 550 F. Supp. 530 (W.D.N.Y. 1982).

Motions to quash criminal defendants' subpoenas are often granted. *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Hendron*, 820 F. Supp. 715 (E.D.N.Y. 1993); *United States v. Aponte-Vega*, 20 Med. L. Rep. 2202 (S.D.N.Y. May 29, 1992); *United States ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667 (S.D.N.Y. 1985); *United States v. Winans*, 612 F. Supp. 827 (S.D.N.Y. 1985); *United States v. DePalma*, 466 F. Supp. 917 (S.D.N.Y. 1979); *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977). Courts in the Second Circuit have on several occasions denied motions to quash defendants' subpoenas in criminal cases. See *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993); *United States v. Sanusi*, 813 F. Supp. 149, 160 (E.D.N.Y. 1992) (expressing "reluctan[ce] in [] criminal case[s] to substitute its judgment for the defendant's on the question of whether such evidence is 'necessary or critical to a defense.'")

3. Grand jury

In *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) the Second Circuit explicitly refused to decide whether there was a common law privilege under Rule 501 of the Federal Rules of Evidence for reporters to withhold sources from a grand jury. If a privilege existed, it was overcome by the government's compelling interest in investigating the unauthorized disclosure of imminent law enforcement actions. *Id.* at 171. In *Gonzales*, the prosecutor sought the phone records of *The New York Times* in connection with an investigation concerning the unauthorized disclosure of government plans to seize assets of suspected terrorist organizations. *Id.* at 163. The court limited its finding to the facts of this case, explicitly distinguishing it from a case involving

government misconduct or corruption. *Id.* at 171-72. The court similarly found that there was no protection under the First Amendment, holding that the government interest in this case trumped any privilege outlined in the various *Branzburg* opinions, with the exception of Justice Douglas' dissent. *Id.* In dissent, Judge Sack urged the court to recognize a common law privilege, explaining, "[a] qualified journalists' privilege seems to me easily – even obviously – to meet [the qualifications set forth by the Supreme Court in *Jaffe*].... The protection exists. It is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way in which the public is kept informed and therefore of the American democratic process." *Id.* at 181. Echoing the concerns expressed by Judge Tatel in the Judith Miller case, Sack urged the court to adopt a different test for cases involving leak investigations. *Id.* at 185.

D. Information and/or identity of source

Courts in the Second Circuit have applied the privilege to protect both confidential sources, *see Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), and information, *see United States v. Burke*, 700 F.2d 70 (2d Cir. 1983) (confidential materials), *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999) (non confidential outtakes).

E. Confidential and/or non-confidential information

The reporter's privilege in the Second Circuit is strongest when confidential information is sought. *See infra Section VI.A&B* for the tests to compel disclosure of confidential and non-confidential materials. Confidential materials have included: confidential sources, *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir.), *cert. denied*, 411 U.S. 966 (1973); documents provided confidentially, *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756 (S.D.N.Y. 1978); research underlying an article, *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); and a former reporter's confidential notes and diaries reflecting conversations with sources retained by a newspaper, *United States v. Winans*, 612 F. Supp. 827 (S.D.N.Y. 1985).

Non-confidential materials, which are generally unpublished materials that were gathered with no expectation of confidentiality, have included: unedited video outtakes, *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999); audiotapes of interviews, *In re Ramaekers*, 33 F. Supp. 2d 312 (S.D.N.Y. 1999); tape recordings of telephone conference calls which were not subject to an agreement of confidentiality, *PPM America, Inc. v. Marriott Corp.*, 152 F.R.D. 32 (S.D.N.Y. 1993); tape-recorded news conferences, *Don King Prods., Inc. v. Douglas*, 131 F.R.D. 421 (S.D.N.Y. 1990); and a reporter's testimony confirming published statements, *SEC v. Seahawk Deep Ocean Tech., Inc.*, 166 F.R.D. 268 (D. Conn. 1996).

F. Published and/or non-published material

Whether the material is published or unpublished does not change the test to overcome the privilege in the Second Circuit. Both non-confidential unpublished and published materials receive a qualified privilege. *See Gonzales v. National Broadcasting Co.*, 194 F.3d at 36 (2d Cir. 1999) (unpublished materials); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (acknowledging unpublished resource materials may be protected); *SEC v. Seahawk Deep Ocean Tech., Inc.*, 166 F.R.D. 268 (D. Conn. 1996) (published materials). In *Seahawk*, the SEC sought to depose a reporter to confirm that one of the defendants in the underlying civil case had made statements printed in a newspaper article. Although the SEC sought published, non-confidential information, the court held that a qualified First Amendment privilege applied. The SEC overcame the privilege and was allowed to depose the reporter.

G. Reporter's personal observations

The privilege in the Second Circuit does not protect reporters who witness criminal activity in circumstances similar to *Branzburg*. In *United States v. Cutler*, 6 F.3d 67, 73 (2d Cir. 1993), the Court explained that when reporters are witnesses to a crime, and they are asked to give testimony about the crime, the request for testimony in this situation is parallel to the situation in *Branzburg v. Hayes*, 408 U.S. 665 (1972), where the Supreme Court held that there is no privilege to refuse "to answer questions that directly relate[] to criminal conduct that [a journalist] has observed and written about." The reporter who witnessed the crime in *Branzburg* was subpoenaed by a grand jury, whereas in *Cutler* the reporter who witnessed the crime was subpoenaed by the defendant. The Second Circuit felt that the two cases were too similar to allow the reporter in *Cutler* to receive the privilege. *Id.* at 73.

In another case involving an eyewitness, *In re Ziegler*, 550 F. Supp. 530 (W.D.N.Y. 1982), the district court refused to extend the privilege to a reporter who witnessed the assault of an organized crime figure. After Ziegler

wrote about the altercation, the government subpoenaed Ziegler to testify about the incident. The court denied Ziegler's motion to quash the subpoena because "the legal principle *Branzburg* stands for is no less applicable to the instant case, that a reporter, the same as any other citizen, must testify before the Grand Jury as to what he has personally observed." *Id.* at 532.

The privilege may protect reporters who are eyewitnesses to public events with multiple witnesses. In *Carter v. City of New York*, 2004 U.S. Dist. LEXIS 1308 (S.D.N.Y. Jan. 30, 2004) the court refused to compel a reporter to testify about his personal observations of a public protest, finding that the defendants had not made a compelling showing of need.

The privilege may also protect journalists who are witnesses to an event at issue in a civil litigation. In *SEC v. Seahawk Deep Ocean Tech., Inc.*, 166 F.R.D. 268 (D. Conn. 1996), the court stated the reporter witnessed one of the alleged acts of misconduct in a civil securities fraud action, yet the court did not rule that the reporter automatically did not receive the privilege as a result of being a witness. Instead, the court applied the three-prong reporter's privilege test and denied the reporter's motion to quash. *Id.* at 271-72.

H. Media as a party

Whether the media is a party to a lawsuit does not change the formulation of the common law test for reporter's privilege. The privilege was developed in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), which involved a party reporter. Most of the reported cases involve non-parties. Some courts have held that the showing required to compel a non-party reporter is higher than that of a party to the litigation. See *Driscoll v. Morris*, 111 F.R.D. 459 (D. Conn. 1986).

I. Defamation actions

The same formulation of the test to determine if a qualified privilege exists in non-libel suits applies in libel suits, but the privilege is weaker in a libel suit. See *Aequitron Med. Inc. v. CBS, Inc.*, 24 Med. L. Rptr. 1025, 1995 U.S. Dist. Lexis 9485 (S.D.N.Y. 1995). For example, in *Aequitron*, journalists for "CBS This Morning" asserted the privilege to withhold non-confidential documents requested by plaintiffs in a trade libel and defamation case. Plaintiff corporation, which manufactured infant heart rate and respiration monitors that are used to protect infants from SIDS, accused defendant CBS of making false, deceptive and defamatory statements about the monitors. The court applied the three-prong qualified privilege test for CBS, but the court emphasized that the privilege is weaker in a libel case against a media defendant where the plaintiff seeks non-confidential information. *Id.* at *8. The court held that the plaintiff overcame the privilege because the plaintiff met all three prongs of the privilege test. *Id.* at *9. (For more discussion of *Aequitron* see Section VI.B.1.)

