

REPORTER'S PRIVILEGE: 3RD 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

3RD CIR.

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I. Introduction: History & Background

In general, the Third Circuit historically has afforded broad protection to journalists against compelled disclosure of their sources or the fruits of their newsgathering. Indeed, at least so far as reported opinions reveal, in civil actions involving subpoenas to non-party reporters, invocation of the First Amendment-based qualified reporter's privilege is almost always upheld. Although courts within the Third Circuit are more likely to find that other constitutional interests outweigh the reporter's privilege when invoked by journalists in criminal cases or grand jury proceedings (especially where the identity of a source has already been made known through other means), even in these areas, the Third Circuit is relatively hospitable to the privilege. Indeed, the federal courts arguably have adopted a broader reading of the Pennsylvania Shield Law than have that state's courts.

As set forth in more detail below, the Third Circuit employs a three-part balancing test to determine whether a person seeking disclosure from a journalist has overcome the privilege: Such a person must make specific showings that the information sought is material, relevant and necessary to the party's claims or defenses. *See, e.g., Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979). In practice, this means that the party seeking disclosure must show that he or she has exhausted other potential sources for the information sought from a journalist and that such information is crucial to the party's claims or defenses. *See, e.g., id.* at 717. The sufficiency of the showing required for each element will depend upon a balancing test in which the courts weigh the relative interests of the reporter with the interests of the party seeking disclosure. *See, e.g., id.* at 716-17. Thus, for example, where a criminal defendant's constitutional right to a fair trial is implicated by a request for disclosure, he or she likely will not need to make as great a showing to overcome the privilege as would a civil litigant whose constitutional rights were not implicated.

Author's Note: The author gratefully acknowledges Aaron Johansen (the current edition) and John F. Blevins (the prior edition) for the research and writing they contributed to this outline.

II. Authority for and source of the right

The Third Circuit recognized a qualified reporter's privilege derived from the First Amendment in *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979). Expressly relying on *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court of Appeals cited Federal Rule of Evidence 501 and the First Amendment as the sources of, respectively, its authority to recognize the privilege and the privilege's contours, although it also described the privilege as arising under "federal common law." *Riley*, 612 F.2d at 714-15; *see also, e.g., United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1981) (privilege is "deeply rooted in the first amendment"); *Parsons v. Watson*, 778 F. Supp. 214, 216 (D. Del. 1991) (privilege "finds its roots" in *Branzburg*). The Third Circuit also has indicated that it may consider state law in evaluating a claim of privilege, even when its jurisdiction is based on a federal question. *Riley*, 612 F.2d at 715 ("Although we are not bound to follow the Pennsylvania [shield] law, neither should we ignore [it]."); *see also Downey v. Coalition Against Rape & Abuse, Inc.*, 31 Media L. Rep. (BNA) 2582, 2003 WL 23164082, at *5 n.6 (D.N.J. 2003) (considering both federal common law and state law policies when assessing assertion of privilege in action presenting both federal and state law claims and observing that "more emphasis on state law policy is appropriate ... where the federal ... claims ... are notably weak").

By the same token, pursuant to Fed. R. Evid. 501, when sitting in diversity, courts in the Third Circuit are bound to apply the applicable state law of privilege. *See, e.g., Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 277 n.63 (3d Cir. 1980).

III. Scope of protection

A. Generally

Courts in the Third Circuit historically have afforded broad protection to the identity of reporters' sources and to unpublished fruits of newsgathering. *See generally United States v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981) ("*Cuthbertson II*"); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Damiano v. Sony Music Entm't, Inc.*, 168 F.R.D. 485 (D.N.J. 1996). So far as reported opinions reveal, the Third Circuit has never required a journalist to disclose the identity of a confidential source or produce outtakes or similar material that might reveal the identity of such a source. Where a source's identity already has been disclosed through other means, however, courts in the Third Circuit tend to be more skeptical of claims of privilege. *See, e.g., In Re Grand Jury Empanelled Feb. 5, 1999*, 99 F. Supp. 2d 496, 499-500 (D.N.J. 2000) (requiring disclosure in grand jury proceeding involving published information from "a self-avowed source whose identity is publicly known").

Even in those cases in which courts within the Third Circuit have ruled that the party seeking disclosure has or may be able to overcome the privilege, the courts are usually careful to narrowly circumscribe the required disclosure. In *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) ("*Cuthbertson I*"), for example, the court required CBS (as a third party to a criminal prosecution) to disclose to the trial court for *in camera* review only those verbatim or near-verbatim statements in its possession made by persons on the government's witness list so that the court could determine, as each witness testified, whether the defendant was entitled to obtain and use such statements for purposes of impeachment. On remand after its *in camera* review, the trial court determined that the statements constituted exculpatory evidence to which the defendant was entitled regardless of what testimony the witnesses gave. On further appeal, the Third Circuit reversed. *Cuthbertson II*, 651 F.2d at 194-96; *see also, In re Subpoena of Maykuth*, 34 Media L. Rep. (BNA) 1476, 2006 WL 724241, at *3 (E.D. Pa. 2006) (where defendant overcame qualified privilege, court required reporter to answer direct questions about whether plaintiffs made statements quoted in article, but modified breadth of cross examination and redirect questions because they were overbroad and failed "to meet the strictures of the reporter's privilege").