IV. Who is covered

The Second Circuit's test for who can benefit from the reporter's privilege is broad. The Second Circuit, in *Von Bulow v. Von Bulow*, held that "the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material — sought, gathered or received — to disseminate information to the public and that such intent existed at the inception of the newsgathering process." 811 F.2d 136, 144 (2d Cir. 1987). The court went on to say: "The intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for 'the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" *Id.* (quoting *Lovell v. Griffin*, 303 U.S. 444 (1938)).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The definition of reporter is not contingent upon the reporter working full-time or working a minimum number of hours. Instead, the core of the test is whether an individual gathers information in the course of newsgathering duties and has the intention to disseminate the information to the public. *Von Bulow v. Von Bulow*, 811 F.2d 136,

144 (2d Cir. 1987). The privilege has been extended to cover student reporters. *Persky v. Yeshiva Univ.*, No. 01 Civ. 5278 (LMM), 2002 WL 31769704 (S.D.N.Y. Dec. 10, 2002); *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993), see *Supra* IV.A..2.

b. Editor

Courts in the Second Circuit have extended the privilege to editors.

In *Lipinski v. Skinner*, 781 F. Supp. 131 (N.D.N.Y. 1991), plaintiff was arrested and forced to undergo HIV testing. Plaintiff tested positive for HIV. The *Binghamton Press* published an article stating that the plaintiff was the first inmate in the Broome County jail with AIDS. Plaintiff sued the police and jail officials alleging that they violated the law by forcing him to take an HIV test and failing to protect his confidentiality. The author of the article stated in a deposition that one of her editors at the paper told her to investigate reports of an inmate with AIDS and that the sheriff confirmed that the plaintiff had tested positive. The author had two editors at the paper, and she did not state which editor gave her the information. Plaintiff subpoenaed testimony from both of the author's editors to determine which editor gave the author the lead. The court held that plaintiff satisfied the *Burke* three-prong test to overcome the privilege and ordered that the newspaper's motion to quash the subpoenas against the editors be denied. *Id.* at 138-139. Plaintiff's discovery was limited to questions about who initially disclosed the information regarding plaintiffs' HIV test to the newspaper. *Id.* at 140.

Additionally, in *In re Welling*, 40 F. Supp. 2d 491 (S.D.N.Y. 1999), a Barron's associate editor wrote an article that led attorneys in a securities fraud cases to believe she had relevant evidence. Her motion to quash the subpoena was denied. After the trial court decision, the associate editor tried to have herself held in contempt so she could appeal the decision to not quash the subpoena. The district court did not reach the merits of the decision, finding she could not be held in contempt because the deadline for complying with the subpoena had not yet been fixed, so she had not yet disobeyed a court order. *Id.* at 493-94.

c. News

While the Second Circuit does require that information be gathered in the newsgathering process to be covered by the reporter's privilege, it has not specifically defined the term "news." Yet the Second Circuit in *Von Bulow v. Von Bulow* made it clear that newsgathering only includes efforts to disseminate information to the public. 811 F.2d 136, 145 (2d Cir. 1987); see also *infra* Section IV.A.2. Examples of newsgathering include a journalist's discussions with a confidential source that the journalist intends to publish in a newspaper, *United States v. Apon-te-Vega*, 20 Med. L. Rep. 2202 (S.D.N.Y. May 29, 1992); a network's filming of traffic stops by a policeman for the purpose of broadcasting the stops on a television show, *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999); and a financial newsletter's acquisition of a tape recording of a conference call which contained information about a conspiracy that the newsletter intended to publish, *PPM America, Inc. v. Marriott Corp.*, 152 F.R.D. 32 (S.D.N.Y. 1993).

d. Photo journalist

The Second Circuit has not explicitly defined the term "photojournalist." There appears to be no caselaw in the Second Circuit addressing whether the reporter's privilege applies to photojournalists, but under the *Von Bulow* test it appears that they would be covered. See also cases involving video outtakes, e.g. *In re NBC*, 79 F.3d 346 (2d Cir. 1996).

e. News organization / medium

The Second Circuit has not distinguished among media. The same law applies to any entity or individual as long as the entity or individual gathers information in the course of newsgathering duties and has the intention to disseminate the information to the public. *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

2. Others, including non-traditional news gatherers

District courts have expressed a willingness to extend the privilege to less traditional newsgatherers, including the publisher of a technical newsletter and student journalists. See *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 85 (E.D.N.Y. 1975) (technical newsletter); *Persky v. Yeshiva Univ.*, No. 01 Civ. 5278 (LMM), 2002 WL

31769704 (S.D.N.Y. Dec. 10, 2002) (student journalist); *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993) (student journalist).

It is likely that freelance writers would also satisfy the broad Second Circuit privilege test, so long as "the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material — sought, gathered or received — to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

This test also applies to authors of books. In *Von Bulow v. Von Bulow*, the Second Circuit recognized that book authors with the requisite intent could qualify for the privilege. The court did not allow the author of a manuscript on the accused murderer, Claus von Bulow, to benefit from the privilege because she "gathered information initially for purposes other than to disseminate information to the public." *Id.* at 146. For example, she commissioned reports on the lifestyles of von Bulow's wife's children, with no intention of disclosing them. At oral argument the author's counsel admitted that when the author commissioned the reports her main concern was to vindicate Claus von Bulow. The Second Circuit also found the author's personal notes on the trial of Claus von Bulow not to be privileged. The author claimed to have taken these notes to write an article for the *New York Post*, but the Second Circuit found her assertion belied by the fact that she continued to take notes even after the *Post* decided not to print her article. *Id.* at 145.

The Second Circuit has not definitively stated whether academics receive a privilege. In *In re Grand Jury Subpoena (Brajaha)*, the court held that pursuant to Federal Rule of Evidence 501 it had the power to fashion a scholar's privilege, but the court did not decide if the scholar's privilege in fact exists. *In re Grand Jury Subpoena (Brajaha)*, 750 F.2d 223, 224-25 (2d Cir. 1984). In this case, a graduate student created a journal in preparation for writing his dissertation entitled "The Sociology of the American Restaurant." The grand jury subpoenaed the journal because it included the student's notes on a restaurant in which a suspicious fire had started. The Court held that if a scholar's privilege exists, it "requires a threshold showing consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality." *Id.* at 225. The court remanded the case for additional findings and ordered *in camera* review and redaction of sections of the journal that arguably fell under the scholar's privilege. *Id.* at 226.

Similarly, the Second Circuit has not explicitly stated whether the privilege applies to newspaper librarians or others connected to the news process. Given the broad reach of who can receive the privilege in the Second Circuit, it is likely that anyone connected to the news process could receive the privilege if they gather information in the course of newsgathering duties and have the intention to disseminate the information to the public.

B. Whose privilege is it?

The privilege belongs to the reporter, and not to the source. In *Small v. UPI*, 84 Civ. 7320 (VLB), 1989 U.S. Dist. LEXIS 12459 (S.D.N.Y. Oct. 20, 1989) (Roberts, Mag.), the court held that the privilege belongs to the reporter and the source may neither waive the privilege nor invoke the privilege to protect information that the reporter may choose to reveal. In *Small*, plaintiff sued UPI and some of its executives for breach of contract and defamation. UPI sought to withhold discovery of the transcript of an interview with two named defendants, conducted by reporters who had no affiliation with UPI but were writing a book on UPI. The court rejected defendant's privilege claim because the privilege belongs to the reporter, not to the source. *Id.* at *3.