B. Absolute or qualified privilege

The Third Circuit repeatedly has held that the First Amendment-based reporter's privilege is a qualified one, regardless of whether raised in a civil or criminal context. *E.g., Cuthbertson I*, 630 F.2d at 146-47; *Riley*, 612 F.2d at 715. In *United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980), it bears note, the Court of Appeals observed that, "When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits." As another court has observed, however, "every case has some constitutional element, such as a litigant's right to a fair and open trial." *Damiano*, 168 F.R.D. at 495.

In diversity cases arising under Pennsylvania law, however, courts within the Third Circuit effectively have held that the privilege created by the state shield law is absolute, at least with respect to confidential sources. *See In re Subpoena to Barnard*, 27 Media L. Rep. (BNA) 1500, 1999 WL 38269, at *2 (E.D. Pa. 1999) ("The Pennsylvania Shield Law provides journalists with an absolute privilege against the compelled disclosure of confidential sources of information."); *see also, e.g., Lal v. CBS, Inc.*, 551 F. Supp. 364, 365 (E.D. Pa. 1982) ("privilege afforded by state law is broader than the constitutional privilege"), *aff'd*, 726 F.2d 97 (3d Cir. 1984).

C. Type of case

1. Civil

The Third Circuit repeatedly has held that the First Amendment-based reporter's privilege is a qualified one, regardless of whether raised in a civil or criminal context. *E.g., Cuthbertson I*, 630 F.2d at 146-47; *Riley*, 612 F.2d at 715. In the civil context, however, the party seeking disclosure generally must make a stronger showing under the applicable three-part test than would a criminal defendant. *Id.* at 716; *see also, e.g., Parsons v. Watson*, 778 F. Supp. 214, 218 (D. Del. 1991) (courts "require a stronger showing in civil cases than in criminal cases"); *Altamose Constr. Co. v. Bldg. & Constr. Trades Council of Phila.*, 443 F. Supp. 489, 491 (E.D. Pa. 1977) (same). Although the privilege itself is unaffected by whether the case is civil or criminal, the countervailing interests in civil cases are weaker than those in criminal cases, where a defendant's constitutional rights are more likely to be implicated by a failure to obtain information. *See, e.g., Damiano*, 168 F.R.D. at 495.

2. Criminal

<A:03:3C1>See § III.C.1. *supra*. While neither the privilege itself nor the reporter's (and thus the public's) First Amendment interests are diminished in criminal cases, the countervailing interests become stronger. *Cuthbertson I*, 630 F.2d at 146-48. These countervailing interests include the criminal defendant's rights under the Fifth and Sixth Amendments. *Id.* at 147; *see also Criden*, 633 F.2d at 358 (explaining that defendant's rights come from both "the confrontation and compulsory process clauses of the sixth amendment and... the due process clause of the fifth amendment"); *Parsons*, 778 F. Supp. at 218 (courts "may require a stronger showing in civil cases than in criminal cases because the important constitutional rights possessed by criminal defendants present significant countervailing interests weighing against" the news gatherer). As the Third Circuit noted in *Criden*, a criminal defendant "probably should be required to prove less to obtain the reporters' version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself." 633 F.2d at 358.

3. Grand jury

<A:03:3C2>See § III.C.2. *supra*. While the Third Circuit has held that the qualified privilege applies to grand jury proceedings, courts have found that the investigation of possible crimes represents a countervailing constitutional interest that affects the applicable balancing test. *See, e.g., In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 369-72 (W.D. Pa. 1991), *aff'd without opinion by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (in banc); *see also In re Grand Jury Empanelled Feb. 5, 1999*, 99 F. Supp. 2d at 498, 500 (upholding subpoena in part because it was issued in connection with grand jury proceeding protected by the Fifth Amendment). Where a book author was himself the target of a grand jury investigation, the Third Circuit affirmed the trial court's order holding the author in civil contempt for refusing to produce documents in response to a grand jury subpoena. *In re Gronowicz*, 764 F.2d 983 (3d Cir. 1985) (en banc).

D. Information and/or identity of source

Courts in the Third Circuit have given strong protection both to the identity of reporters' sources and other information that might implicitly identify the source. *See, e.g., Criden*, 633 F.2d at 350, 360 (notwithstanding that reporter was required to testify as to certain matters, "she is to disclose not the source of any information"); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 279 (3d Cir. 1980) (pursuant to Pennsylvania shield law, upholding claim of privilege with respect to video "outtakes" that might "reveal the identity of secondary sources").

E. Confidential and/or non-confidential information

Courts in the Third Circuit have explained that whether the information sought was obtained under a promise of confidentiality is one factor to be considered when balancing the competing interests at stake. *See, e.g., Criden*, 633 F.2d at 355-56 (discussing at length value of confidential sources and observing that need to maintain confidentiality is underlying reason for reporter's privilege). In cases involving non-confidential information, courts generally will permit a lesser showing to overcome the privilege than in cases involving confidential information. *See, e.g., Cuthbertson I*, 630 F.2d at 147 ("the lack of a confidential source may be an important element in [the] balancing [test]"); *In re Grand Jury Empanelled Feb. 5, 1999*, 99 F. Supp. 2d at 501 ("The seeker of information is required to prove less where, as here, the information sought is nonconfidential and the source self-avowed. Accordingly, the government should only have to establish that the information sought is necessary for the grand jury's purposes."); *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 147, 149-50 (E.D. Pa. 1994) (non-confidentiality of information is "an important factor favoring disclosure"); *Parsons*, 778 F. Supp. at 218 (same).

In addition, a confidential relationship between reporter and source can be implied. For example, in a case involving anonymous sources, one district court observed that an "implied confidential relationship" can arise when information is transmitted by anonymous sources. Thus, "there need not be an explicit promise of confidentiality for the news gatherer to invoke his or her privilege." *In re Grand Jury Subpoena of Williams*, 766 F. Supp. at 372.

F. Published and/or non-published material

While publication has been held to waive the privilege under the Pennsylvania state shield law, courts in the Third Circuit have held that mere publication is not necessarily a waiver of the federal privilege. *In re Subpoena to Barnard*, 27 Media L. Rep. (BNA) 1500, 1999 WL 38269, at *3 (E.D. Pa. 1999). Publication is, however, a factor

that may be weighed in application of the federal privilege balancing test. *See, e.g., In re Grand Jury Empanelled Feb. 5, 1999*, 99 F. Supp. 2d at 499-500.

G. Reporter's personal observations

Although it does not appear that the Court of Appeals has directly addressed this question in reported opinions, in *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979), the court, in the course of quashing a subpoena, observed that "[t]his is not a case where the reporter witnessed events which are the subject of grand jury investigations into criminal conduct."

One district court, however, relying on case law from other circuits, held that the reporter's privilege "does not apply when a reporter is being questioned about a public incident or event to which he or she was a witness because there is no intrusion into the newsgathering or special functions of the press." *Kitzmiller v. Dover Area Sch. Dist.*, 379 F. Supp. 2d 680, 686 (M.D. Pa. 2005). On a motion for reconsideration, the court modified the subpoena to limit questioning solely to what the reporters saw and heard, explaining that the deposition was not to inquire as to the "reporter's motivation(s), bias, mental impressions, or other inquiry which involves matters extrinsic to what the reporters saw and heard." *Kitzmiller v. Dover Area Sch. Dist.*, 2005 U.S. Dist. LEXIS 33878, at *7 (M.D. Pa. Sept. 12, 2005).

H. Media as a party

Where a reporter or media organization is a party to an action, the district courts have suggested that the privilege is more easily overcome. *See, e.g., United States v. Nat'l Talent Assocs., Inc.*, No. 96-2617 (AJL), 25 Media L. Rep. 2550, 1997 WL 829176 at *6 (D.N.J. Sept. 4, 1997) ("Generally, the privilege yields more readily where the news organization is a party."), *Magistrate Judge's Report and Recommendation Adopted*, No. 96-2617, 1997 WL 829196 (D.N.J. Sept. 22, 1997); *Parsons*, 778 F. Supp. at 218 ("[T]he courts may require a lesser showing where the journalist is a party to the lawsuit rather than a third-party witness.")

Moreover, where the journalist is himself the target of a grand jury investigation, as where a book's author was alleged to have made fraudulent statements in connection with obtaining a publishing contract, the Third Circuit has held that the limits of the grand jury's inquiry are established by the so-called *Schofield* rule, which requires that the government show by affidavit that the subpoenaed items are "(1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose." *In re Gronowicz*, 764 F.2d at 986 (quoting *In re Grand Jury Proceedings*, 507 F.2d 963, 966 (3d Cir. 1975)).

I. Defamation actions

While courts in the Third Circuit do not appear to have created a formal "libel exception" to the reporter's privilege, the Court of Appeals at least has raised the question whether the privilege would apply where the reporter or a media organization is a defendant in a libel action and the publication is alleged to have been made with constitutional malice. *Riley*, 612 F.2d at 716 (reversing contempt citation against journalist who declined to comply with disclosure order, but observing that case before it was not "a situation in which the journalist and/or publisher are defendants in a suit brought for damages caused by publications alleged to have contained knowing or reckless falsehoods").

On the other hand, federal courts in the Third Circuit sitting in diversity have applied Pennsylvania's shield law to bar discovery of a reporter's sources and notes even in a libel action in which the defendant has been granted summary judgment on the basis of an absence of actual malice, at least where the plaintiff is a public official. *See, e.g., Coughlin v. Westinghouse Broad. & Cable Inc.*, 780 F.2d 340, 342 (3d Cir. 1985); *Lal v. CBS, Inc.*, 551 F. Supp. at 366. The district court in New Jersey has done likewise with respect to that state's "comprehensive and absolute" shield law. *See Prager v. American Broad. Cos.*, 569 F. Supp. 1229, 1239 (D.N.J. 1983), *aff'd*, 734 F.2d 7 (3d Cir. 1984) (table).