In *United States v. Winans*, the court held that publishers or broadcasters may assert the privilege concurrently with or in lieu of an individual reporter. *United States v. Winans*, 612 F. Supp. 827 (S.D.N.Y. 1985). In this case, a former reporter for the *Wall Street Journal*, who was being prosecuted for securities violations, sought to have his former publisher disclose the names of confidential sources in the reporter's notes and diaries that remained with the *Journal*. The court held that the *Journal* could assert the privilege in lieu of the reporter and held that the reporter did not meet the three-prong test to overcome the privilege. *Id.* at 1280.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

No special rules or unusual interpretations attach to the timing or manner of service of subpoenas in the Second Circuit. The requirements set out in Rule 45 of the Federal Rules of Civil Procedure and Rule 17 of the Federal Rules of Criminal Procedure control. Rules 45(b) and 17(d) both specify that the subpoena server not be a party and be at least 18 years old. Personal service is required. Rule 45(c)(3)(A)(i) of the Federal Rules of Civil Procedure states that a subpoena shall be quashed if it "fails to allow reasonable time for compliance."

2. Deposit of security

There is no rule in the Second Circuit that any security be deposited in order to procure testimony or materials. Under Federal Rule of Civil Procedure 45(b)(1), witness and mileage fees must accompany service of a subpoena that requires attendance at a trial or deposition. Whether subsequent tender of fees perfects service is unsettled in the Second Circuit. 9 James Wm. Moore et al., *Moore's Federal Practice* § 45.21 (2007); 1 James Wm. Moore et al., *Moore's Federal Rules Pamphlet 2007* § 45.6 (Lexis 2007).

3. Filing of affidavit

No affidavit is required upon issuance of the subpoena.

4. Judicial approval

A party ordinarily need not receive any special approval from a judge or magistrate to serve a subpoena in the Second Circuit. Some district judges require judicial approval prior to filing motions. All local rules for Second Circuit courts are available online at www.ca2.uscourts.gov/Docs/Rules/LR.pdf.

5. Service of police or other administrative subpoenas

Issues involving administrative subpoenas are dealt with on a state level and should not be an issue in a federal legal proceeding.

B. How to Quash

1. Contact other party first

The law does not require notifying the subpoenaing party prior to moving to quash.

2. Filing an objection or a notice of intent

No notice of intent is required prior to filing a motion to quash. Failure to timely object is usually considered a waiver of any objection to the subpoena. *United States v. IBM Corp.*, 70 F.R.D. 700, 701-02 (S.D.N.Y. 1976); *Eldaghar v. City of New York*, 2003 U.S. Dist. LEXIS 19247, at *2 (S.D.N.Y. Oct. 28, 2003).

3. File a motion to quash

a. Which court?

A motion to quash should be filed in the same court from which the subpoena was issued, as only that court may properly quash the subpoena. Fed. R. Civ. P. 45(c)(3)(A); *Jack Frost Laboratories, Inc. v. Physicians & Nurses Mfg. Corp.*, 1994 U.S. Dist. LEXIS 261 (S.D.N.Y. Jan. 13, 1994).

b. Motion to compel

The recipient of a subpoena seeking privileged information always has the option — some would say the obligation — of filing a motion to quash rather than objecting and/or awaiting a motion to compel. If one simply does not comply with a subpoena, one runs the risk of being held in contempt. Filing a motion to quash requires paying the associated fees and committing to litigation of an issue that might otherwise be avoided, if, for example, the party seeking information ultimately decides not to pursue disclosure.

c. Timing

A motion to quash normally should be filed as soon as practicable. A motion to quash is timely if it is made before the time of compliance set out in the subpoena. *See Nova Biomedical Corp. v. I-Stat Corp.*, 182 F.R.D. 419, 422 (S.D.N.Y. 1998); *see also* 1 James Wm. Moore et al., *Moore's Federal Rules Pamphlet* § 45.10 (Lexis 2007).

d. Language

While there is no "stock language" that is required, motions to quash are often predicated on one of the following grounds: the request for information is overly broad, insufficient time has been permitted for compliance, the request is unduly burdensome, and/or the material requested is privileged.

e. Additional material

Every motion must be accompanied by a memorandum of law, which should contain all relevant legal authorities. Some local rules may require additional attachments; for example, often a copy of the subpoena to be quashed must be submitted along with the motion. It is important to check the rules of the particular judge before whom you are moving to quash.

4. In camera review

a. Necessity

A court is not legally required to hold an *in camera* review of materials sought. Many judges consider *in camera* review necessary to determine if the information is privileged. If the party seeking to quash is unable to adequately explain why the materials should be protected without disclosing confidential information, then *in camera* review may be essential to an informed ruling. *See N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 171 (2d Cir. 2006).

b. Consequences of consent

A stay pending appeal of an adverse ruling following *in camera* review is not automatic. The court which issued the ruling may grant a stay pending appeal based on four factors: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a 'substantial possibility, although less than a likelihood, of success' on appeal, and (4) the public interests that may be affected." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 131 F. Supp. 2d 540, 543 (S.D.N.Y. 2001) (internal citations omitted); *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993).

c. Consequences of refusing

If a reporter or publisher does not consent to *in camera* review, a judge will very likely not grant the motion to quash. Disobeying a judge's order for *in camera* review also may result in being held in contempt.

5. Briefing schedule

Every court sets its own briefing schedule for a motion to quash. Local rules, including the rules applicable to timing of briefs, are available at www.ca2.uscourts.gov/Docs/Rules/LR.pdf.

6. Amicus briefs

Courts in the Second Circuit accept amicus briefs at both the district court and the appellate levels. The decision whether to do so is entirely within the court's discretion. The following are some organizations that have filed amicus briefs in cases involving media privilege:

Reporters Committee for Freedom of the Press
1101 Wilson Blvd. Suite 1100
Arlington, VA 22209
(703) 807-2100
www.rcfp.org

American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 344-3005

www.aclu.org

Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 435-9333
www.eff.org

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Both confidential and non-confidential information are subject to a qualified privilege in the Second Circuit. A claim of privilege is easier to sustain when the material sought is confidential. When the information sought is confidential, "disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983). To compel disclosure of non-confidential information, litigants must demonstrate that the information is "of likely relevance to a significant issue in the case, and [is] not reasonably obtainable from other available sources." *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1998).

B. Elements

1. Relevance of material to case at bar

The relevance tests differ depending on whether the material is confidential or non-confidential. One seeking disclosure of confidential materials must demonstrate by clear and convincing evidence that that the materials sought are both "highly material and relevant" and "necessary or critical to the maintenance of the claim." *Burke*, 700 F.2d at 76-77. One seeking disclosure of non-confidential materials must establish that the materials are "of likely relevance" to "a significant issue in the case." *Gonzales v. National Broadcasting Co.*, 194 F.3d at 36.

<u>Confidential Information</u>

Highly material and relevant

The first element of the test to overcome a qualified privilege for *confidential* information is that the party seeking the information must show that the information is "highly material and relevant" to the ultimate issue. *Burke*, 700 F.2d at 76-77. To satisfy the relevancy test, it is necessary to make a "clear and specific showing" of materiality. *Id.* In *Burke*, defendants in a point shaving scandal sought research documents from a reporter who wrote an article about the scandal in *Sports Illustrated*. The court ruled that the documents were highly material and relevant because they may have contained information that contradicted the trial testimony of a government witness. *Id.* at 77. (For other examples of cases in which confidential information was found to be "highly material and relevant," see *Umhey v. County of Orange*, 957 F. Supp. 525 (S.D.N.Y. 1997) (motion to quash denied); *Pellegrino v. New York Racing Ass'n, Inc.*, No. 96-CV-2315 (TCP) (E.D.N.Y. Aug. 22, 1996, *modified* Sept. 18, 1996) (motion to quash denied); *Lipinski v. Skinner*, 781 F. Supp. 131 (N.D.N.Y. 1991) (motion to quash denied).) The other two prongs of the privilege were not met in this case. (For more discussion on *Burke* see *infra* Sections I and III.C.1)

In *United States ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667 (S.D.N.Y. 1985), the court found that the information sought was not highly material. In *Vuitton*, the defendant had been found guilty of willfully violating an injunction forbidding him to sell counterfeit trademarked goods. Following his conviction, he sought to subpoena outtakes of a CBS News investigation about the counterfeiting scandal in an attempt to find evidence of prosecutorial misconduct. The court held that these outtakes were not highly material because it was merely a hunch or sheer speculation that these outtakes would provide the helpful information the defendant sought. *Id.* at 671.