IV. Who is covered

It appears that the Third Circuit has only once ventured into the difficult business of defining who is entitled to invoke the First Amendment-based reporter's privilege, in *In re Madden*, 151 F.3d 125 (3d Cir. 1998). There, an

employee of "World Championship Wrestling" was responsible for recording "reports" regarding "professional" wrestlers and wrestling events on a 900 telephone line, for access to which callers paid a fee. The Third Circuit held that persons or entities seeking to invoke the First Amendment-based journalist's privilege have the burden of demonstrating that they are "engaged in investigative reporting, gathering news, and have the intent at the beginning of the newsgathering process to disseminate this information to the public." *Id.* at 130. Because Madden concededly was an "entertainer," not a reporter, and concededly was not primarily in the business of gathering news or facts, but of creating "hype" and "fiction," the Third Circuit concluded that he was not entitled to invoke the journalist's privilege. As the court explained, "This test does not grant status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public. As we see it, the privilege is available only to those persons whose purposes are those traditionally inherent to the press; persons gathering news for publication." *Id.* at 129-30. Nevertheless, it also observed that "it makes no difference whether the intended manner of dissemination was by newspaper, magazine, book, public or private broadcast or handbill because the press, in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 129 (citations omitted); *see also, e.g., In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 368-69 (E.D. Pa. 1992) (intent to disseminate information for good of public weighed in favor of finding that credit reporting company was entitled to invoke journalist's privilege); *Butczynski v. Luzerne County*, 2006 WL 952408, at *2 (M.D. Pa. 2006) ("A qualified privilege arises where a party seeks discovery of facts acquired by a journalist in the course of gathering news.").

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

In *In re Madden*, 151 F.3d at 130, the Third Circuit held that persons or entities seeking to invoke the First Amendment-based journalist's privilege have the burden of demonstrating that they are "engaged in investigative reporting, gathering news, and have the intent at the beginning of the newsgathering process to disseminate this information to the public." As the court explained, "[t]his test does not grant status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public. As we see it, the privilege is available only to those persons whose purposes are those traditionally inherent to the press; persons gathering news for publication." *Id.* at 129-30. Nevertheless, the Third Circuit also observed, "it makes no difference whether the intended manner of dissemination was by newspaper, magazine, book, public or private broadcast or handbill because the press, in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 129 (citations omitted).

b. Editor

Courts in the Third Circuit do not appear expressly to have addressed this question, but under the three-part test it employs, there appears little doubt that traditional editors would qualify for the First Amendment-based privilege. *See* § IV.A.1.a *supra*.

c. News

In *In re Madden*, 151 F.3d at 130, the Third Circuit held that persons or entities seeking to invoke the First Amendment-based journalist's privilege have the burden of demonstrating that they are "engaged in investigative reporting, gathering news, and have the intent at the beginning of the newsgathering process to disseminate this information to the public." As the court explained, "[t]his test does not grant status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public." *Id.* at 129. In that case, the court held that entertainment or "creative fiction" concerning "professional" wrestlers does not qualify as "news." *Id.* at 130-31. As one district court has explained, however, the First Amendment-based privilege "is not confined to any particular subject matter." *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. at 369.

d. Photo journalist

Courts in the Third Circuit do not appear expressly to have addressed this question, but under the three-part test it employs, there appears little doubt that photojournalists would qualify for the First Amendment-based privilege. See <A:03:4A1a>§ IV.A.1.a *supra*.

e. News organization / medium

In *In re Madden*, 151 F.3d at 130, the Third Circuit held that persons or entities seeking to invoke the First Amendment-based privilege have the burden of demonstrating that they are "engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public." As the court explained, "[t]his test does not grant status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public. As we see it, the privilege is available only to those persons whose purposes are those traditionally inherent to the press; persons gathering news for publication." *Id.* at 129-30. Nevertheless, it also observed that "it makes no difference whether the intended manner of dissemination was by newspaper, magazine, book, public or private broadcast or handbill because the press, in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 129 (citations omitted).

2. Others, including non-traditional news gatherers

The three-part test employed by the Third Circuit to determine who is entitled to invoke the First Amendment-based journalist's privilege depends not on formal distinctions in job description or role, but on the purpose for which the person or entity has gathered news. See <A:03:4A1e>§ IV.A.1.e. *supra*; see also, e.g., *United States v. Vastola*, 685 F. Supp. 917, 920, 924-25 (D.N.J. 1988) (extending privilege to author of book about mafia and Ronald Reagan); *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. at 367-71 (extending privilege to corporation reporting on creditworthiness of companies and their securities that distributed reports to public).

B. Whose privilege is it?

In the Third Circuit, the First Amendment-based privilege ostensibly belongs to the reporter or news organization and not to the source. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("The privilege belongs to CBS, not the potential witnesses, and it may be waived only by its holder."); *Damiano v. Sony Music Entm't, Inc.*, 168 F.R.D. 485, 500-01 (D.N.J. 1996) (privilege belongs to reporter and/or Associated Press, not source). So far as reported opinions reveal, courts in the Third Circuit do not appear to have addressed directly the question of whether the privilege belongs to the reporter individually and/or to his or her employer.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Federal Rule of Civil Procedure 45 establishes the requirements for issuance of a subpoena in federal district courts. The Third Circuit does not appear through case law to have placed any special gloss on these requirements where subpoenas are directed to the news media.

2. Deposit of security

Neither the applicable rules nor case law in the Third Circuit appear to address this point.

3. Filing of affidavit

Except in the grand jury context, neither the applicable rules nor case law in the Third Circuit appear to require that a subpoena to the news media be supported by an affidavit, at least in the first instance. In the grand jury context, the Third Circuit has held that the limits of a grand jury's inquiry are established by the so-called *Schofield* rule, which requires that the government show by affidavit that the subpoenaed items are "(1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose." *In re Gronowicz*, 764 F.2d 983, 986 (3d Cir. 1985) (quoting *In re Grand Jury Proceedings*, 507 F.2d 963, 966 (3d Cir. 1975)).

4. Judicial approval

Neither the applicable rules nor case law in the Third Circuit appear to require prior judicial approval of a subpoena issued by counsel to the news media.

5. Service of police or other administrative subpoenas

Neither the applicable rules nor case law in the Third Circuit appear to address this point.

B. How to Quash

1. Contact other party first

Although there is no requirement that a person subject to a subpoena issued in the name of a federal court do so, in general, it usually is preferable to contact the attorney who issued the subpoena prior to taking formal steps to quash it. Often, the attorney who issued the subpoena will be unfamiliar with the reporter's privilege and, upon being educated, will voluntarily withdraw the subpoena or substantially narrow it. Careful attention must be paid to the return date on the subpoena (that is, the date by which the recipient must appear or otherwise comply), however, and if the dispute cannot be resolved through informal negotiation, the recipient of the subpoena should be certain to serve an objection or file a motion to quash in a timely manner, as discussed more fully below.

2. Filing an objection or a notice of intent

To the extent that a subpoena issued in the name of a federal court in a civil action seeks only the production of documents, tapes or similar materials, the recipient may, at his or her option, serve upon the attorney who issued the subpoena a written objection to the subpoena. *See* Fed. R. Civ. P. 45(c)(2)(B). The objection need not be filed with the court. After service of the objection, the person who received the subpoena need not respond to it unless and until the party that issued the subpoena obtains an order from the court compelling disclosure, and the party is required to give the recipient of the subpoena notice of any motion to compel. *Id.* In the absence of service of an objection, the recipient of such a subpoena must either comply, or file a motion with the court to quash or modify the subpoena, as discussed below.

Where a subpoena for documents, tapes or similar materials is issued in the name of a federal court in a criminal action, the recipient must either comply, or "promptly" file a motion with the court to quash or modify the subpoena. Fed. R. Crim. P. 17(c).

3. File a motion to quash

a. Which court?

Pursuant to Fed. R. Civ. P. 45(c)(3)(A), a motion to quash a subpoena issued in the name of a federal court in a civil action must be filed in the court that issued the subpoena. While the Federal Rules of Criminal Procedure do not expressly address the point, it is apparent that a motion to quash should be filed in the court that issued the subpoena. *See* Fed. R. Crim. P. 17(c).

b. Motion to compel

If the recipient of a subpoena serves a written objection to a subpoena issued in the name of a federal court in a civil action, *see* § V.B.2 *supra*, the party that issued the subpoena cannot obtain the materials sought without filing a motion to compel compliance with the subpoena. While it is often tempting to place the burden of filing a motion on the party who issued the subpoena by serving such an objection, rather than affirmatively moving to quash the subpoena, in some cases there may be a strategic advantage for the recipient of the subpoena to be the moving party. For example, the movant may control the timing and, to some extent, the briefing schedule on such a motion, and the movant may be able to frame the issues in the most helpful way. Whether waiting for the other side to move to compel or affirmatively moving to quash will be more advantageous generally will depend on the facts of the particular case.

c. Timing

Pursuant to Fed. R. Civ. P. 45(c)(2)(B), if the recipient of a subpoena in a civil action wishes to rely on a written objection, *see* § V.B.2 *supra*, the recipient must serve the objection "within 14 days after service of the subpoena

or before the time specified for compliance if such time is less than 14 days after service." A motion to quash, whether in a civil or a criminal matter, generally is required to be filed "promptly," in accordance with local rules or practice, and in any event prior to the return date of the subpoena (that is, the date by which the recipient is required to appear or otherwise comply with the subpoena).

d. Language

In the Third Circuit, there do not appear to be any "magic words" that a person challenging a subpoena must include. Clearly, however, an objection or motion to quash should demonstrate that the recipient of the subpoena qualifies to invoke the reporter's privilege, *see* §§ IV *supra* and VI *infra*, and that the party issuing the subpoena cannot meet the three-part test for overcoming the privilege, *see* § VI *infra*.

e. Additional material

Neither the applicable rules nor case law in the Third Circuit appear to address this point.