Necessary/Critical to the Maintenance of the Claim

The second element of the test to overcome a qualified privilege for *confidential* information is that the information must be "necessary or critical to the maintenance of the claim." *Burke*, 700 F.2d at 76-77. Courts in the Second Circuit have stated that for the information or testimony to be necessary or critical, the claim must "virtually rise[] or fall[] with the admission or exclusion" of the requested information. *In re Waldholz*, 1996 U.S. Dist. LEXIS 9648, at *11 (S.D.N.Y. July 11, 1996) (quoting *In re NBC (Krase v. Graco)*, 79 F.3d 346, 351 (2d Cir. 1996)). Courts have also noted that when information sought from the reporter would be cumulative of other evidence, it cannot be necessary or critical to a claim. *Burke*, 700 F.2d at 78; *In re Application of Behar (Church of Scientology v. IRS)*, 779 F. Supp. 273, 275 (S.D.N.Y. 1991). Uniqueness need not be demonstrated. *In re Natural Gas Commodities Litig.*, 235 F.R.D. 241 (S.D.N.Y. 2006) ("necessary or critical" does not require "uniqueness").

In *Lipinski v. Skinner*, 781 F. Supp. 131 (N.D.N.Y. 1991) (motion to quash denied), testimony from editors of a newspaper was considered necessary and critical to plaintiff's claim that police had given confidential, sensitive information about him to a newspaper. The editors could testify about who in the police force had made the initial disclosure to the paper. (For a more detailed discussion of *Lipinski*, see *infra* Section IV.A.1.b.)

In *Umhey v. County of Orange*, 957 F. Supp. 525 (S.D.N.Y. 1997) (motion to quash denied), plaintiff brought an action for emotional distress, and defendant subpoenaed a third-party reporter to determine whether the plaintiff — who sued in part because of disclosure of confidential information to the media — was herself the source of the confidential information. The court held that the information sought was necessary and critical to the defense. Also, the court ordered the reporter not to answer questions about sources other than the plaintiff.

In *Pellegrino v. New York Racing Ass'n, Inc.*, No. 96-CV-2315 (TCP) (E.D.N.Y. Aug. 22, 1996, *modified* Sept. 18, 1996) (motion to quash denied), plaintiff sought to prove that the NYRA was responsible for leaking to a journalist information that plaintiff had been fired for sexual harassment. Plaintiff subpoenaed the journalist to disclose which of NYRA's employees had told him that plaintiff was fired for sexual harassment. The court held that the identification of the source was critical and necessary for the maintenance of the claim because plaintiff had to show that the source was authorized to speak on behalf of NYRA in order to prevail. In contrast, subpoenas have been quashed where the information sought was found not "necessary or critical to the maintenance of the claim. See *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir.), *aff'g* 339 F. Supp. 942 (S.D.N.Y. 1972), *cert. denied*, 411 U.S. 966 (1973); *Sommer v. PMEC Assoc. & Co.*, 1991 U.S. Dist. LEXIS 5697 (S.D.N.Y. May 1, 1991); *United States ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667 (S.D.N.Y. 1985).

For instance, in *Sommer v. PMEC Assoc. & Co.*, defendants counter-claimed that plaintiff, Sommer, who contested the conversion to cooperative ownership of an apartment complex, had a vendetta against the owners of the complex. Defendants stated that one way in which Sommer carried out his vendetta was by feeding false and misleading statements to *Newsday* about the owners. Defendants thus subpoenaed *Newsday* for all research and other materials regarding stories on the conversion of North Shore Towers. The court held that this information from *Newsday* was not necessary and critical because:

Sommer's alleged feeding of false and misleading statements to *Newsday* is only one of sixteen courses of conduct which defendants allege Sommer undertook in furtherance of his vendetta. Given that defendants have already been provided with all of *Newsday*'s published reports concerning the conversion, and given that defendants may investigate fifteen other avenues in support of their allegations of a vendetta, the Court concludes that defendants' claim will not virtually rise or fall upon the admission or exclusion of the material sought here from *Newsday*.

Sommer, 1991 U.S. Dist. LEXIS 5697, at *8.

<u>Non-Confidential Information</u>

Of Likely Relevance

The first element of the test to overcome a qualified privilege for non-confidential information is that the party seeking disclosure must demonstrate that the information "is of likely relevance." *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1998). In *Gonzales*, the court held that outtakes of allegedly improper traffic stops by the defendant, a Louisiana sheriff, were more than likely to be relevant because "they may assist the trier of fact in assessing whether [the sheriff] had probable cause to stop the NBC vehicle and might help determine whether he engaged in a pattern or practice of stopping vehicles without probable cause, as the Plaintiffs allege." *Id.* *Gonzales* was decided in 1999. There appear to be no subsequent cases interpreting the "of likely relevance" element for non-confidential information. The motion to quash in *Gonzales* was denied. (For more discussion on *Gonzales* see *infra* Sections I and III.C.1)

Before *Gonzales*, the court applied the more stringent "highly material and relevant" test to cases involving non-confidential information. Where courts deemed non-confidential information "highly material and relevant" the material obviously would also pass muster under the less stringent *Gonzales* standard of relevance. *In re Ramaekers*, 33 F. Supp. 2d 312 (S.D.N.Y. 1999) (motion to quash denied); *In re Waldholz*, 1996 U.S. Dist. LEXIS 9648 (S.D.N.Y. July 11, 1996) (motion to quash denied); *Aequitron Med., Inc. v. CBS, Inc.*, 1995 U.S. Dist. Lexis 9485 (S.D.N.Y. 1995) (motion to quash denied).

For instance, in *In re Waldholz*, a securities class action, shareholders contended that officers and directors of pharmaceutical companies made false and misleading statements about the efficacy and safety of an AIDS drug. The plaintiffs subpoenaed Waldholz, a *Wall Street Journal* reporter, to have him confirm that a board member/defendant, Smith, made the statements attributed to him in Waldholz's article. The court ruled that this information was highly material and directly relevant because "(1) the Class predicates defendants' liability in part directly on the statement by Smith reported in Waldholz's article; and (2) Smith, in his deposition, disputed the accuracy of Waldholz's reporting of Smith's statement." *In re Waldholz*, 1996 U.S. Dist. LEXIS 9648, at *8 (S.D.N.Y. July 11, 1996). The motion to quash was denied.

Involves a Significant Issue in the Case

The second element of the test to overcome a qualified privilege for *non-confidential* information is that the party seeking disclosure must demonstrate that the information involves "a significant issue in the case." *Gonzales v. National Broadcasting Co.*, 194 F.3d at 36. In *Gonzales*, the court held that the information pertained to a significant issue in the case because the outtakes at issue portrayed the deputy sheriff stopping vehicles, and the claim revolved around whether the officer had stopped vehicles without probable cause.