4. In camera review

a. Necessity

Courts in the Third Circuit are not required as a matter of course to conduct an in camera (that is, private) review of the subpoenaed material before deciding whether to quash a subpoena. In practice, however, a court will on occasion seek do so in the course of applying the three-part test for whether the First Amendment-based privilege can be overcome. A court properly can only compel in camera review if the party issuing the subpoena first makes a threshold showing that the information sought is unavailable elsewhere and consists of relevant evidentiary material. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 148-49 (3d Cir. 1980) ("*Cuthbertson I*"); *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 147, 149 (E.D. Pa. 1994).

b. Consequences of consent

Neither the applicable rules nor case law in the Third Circuit appear to address the question of whether consent to in camera review will result in an automatic stay of an adverse ruling pending appeal.

c. Consequences of refusing

Where CBS refused to produce notes and outtakes for in camera review by the trial court in a criminal matter on the ground that such review would impinge its First Amendment-based privilege, the Third Circuit affirmed a citation for civil contempt to the extent that CBS should have produced for in camera inspection those materials as to which the party issuing the subpoena had complied with the limitations of Fed. R. Crim. P. 17(c) and had demonstrated that the information sought was not available from another source. *Cuthbertson I*, 630 F.2d at 148-49.

5. Briefing schedule

Motions practice varies from division to division within each district, and often from judge to judge within a division. Consequently, it is important to consult the clerk's office, or a particular judge's scheduling clerk if the matter has been assigned to an individual judge.

6. Amicus briefs

Federal courts generally accept amicus briefs where the "friend of the court" has something meaningful to add to the parties' briefing. In the Third Circuit, numerous state and national press associations and media companies routinely file amicus briefs at the appellate level and, in significant or difficult cases, at the trial court level. Among the organizations in the Third Circuit that a reporter confronted with a subpoena might want to contact in this regard:

New Jersey Press Association
840 Bear Tavern Road, Suite 305
West Trenton, NJ 08628-1019
(609) 406-0600
www.njpa.org

New Jersey Broadcasters Association
348 Applegarth Road
Monroe Township, NJ 08831
(888) 652-2366
www.njba.com

Pennsylvania Association of Broadcasters
8501 Paxton Street
Hummelstown, PA 17036
(717) 482-4820
www.pab.org

Pennsylvania Newspaper Association
3899 North Front Street
Harrisburg, PA 17110
(717) 703-3000
www.pa-newspaper.org

Maryland-Delaware-DC Press Association
2191 Defense Highway, Suite 300
Crofton, MD 21114
(410)721-4000
www.mddcpress.com

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The person or entity asserting the privilege has the initial burden of demonstrating that they are entitled to claim its protection. The Third Circuit has held that those seeking to invoke the First Amendment-based journalist's privilege have the burden of demonstrating that they are "engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public." *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998). As the Third Circuit further observed, "it makes no difference whether the intended manner of dissemination was by newspaper, magazine, book, public or private broadcast or handbill because the press, in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 129 (citations omitted).

Once the person invoking the privilege has demonstrated that he or she is entitled to its protection, the burden shifts to the party seeking information from the reporter to show that they are entitled to overcome the privilege. The Third Circuit employs a three-part balancing test to determine whether a person seeking disclosure from a journalist has overcome the privilege: Such a person must make specific showings that the information sought is material, relevant and necessary to the party's claims or defenses. *See, e.g., Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979). In practice, this means that the party seeking disclosure must show that he or she has exhausted other potential sources for the information sought from a journalist and that such information is crucial to the party's claims or defenses. *See, e.g., id.* at 717. The sufficiency of the showing required for each element will depend upon a balancing test in which the courts weigh the relative interests of the reporter against the interests of the party seeking disclosure. *See, e.g., id.* at 716-17. Thus, for example, where a criminal defendant's constitutional right to a fair trial is implicated by a request for disclosure, he or she likely will not need to make as great a showing to overcome the privilege as would a civil litigant whose constitutional rights were not implicated. While the courts generally have not defined in traditional terms the burden of proof that the proponent of a subpoena must meet, the Third Circuit has required a "strong showing" based on specific facts. *Id.* at 716-17.

B. Elements

Because the reporter's privilege is qualified in the Third Circuit, courts employ a balancing test on a case-by-case basis to determine if the information should be disclosed. *Riley*, 612 F.2d at 715-16. To overcome the privilege, the party seeking the information must make a strong showing that the information is material, relevant, and necessary. *Id.* at 716. In *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980), the Third Circuit distilled the *Riley* test into a more formal, three-part test. This three-part test requires that a party seeking information from a reporter must: (1) "demonstrate that he has made an effort to obtain the information from other sources;" (2) "demonstrate that the only access to the information sought is through the journalist and her sources;" and (3) "persuade the court that the information sought is crucial to the claim." *Criden*, 633 F.2d at 358-59.