There are some pre-*Gonzales* cases in which non-confidential information was found to meet the even higher standard of being "necessary and critical to the claim." See *In re Ramaekers*, 33 F. Supp. 2d 312 (S.D.N.Y. 1999) (motion to quash denied); *In re Waldholz*, 1996 U.S. Dist. LEXIS 9648 (S.D.N.Y. July 11, 1996) (motion to quash denied); *Aequitron Med., Inc. v. CBS, Inc.*, 1995 U.S. Dist. Lexis 9485 (S.D.N.Y. 1995) (motion to quash denied). For example, in *Aequitron Med., Inc. v. CBS, Inc.*, plaintiffs sued CBS for trade libel and defamation. CBS aired a segment on "CBS This Morning" concerning sudden infant death syndrome (SIDS). During this segment, a doctor ran a test of plaintiff's monitor in his laboratory on a plastic doll and the monitor did not emit any signals, indicating no heartbeat. The doctor explained on the air that the monitor was detecting small electrical signals that caused the device to not sound an alarm. The CBS reporter stated that "if that occurs on a real baby that stops breathing, the monitor may not sound, and the baby could die." Plaintiff alleged that CBS deceived the audience by not revealing that the SIDS monitor was hooked up to an electrical device that simulated normal impulses given by the human body, which, it was argued, caused the monitor to malfunction.

The *Aequitron* court held that the discovery requested by plaintiffs, which included broadcast outtakes of the show, was necessary and critical to their claim. Because one of the elements of their libel claim was that CBS had knowledge that the broadcast was deceptive and chose to air it anyway, it was necessary that plaintiffs have access to the outtakes and other materials to be able to prove the knowledge element. *Aequitron Med., Inc. v. CBS, Inc.*, 1995 U.S. Dist. Lexis 9485, at *9 (S.D.N.Y. 1995).

2. Material unavailable from other sources

The tests for unavailability differ depending on whether the materials are confidential or non-confidential.

<u>Confidential Information</u>

The third part of the test to overcome a qualified privilege for confidential information is that the information "is not obtainable from other available sources." *Burke*, 700 F.2d at 76-77 (To satisfy the "exhaustion requirement" for confidential information, the information sought must "not be obtainable from other available sources."). The third prong for non-confidential information is similar, but a bit less stringent. To overcome the privilege, the non-confidential information sought cannot be "reasonably obtainable from other available sources." *Gonzales*, 194 F.3d at 36. (To meet the "exhaustion requirement" for non-confidential information, the information sought must "not be reasonably obtainable from other available sources.") (emphasis added).

This part of the test is often referred to as the "exhaustion requirement." Courts in the Second Circuit consistently have given strict application to this element. One district court stated: "[a]t the very least, a party seeking to overcome a constitutional privilege on the basis of necessity must show that it has exhausted all other available non-privileged sources for the information. . . . [A party that] has not even worked up a sweat, much less exhausted itself [cannot defeat the privilege]." *In re Pan Am Corp.*, 161 B.R. 577, 585 (S.D.N.Y. 1993). A party seeking disclosure from a journalist has not exhausted its options when obvious alternative witnesses exist and they have not been deposed or at least interviewed. *Application of Behar (Church of Scientology v. IRS)*, 779 F. Supp. 273, 275 (S.D.N.Y. 1991). This rule applies when dozens or even hundreds of alternative witnesses exist. *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir.), cert. denied, *Arizona v. McGraw-Hill, Inc.*, 459 U.S. 909 (1982). In addition, the Second Circuit has stated that an exhaustion claim is not met by only stating that discovery has not revealed the information sought. *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993). The exhaustion argument is also not satisfied when the party seeking information deposes numerous witnesses during pre-trial discovery, but does not ask any of them if they were the source of the information. *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982).

An example of a case where a party was not found to have satisfied the exhaustion requirement in seeking confidential information is *United States v. Aponte-Vega*, 1992 U.S. Dist. Lexis 7843, 20 Med. L. Rep. 2202 (S.D.N.Y. May 29, 1992) (court only addressed exhaustion requirement); see also *United States v. Burke*, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir.), aff'g 339 F. Supp. 942 (S.D.N.Y. 1972), cert. denied, 411 U.S. 966 (1973); *In re Pan Am Corp.*, 161 B.R. 577, 585 (S.D.N.Y. 1993) (court only addressed exhaustion requirement); *Sommer v. P MEC Assoc. & Co.*, 1991 U.S. Dist. LEXIS 5697 (S.D.N.Y. May 1, 1991).

In *Aponte-Vega*, defendant subpoenaed the author of an article that reported that DEA agents were under investigation for falsifying evidence. 1992 U.S. Dist. Lexis 7843, 20 Med. L. Rep. 2202 (S.D.N.Y. May 29, 1992). Defendants sought to have the reporter reveal his confidential source, but the court held that the government could easily be used as an alternative source for the information and therefore a qualified privilege protected the reporter.

The exhaustion requirement has been met in several cases involving confidential information. See *Umhey v. County of Orange*, 957 F. Supp. 525 (S.D.N.Y. 1997) (motion to quash denied); *Pellegrino v. New York Racing Ass'n, Inc.*, No. 96-CV-2315 (TCP) (E.D.N.Y. Aug. 22, 1996, modified Sept. 18, 1996) (motion to quash denied); *Lipinski v. Skinner*, 781 F. Supp. 131 (N.D.N.Y. 1991) (motion to quash denied). For example, in *Lipinski*, discussed above, the court held that only the editors could possibly reveal who originally told the newspaper that plaintiff had tested positive for HIV, thus the exhaustion requirement was met and plaintiff could depose the editors about the origin of the leak to the newspaper. *Lipinski v. Skinner*, 781 F. Supp. 131 (N.D.N.Y. 1991) (motion to quash denied).

<u>Non-Confidential Information</u>

In *Gonzales*, the Second Circuit stated that the standard for exhaustion involving non-confidential information is that the information be "not reasonably obtainable from other available sources." *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1998). The *Gonzales* court held that the information reflected in the outtakes in that case was not reasonably obtainable from other sources "because they can provide unimpeachably objective evidence of Deputy Pierce's conduct." *Gonzales*, 194 F.3d at 36. The Second Circuit also disagreed with the

district court that a deposition in this instance would be an adequate substitute for the information that could be obtained from the outtakes. *Id.*

a. How exhaustive must search be?

As mentioned above, "[a]t the very least, a party seeking to overcome a constitutional privilege on the basis of necessity must show that it has exhausted all other available non-privileged sources for the information." *In re Pan Am Corp.*, 161 B.R. 577, 585 (S.D.N.Y. 1993). For example, in *United States v. Aponte-Vega*, the defendant could have obtained the information about an investigation of DEA agents falsifying evidence from the government instead of the journalist's confidential source. 1992 U.S. Dist. Lexis 7843, 20 Med. L. Rep. 2202 (S.D.N.Y. May 29, 1992). In contrast, in *Lipinski v. Skinner*, this standard was met because plaintiff could not obtain information about who initially disclosed his positive HIV test to the newspaper from any other non-privileged source. 781 F. Supp. 131 (N.D.N.Y. 1991) (motion to quash denied).

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

The Second Circuit has explained that disclosure may not be ordered when the party seeking information "fail[s] to carry their burden of first seeking the information elsewhere." *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982), *cert. denied*, *Arizona v. McGraw-Hill, Inc.*, 459 U.S. 909 (1982).

c. Source is an eyewitness to a crime

The Second Circuit has not specifically held that when a source is an eyewitness or participant to a crime, the information obtained from that source is by definition "unavailable" from any other source.