1. Relevance of material to case at bar

In the Third Circuit, the proponent of a subpoena to a reporter must demonstrate not merely that the information sought is relevant to the party's claims or defenses, but that the information sought from a reporter is "crucial" to the claim or defense. *Criden*, 633 F.2d at 358-59. Courts have not hesitated to quash subpoenas where the proponent could not demonstrate that the information sought from the reporter was "crucial" to the case at bar, notwithstanding that the information in question clearly was "relevant." *See e.g., United States v. Nat'l Talent Assocs., Inc.*, No. 96-2617 (AJL), 1997 WL 829176, at *4 (D.N.J. Sept. 4, 1997) (information sought, "while relevant," was "not crucial"), *Magistrate Judge's Report and Recommendation Adopted*, No. 96-2617, 1997 WL 829196 (D.N.J. Sept. 22, 1997); *accord Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 150, 151-52 (E.D. Pa. 1994); *Parsons v. Watson*, 778 F. Supp. 214, 218-19 (D. Del. 1991); *United States v. Vastola*, 685 F. Supp. 917, 924-25 (D.N.J. 1988); *but see In re Grand Jury Empanelled Feb. 5, 1999*, 99 F. Supp. 2d 496, 501 (D.N.J. 2000) (in grand jury context, at least where identity of source had already been disclosed through other means, government was not required to demonstrate that information was "crucial" to its investigation, but merely that it was "necessary for the grand jury's purposes").

By the same token, however, proponents of some subpoenas can meet their burden on this element in some circumstance. *See, e.g., Criden*, 633 F.2d at 359 (where reporter's testimony could prove or disprove element of underlying defense and reporter was only available avenue to information, party issuing subpoena had demonstrated crucial need, particularly since party was not seeking disclosure of source's identity); *In re Subpoena to Barnard*, 27 Media L. Rep. (BNA) 1500, 1502-03, 1999 WL 38269, at *3 (E.D. Pa. 1999) (where information sought concerned statements in published article and statements were admission of wrongdoing by defendant in underlying civil action, plaintiff who issued subpoena to reporter had demonstrated that testimony concerning statements was "crucial"); *In re Subpoena of Maykuth*, 34 Media L. Rep. (BNA) 1476, 2006 WL 724241, at *3 (E.D. Pa. 2006) (observing that information sought from reporter strikes at "very heart" of plaintiffs' case).

2. Material unavailable from other sources

In the Third Circuit, the proponent of a subpoena to a reporter must demonstrate both that it has sought the information from other sources and that the information in question can only be obtained through the reporter. More specifically, the party seeking information must (1) "demonstrate that he has made an effort to obtain the information from other sources;" and (2) "demonstrate that the only access to the information sought is through the journalist and her sources." *Criden*, 633 F.2d at 358-59. Courts in the Third Circuit appear generally to apply these requirements strictly and have required that parties make specific, factual showings as to both elements. Where the party issuing a subpoena is unable to do so, courts have not hesitated to quash subpoenas. *See, e.g., United States v. Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir. 1981) ("*Cuthbertson II*"); *Riley*, 612 F.2d, 716-17; *Downey v. Coalition Against Rape & Abuse, Inc.*, 31 Media L. Rep. (BNA) 2582, 2003 WL 23164082, at *6 (D.N.J. 2003); *United States v. Nat'l Talent Assocs., Inc.*, No. 96-2617 (AJL), 1997 WL 829176, at 5-6 (D.N.J. Sept. 4, 1997), *Magistrate Judge's Report and Recommendation Adopted*, No. 96-2617, 1997 WL 829196 (D.N.J. Sept. 22, 1997); *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 371 (E.D. Pa. 1992); *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 367-69 (W.D. Pa. 1991), *aff'd without opinion by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (in banc).

By the same token, the courts have held that some parties have met their burden on this element. *See, e.g., Criden*, 633 F.2d at 358-59 (where party had taken testimony from suspected source and sought to obtain relevant

information from government, and reporter remained only avenue to obtain information concerning source's credibility and motivation in conversation with reporter, party had met burden on these elements); *In re Grand Jury Empanelled Feb. 5, 1999*, 99 F. Supp. 2d at 500-01 (where government sought audiotape of interview with person who purportedly had information concerning fraud committed by others and credibility of interviewee was at issue, and reporter possessed only copy of audiotape, government had met burden on these elements); *In re Subpoena to Barnard*, 27 Media L. Rep. (BNA) at 1502-03, 1999 WL 38269, at *3 (where party had sought testimony from only person other than reporter with knowledge of conversation in question and that person had invoked Fifth Amendment right, party had met burden on these elements); *In re Subpoena of Maykuth*, 34 Media L. Rep. (BNA) 1476, 2006 WL 724241, at *3 (E.D. Pa. 2006) (where party deposed suspected sources and reporter remained only person who could verify whether plaintiffs made certain statements, party met burden on these elements).

a. How exhaustive must search be?