3. Balancing of interests

In analyzing whether subpoenaed information is protected by the reporter's privilege, courts in the Second Circuit sometimes consider factors beyond those in the three-part *Burke* and *Gonzales* tests. For example, in *Aequitron Med., Inc.*, a district court held that the privilege is weaker in a libel case against a media defendant where the plaintiff seeks non-confidential information. Without receiving information about confidential sources and the journalistic process it becomes very difficult for a libel plaintiff to prove actual malice, i.e., to establish that the defendant had knowledge or reckless disregard of the statement's falsity. *Aequitron Med., Inc. v. CBS, Inc.*, 93 Civ. 950 (DC), 1995 U.S. Dist. LEXIS 9485 (S.D.N.Y. July 10, 1995). Other factors that may contribute to a weakening of the privilege include: whether the reporter himself is subpoenaed, *United States v. Markiewicz*, 732 F. Supp. 316, 319 (N.D.N.Y. 1990) (explaining that the privilege is weaker when the testimony of the reporter himself is subpoenaed, rather than when a party seeks to compel the reporter to produce unpublished materials), and whether the questions asked of the reporter are narrowly tailored. *Id.* Despite this consideration of the weakening of the privilege in the district courts, the Second Circuit has not explicitly followed suit.

4. Subpoena not overbroad or unduly burdensome

Federal Rules of Civil Procedure 45(c)(1) and 45(c)(3)(A)(iv) state that a subpoena may not impose an undue burden. Federal Rule of Criminal Procedure 17(c) states that a subpoena may be quashed if it is unreasonable or oppressive.

The Second Circuit has stated that use of a subpoena for a fishing expedition is improper and blanket subpoenas are not permitted. *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 90 Civ. 6328 (SWK), 1992 U.S. Dist. LEXIS 14832, at *24-25 (S.D.N.Y. Sept. 30, 1992); *see generally* 9A Wright & Miller, Federal Practice and Procedure §§ 2457-2459 at 32-55. Courts have allowed parties to issue subpoenas that demand production of all documents in the recipient's custody or control relating to a certain specified matter or issue. 9A Wright & Miller, Federal Practice and Procedure § 2457 at 35. For example, in *Polaroid Corp. v. Commerce Int'l Co.*, 20 F.R.D. 394 (S.D.N.Y. 1957), a patent infringement action, the court permitted a subpoena that called for all documents, records, books, memoranda, correspondence, and papers alluding to any facts or information received by the defendant or his agents. The subpoena had a list of categories that adequately described the documents plaintiff sought and that related to issues in the pleadings.

The Second Circuit also has stated that a subpoena may be quashed if it calls for clearly irrelevant matter. *Ander-son v. British Overseas Airways Corp.*, 149 F. Supp. 68 (S.D.N.Y. 1956) (stating that a subpoena will be quashed

if it is burdensome in detail and under circumstances where no further evidence could affect a conclusion made by the court). If there is any ground on which the subpoena may be relevant, the court does not have to quash the subpoena. *Commercial Metals Co. v. Int'l Union Marine Corp.*, 318 F. Supp. 1334 (S.D.N.Y. 1970) (denying motion to quash subpoena in contract dispute between shipowner and charterer because records showing profits earned by shipowner from alleged wrongful use of the ship during the charter period was relevant to the arbitrator's inquiry). Even if relevant evidence is sought, a subpoena still can be unreasonable or oppressive. See 9A Wright & Miller, Federal Practice and Procedure, § 2459 at 46.

Courts in the Second Circuit have found subpoenas to be unreasonable and oppressive for many reasons. For instance, a subpoena will be quashed if compliance would require violating the laws of another country, *In re Equitable Plan Co.*, 185 F. Supp. 57 (S.D.N.Y. 1960); if the subpoena is used to get around an aspect of foreign law, *Laker Airways Ltd. v. Pan American World Airways*, 607 F. Supp. 324, 326 (S.D.N.Y. 1985); and if the subpoena calls for a huge mass of unidentified documents, which are not limited geographically or as to time. *Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 30 F.R.D. 156, 158 (S.D.N.Y. 1958). A subpoena was also found unreasonable in an unlawful labor acts action, in which the discovering party asked for all bankbooks and statements, all communications with any clergy or clerical institution, all propaganda material, including any and all memoranda in connection with preparation of such propaganda, and all communication between defendant and any newspaper or semipublic agency. *Aacon Contracting Co. v. Ass'n of Catholic Trade Unionists*, 175 F. Supp. 659, 661-62 (S.D.N.Y. 1959). Further, in *United States v. Watchmakers of Switzerland Information Center Inc.*, 27 F.R.D. 513, 515 (S.D.N.Y. 1961), the court held that a trial subpoena *duces tecum* was oppressive because the information sought by the discovering party could have been discovered through pre-trial discovery and inspection and would take months to compile. The court did give the subpoenaing party a right to examine and to be heard as to the relevance of the information submitted in response to the trial subpoena. *Id.*

There are also many Second Circuit decisions in which the court did not find subpoenas to be unreasonable or oppressive. For example, in *United States v. Int'l Bus. Machs. Corp.*, 71 F.R.D. 88, 92 (S.D.N.Y. 1976), the court held that in light of the size and significance of the pending antitrust litigation a subpoena was reasonable, even if compliance with the subpoena would cost tens of thousands of dollars and would require three to six months. The court did modify and limit the subpoena. *Id.* In *Atlantic Coast Insulating Co. v. United States*, 34 F.R.D. 450, 453 (E.D.N.Y. 1964), the court held that a subpoena containing a broad request for the production of documents at a deposition was reasonable when the breadth was precautionary rather than harassing, and the discovering party was ignorant about the adversary's records.

5. Threat to human life

There appears to be no statutory or caselaw in the Second Circuit addressing whether threat to human life is a factor the court should weigh in deciding whether privileged material should be disclosed.

6. Material is not cumulative

Courts in the Second Circuit have noted that if material sought from a reporter is unduly cumulative of other evidence, it cannot be "necessary or critical to the maintenance of the claim." See *United States v. Burke*, 700 F.2d 70, 78 (2d. Cir. 1983); *Application of Behar (Church of Scientology v. IRS)*, 779 F. Supp. 273, 275 (S.D.N.Y. 1991); *United States v. Markiewicz*, 732 F. Supp. 316, 321 (N.D.N.Y. 1990). For example in *Application of Behar (Church of Scientology v. IRS)*, 779 F. Supp. 273 (S.D.N.Y. 1991), the Church of Scientology tried to obtain information from the IRS, but the IRS refused to disclose the information. The IRS cited an article written by Behar in *Time* magazine, which supported its claim that release of certain information would place persons in danger of harm from the church. The church then subpoenaed Behar regarding his communication with the IRS. The court held that the non-confidential information sought by the Church of Scientology from Behar was not necessary or critical because the IRS had 18 other pieces of evidence in support of the church's exemption claim and the information sought was therefore cumulative of other evidence. *Behar*, 779 F. Supp. at 275.

7. Civil/criminal rules of procedure

Federal Rule of Civil Procedure 45(c)(2)(B) states that a party who is subpoenaed may submit a written objection to the subpoena within 14 days of service of the subpoena or before the time set for compliance, if less than 14 days. Rule 45(c)(3)(A) states that the court shall quash or modify the subpoena if it imposes an undue burden,

does not allow for enough time to comply, requires a person to travel more than 100 miles (with exceptions) or requires disclosure of privileged information. Federal Rule of Criminal Procedure 17(c)(2) states that the court will quash a subpoena if it is unreasonable or oppressive.

The burden to establish that a subpoena is oppressive or unreasonable is on the party who seeks to have it quashed. See 9A Wright & Miller, Federal Practice and Procedure, § 2459 at 46. The party moving to quash cannot merely declare that complying with the subpoena would be burdensome without showing the reason why it would be burdensome and the extent of the burden and injury if the person is forced to comply. See *United States v. Int'l Bus. Machs. Corp.*, 83 F.R.D. 97, 104 (S.D.N.Y.); see generally 9A Wright & Miller, Federal Practice and Procedure, § 2459 at 46-47. For examples of when this burden has and has not been deemed met, see *infra* Section VI.B.

8. Other elements

The Second Circuit has not discussed other elements that are considered in deciding whether to enforce a subpoena besides the elements discussed above.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Under the First Amendment, reporters may waive the privilege. The source may not waive the privilege nor may the source invoke the privilege to protect information that the reporter may choose to reveal. See *Small v. UPI*, 1989 U.S. Dist. Lexis 12459 (S.D.N.Y. Oct. 20, 1989) (Roberts, Mag.).

2. Elements of waiver

a. Disclosure of confidential source's name

There appears to be no statutory or caselaw addressing whether disclosure of a confidential source's name is an automatic waiver of privilege.

b. Disclosure of non-confidential source's name

There appears to be no statutory or caselaw addressing whether the disclosure of a non-confidential source's name waives the privilege.

c. Partial disclosure of information

There appears to be no statutory or caselaw addressing the issue of whether a journalist waives the privilege if she partially discloses information from the source.

d. Other elements

The following four cases discuss waiver in situations in which the reporter has not revealed or partially disclosed information from a source.

In *Inside Radio, Inc. v. Clear Channel Comm. Inc.*, 2002 U.S. Dist. LEXIS 11982 (S.D.N.Y. July 3, 2002), Inside Radio, Inc. ("IRI") alleged Clear Channel Communications ("CCC") libeled IRI in various articles when it asserted that IRI knowingly published false statements about CCC. As part of its defense, CCC requested the identity of the confidential source for IRI's stories about CCC. The question for the court was whether IRI waived privilege by putting the identity of its source at issue in asserting its claims against CCC. *Id.* at *8. In determining this, the court applied the *Burke* standard used to determine disclosure of sources. *Id.* at *10. Because the identity of IRI's source was (1) highly material and relevant, (2) necessary to the defense because IRI claimed CCC libeled it by charging it deliberately lied, and (3) unable to be obtained through other means, IRI had waived the privilege. *Id.* at *19.

The issue in *Driscoll v. Morris*, 111 F.R.D. 459 (D. Conn. 1986) was the same as *Inside Radio*. A reporter brought a defamation claim alleging defendant falsely informed people that he illegally obtained grand jury information from a confidential source. As an element of damages, plaintiff claimed the defendant's statements

affected his relationships with confidential sources. Because plaintiff put the identity of his sources at issue, he waived the privilege. *Id.* at 464.

In *United States v. Markiewicz*, 732 F. Supp. 316 (N.D.N.Y. 1990), the court acknowledged that "at least one court has determined that a reporter's qualified privilege is waived if he or she submits to an interview or files an affidavit detailing the substance of the conversation with respect to which he is asked to testify." *Id.* at 320 (referring to *Pinkard v. Johnson*, 118 F.R.D. 517, 523 (M.D. Ala. 1987)). The issue of waiver was not relevant to the present case.

In *Pugh v. Avis Rent A Car Sys., Inc.*, 1997 U.S. Dist. LEXIS 16671, 26 Med. L. Rptr. 1311 (S.D.N.Y. Oct. 28, 1997), the court held that the presence of third parties not entitled to assert the privilege at interviews conducted by a media entity (CBS in this case) does not constitute an automatic waiver of the privilege by the media entity. A subpoena for outtakes of the interviews was quashed.

3. Agreement to partially testify act as waiver?

There do not appear to be any cases that specifically state whether the privilege is waived if the reporter agrees to partially testify — for example, to confirm that the story as published is accurate and true.

VII. What constitutes compliance?

A. Newspaper articles

Under Federal Rule of Evidence 902(6), newspapers are self-authenticating. This rule automatically authenticates that the article was published — it does not authenticate the truth or accuracy of the contents.

The truth of the contents of an article can be authenticated by stipulation. If the reporter or media entity is a non-party, a stipulation with one party might be opposed by a different party, in which case it may be necessary that the reporter or employee of the newspaper testify. If a representative of the subpoenaed media entity must testify, it is often best to put forth an individual who works in an administrative capacity so as to limit the scope of topics investigated during examination.

B. Broadcast materials

When a broadcast reporter or entity is subpoenaed to turn over tapes that were aired, a stipulation may often be advisable. If live testimony is required, a non-reporter representative, such as a custodian of records or videotape librarian, may be able to authenticate tapes that were aired. In a criminal trial it may not be sufficient to use a representative because of Sixth Amendment confrontation clause issues.

C. Testimony vs. affidavits

A sworn affidavit, which would accompany a stipulation that an article was true and accurate as published or that a broadcast was aired and is accurate, may be sufficient in lieu of in-court testimony. All parties typically would have to agree to this procedure.

D. Non-compliance remedies

1. Civil contempt

a. Fines

There is a wide range of fines that could be levied if a reporter or media entity is held in contempt. In *In re National Broadcasting Co. (Krase v. Graco Children Products, Inc.)*, 79 F.3d 346 (2d Cir. 1996), the appeals court reversed a district court fine of \$5,000 a day for contempt of court. In *Graco*, which involved an application of New York's state shield law, the district court ordered NBC, a non-party in a products liability suit, to produce and testify about certain outtakes of televised interviews that defendants subpoenaed, including interviews with plaintiff's counsel on "Dateline." The district court fined NBC \$5,000 a day until it produced the outtakes. The Second Circuit reversed the order because defendants had not satisfied the "necessary and critical" and "exhaustion" prongs of New York's Shield Law. [The district court also denied NBC's motion to stay the sanctions

pending appeal. The Second Circuit granted NBC's stay motion and ordered that the appeal be heard on an expedited basis. 79 F.3d at 350.]

In *Von Bulow v. Von Bulow*, the Second Circuit affirmed a fine of \$500 a day. 811 F.2d 136, 138, 147 (2d Cir. 1987) (the district court stayed the fine until the Second Circuit ruled on the validity of the contempt order). In *Von Bulow*, the district court ordered that the author of a manuscript on the accused murderer Claus von Bulow turn over her written notes and materials, including reports on the lifestyles of von Bulow's wife's children and the author's personal notes on the trial of Claus von Bulow. The Second Circuit did not allow the author to benefit from the reporter's privilege because she did not gather the "information initially for purposes other than to disseminate information to the public." *Id.* at 146. (For more discussion on *Von Bulow*, see *infra* Section IV.A.2.).

In *United States v. Cutler*, the Second Circuit affirmed a fine of \$1.00 per day. *United States v. Cutler*, 6 F.3d 67, 70, 75 (2d Cir. 1993) (the district court stayed the fine pending an expedited appeal). During the trial of John Gotti, Cutler, Gotti's attorney, was charged with criminal contempt following his public comments about the case in violation of a court order. Cutler subpoenaed reporters and TV stations to obtain unpublished notes, video outtakes and testimony regarding interviews with him and statements by government officials. The district court held the reporters in contempt for refusing to provide these materials to Cutler. The Second Circuit ordered the reporters and TV stations to disclose their unpublished notes, video outtakes and testimony about Cutler. *Id.* at 73-74. Cutler was held not entitled to the same types of information about government officials that were involved in the case. *Id.* at 74-75. (For more discussion on *Cutler*, see *infra* Sections I and II.).

b. Jail

In 1972, in *U. S. ex rel. Goodman v. Kehl*, 456 F.2d 863 (2d Cir. 1972), the Second Circuit affirmed a 30-day jail sentence for a radio station manager who refused to turn over tapes in compliance with a court order. There appear to be no cases in the Second Circuit since *Kehl* in which a reporter was jailed for refusing to disclose information.

2. Criminal contempt

There are very few cases in which a reporter has been held in criminal contempt for not revealing information. In *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), a reporter allegedly libeled actress Judy Garland. The reporter refused to reveal her source, and she was held in criminal contempt. The main justification for compelling disclosure and levying criminal contempt was that the reporter's source was essential to Garland's libel claim.

3. Other remedies

There appear to be no other remedies for non-compliance in the Second Circuit.

VIII. Appealing

A. Timing

1. Interlocutory appeals

The rule for the timing of interlocutory appeals is that a litigant may appeal a district court order that is construed as a final appealable order if the appeal is made within ten days of the district court order. *See* 28 U.S.C. 1292(b). Orders denying or mandating discovery are non-appealable interlocutory decisions. *See Baker v. F & F Inv.*, 470 F.2d 778, 780 n.3 (2d Cir. 1972). In general, interlocutory appeals are not permitted for matters related to discovery, but under 28 U.S.C. 1292(b), the appeals court has discretion to take these appeals from an order by the district court. Although interlocutory appeals of discovery orders are usually not allowed, one may apply to the Second Circuit for a writ of mandamus compelling the trial court to reverse or modify its order. The standard for reviewing these applications is highly deferential to the trial court. A judgment of contempt involving a non-party is considered a final appealable judgment. *See Von Bulow v. Von Bulow*, 811 F.2d 136, 138 (2d Cir. 1987). A judgment of contempt involving a party may not constitute a final appealable judgment. *See International Bus. Mach. Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

2. Expedited appeals

Rule 2 of the Rules of the Second Circuit, which mirrors Rule 2 of the Federal Rules of Appellate Procedure, gives the court discretion in whether to grant an expedited appeal. Both rules state: "On its own or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)."

The appellate process in the Second Circuit is commenced by filing a notice of appeal with a copy of the Order or Judgment entered and paying a \$450 filing fee. The appellant can serve copies of the Notice of Appeal on all parties, but must provide the Clerk's office with the original notice and enough copies and envelopes for service. Subsequent to the filing of a Second Circuit Notice of Appeal, the appellant has ten days to file Form C and Form D, which are transcript information and pre-argument statement forms. The pre-argument statement form must be filed with a copy of the underlying decision or judgment that is being appealed. For an expedited appeal, the appellant must also serve and file one original and four copies of a motion requesting an expedited appeal with supporting affidavits and a brief. The motion is a Second Circuit standard form, which must be used. For the particular rules of any court in the Second Circuit, go to www.uscourts.gov/allinks.html#2nd.

B. Procedure

1. To whom is the appeal made?

The United States Court of Appeals accepts appeals from the federal district courts in the circuit. In the event that a magistrate levies a contempt citation, it is necessary to appeal to the district court. *Falise v. American Tobacco Co.*, 2000 WL 264332, at *1 (E.D.N.Y. 2000).

2. Stays pending appeal

The procedure for filing a stay pending appeal in the Second Circuit is governed by Rule 8 of the Rules of the Second Circuit, which adopts Rule 8 of the Federal Rules of Appellate Procedure. To receive a stay, a party must ordinarily first file in the district court. To move for a stay in the Second Circuit, the party must show that moving in the district court would be impracticable or state that a motion has been made to the district court and that the district court either denied it or failed to afford the relief request. It is necessary to state any reasons the district court gave for its decision. The motion must also include the reasons the Second Circuit should grant the relief requested and the facts relied on, originals or copies of affidavits or other sworn statements supporting disputed facts, and pertinent parts of the record. The party filing the motion for a stay must give reasonable notice of the motion to all parties. A motion for a stay must be filed with the circuit clerk and is normally considered by a panel of the Second Circuit. In exceptional cases, in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. The court may condition relief on a party's filing a bond or other appropriate security in the district court. For the particular rules of any court in the Second Circuit, go to www.uscourts.gov/allinks.html#2nd.

3. Nature of appeal

A non-party has an appeal by right when a judgment of contempt is levied. *See Von Bulow v. Von Bulow*, 811 F.2d 136, 138 (2d Cir. 1987).

As stated above, interlocutory appeals are generally not permitted for matters related to discovery, but under 28 U.S.C. 1292(b), the appeals court has discretion to take these appeals from an order by the district court.

A writ of mandamus may be sought when the trial court denies or grants discovery. Courts in other circuits have stated that the standard of review for a writ of mandamus in a case involving the reporter's privilege is whether the trial court's determination was "clearly erroneous." *See, e.g., Star Editorial, Inc. v. United States Dist. Ct.*, 7 F.3d 856 (9th Cir. 1993).

4. Standard of review

The Second Circuit reviews the district court's decision whether or not to quash a subpoena for abuse of discretion. *See Logan v. Bennington College Corp.*, 72 F.3d 1017, 1027 (2d Cir. 1995) (civil subpoenas); *United States v. Caming*, 968 F.2d 232, 238 (2d Cir. 1992) (criminal subpoenas); *United States v. Sanders*, 211 F.3d 711 (2d

Cir. 2000) ("We review a district court decision to quash, or not quash, a grand jury subpoena, solely for abuse of discretion, with much deference being owed to the lower court's authority.") (quoting *In re Grand Jury Matters*, 751 F.2d 13, 16 (2d Cir. 1984)).

5. Addressing mootness questions

The Second Circuit does not appear to have addressed the issue of mootness when the trial or grand jury session for which a reporter was subpoenaed has ended.

6. Relief

If the district court refuses to quash a subpoena and the party trying to protect the information is held in contempt, the party protecting the information can appeal to the Second Circuit to quash the subpoena. If the Second Circuit disagrees with the court's decision to refuse to quash the subpoena, the Second Circuit has vacated the contempt citation rather than ordering the trial judge to reconsider the issues at stake. See e.g., *In re Dow Jones & Co.*, 182 F.3d 899 (2d Cir. 1999) (unpublished); *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982), cert. denied, *Arizona v. McGraw-Hill, Inc.*, 459 U.S. 909 (1982).

IX. Other issues

A. Newsroom searches

The federal Privacy Protection Act (42 U.S.C. § 2000aa), which does not appear to have been litigated in the Second Circuit, gives protection to journalists from overly intrusive government searches of newsroom offices. The Act divides materials into "work product" materials and "documentary" materials. Work product materials are defined as materials (other than things criminally possessed or used as a means of committing a crime) which are created in anticipation of communication to the public, are possessed for the purpose of communicating such materials to the public, and include the impressions, conclusions, opinions or theories of the creator. Documentary materials are defined as materials on which information is recorded, excluding things illegally possessed and property designed, intended or used to commit a crime. 42 U.S.C. § 2000aa-7(a),(b).

For work product materials, the Act makes it illegal for a federal, state or local government official, in connection with the investigation or prosecution of a criminal offense, to search for or seize such materials possessed by a person reasonably believed to intend to disseminate a public communication, such as a newspaper, book or broadcast, in or affecting interstate or foreign commerce. (For exceptions to this rule, see 42 U.S.C. § 2000aa(a)(1), (2).) For documentary materials, the Act makes it illegal for an official to search for or seize such materials possessed by a person in connection with a purpose to disseminate a public communication in or affecting interstate or foreign commerce. (For exceptions to this rule, see 42 U.S.C. § 2000aa(b)(1)-(4).)

B. Separation orders

There appears to be no case or statutory law regarding separation orders in the reporter's privilege context in the Second Circuit. If it is not possible to defeat a motion for a separation order, it is advisable to try to narrow the order to just a part of the trial (e.g., when the reporter is both covering the trial and is a witness, agree to have the reporter exit the room only during portions of the trial involving a subject about which the reporter will testify).

C. Third-party subpoenas

Third parties who play an "integral role" in a reporter's work are protected by the same privileges afforded to reporters in the Second Circuit. *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006). In *Gonzales*, the Second Circuit explicitly held that "whatever rights a newspaper or reporter has to refuse disclosure in response to a subpoena extends to the newspaper's or reporter's telephone records in the possession of a third party provider." *Id.* at 163.

D. The source's rights and interests

The reporter's privilege is held by the reporter, not the source. Thus, the source cannot prevent disclosure of information relayed to the reporter if the reporter chooses not to invoke the reporter's privilege. *Small v. UPI*, 1989 U.S. Dist. Lexis 12459 (S.D.N.Y. Oct. 20, 1989) (Roberts, Mag.).