While courts in the Third Circuit do not appear to have focused particular attention on the question of how exhaustive a party's search for sources other than a reporter must be, in *Riley*, the Court of Appeals explained that "conclusory statements fall far short of the type of specific findings of necessity which may overcome the privilege." 612 F.2d at 717.

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

While courts in the Third Circuit do not appear to have focused particular attention on the question of what proof of a search for alternative sources the party seeking disclosure from a reporter must make, in *Riley*, the Court of Appeals explained that "conclusory statements fall far short of the type of specific findings of necessity which may overcome the privilege." 612 F.2d at 717.

c. Source is an eyewitness to a crime

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context.

3. Balancing of interests

The Third Circuit employs a three-part balancing test to determine whether a person seeking disclosure from a journalist has overcome the privilege: Such a person must make specific showings that the information sought is material, relevant and necessary to the party's claims or defenses. *See, e.g., Riley*, 612 F.2d at 716. In practice, this means that the party seeking disclosure must show that he or she has exhausted other potential sources for the information sought from a journalist and that such information is crucial to the party's claims or defenses. *See, e.g., id.* at 717. The sufficiency of the showing required for each element will depend upon a balancing test in which the courts weigh the relative interests of the reporter with the interests of the party seeking disclosure. *See, e.g., id.* at 716-17. Thus, for example, where a criminal defendant's constitutional right to a fair trial is implicated by a request for disclosure, he or she likely will not need to make as great a showing to overcome the privilege as would a civil litigant whose constitutional rights were not implicated.

On the reporter's side, courts in the Third Circuit have identified several interests at stake where disclosure is sought. Courts often emphasize the importance of First Amendment-based protection for newsgathering, which protects the free flow of information and news to the public. *See, e.g., Riley*, 612 F.2d at 714-718; *Nat'l Talent Assocs., Inc.*, 1997 WL 829176, at *1. Protecting confidential sources has been described as vital to this process. Without the privilege, sources would be less willing to provide information for fear of retribution or embarrassment. *Criden*, 633 F.2d at 355-56; *Riley*, 612 F.2d at 714.

On the subpoenaing party's side, courts in the Third Circuit have identified a number of countervailing interests that might be at stake in any particular case. Weighing most heavily in favor of disclosure are the rights of criminal defendants. These constitutional interests include the guarantees both of due process (pursuant to the Fifth and/or Fourteenth Amendments) and the Sixth Amendment's compulsory process/confrontation clauses. *Criden*, 633 F.2d at 355-56; *United States v. Cuthbertson*, 630 F.2d 139, 146-47 (3d Cir. 1980) ("*Cuthbertson I*"); *Parsons v. Watson*, 778 F. Supp. 214, 217-18 (D. Del. 1991). In the grand jury context, courts also have recognized as a countervailing interest the public interest in investigating crimes. *In re Grand Jury Subpoena of Williams*, 766 F.

Supp. at 369 (suggesting that grand jury investigation may "rise to the level of a countervailing constitutional concern").

In determining when the interests of the subpoenaing party overcome the privilege, courts in the Third Circuit focus on the specific facts of the case. In almost every civil case, however, the First Amendment interests of the reporter have been held to outweigh the interests of the party seeking information. In criminal cases, however, the courts have explained that First Amendment rights do not automatically trump the constitutional rights of the defendant. *Criden*, 633 F.2d at 357; *see also Cuthbertson I*, 630 F.2d at 147 (explaining that the framers "did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other") (citations omitted).

4. Subpoena not overbroad or unduly burdensome

In criminal cases, subpoenas are governed by Fed. R. Crim. P. 17(c). They may not be overbroad or frivolous. Courts have made clear that subpoenas must represent "a good faith effort to obtain identified evidence rather than a general 'fishing expedition' that attempts to use the rule as a discovery device." *Cuthbertson I*, 630 F.2d at 144 (citation omitted); *see also Cuthbertson II*, 651 F.2d at 192 (listing four requirements for obtaining unprivileged materials from third party witnesses). Rule 17(c) thus presents a ground for quashing a subpoena that is independent of the reporter's privilege. While there has been less discussion of this concept in civil cases in the Third Circuit, Fed. R. Civ. P. 45(c)(1) similarly requires that the person issuing a subpoena "avoid imposing undue burden or expense," and a subpoena that imposes undue burden may be quashed by the court for that reason alone, Fed. R. Civ. P. 45(c)(3)(A)(iv).

5. Threat to human life

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context.

6. Material is not cumulative

Courts in the Third Circuit do not appear to have expressly addressed this point, but in *Riley*, in the course of concluding that a subpoena should be quashed, the court observed that, since multiple witnesses had testified that a certain person had provided information about the plaintiff to the reporter, the plaintiff had failed to show that the reporter's testimony on the same subject was necessary. 612 F.2d at 718. *See also* § VI.B.2 *supra*.

7. Civil/criminal rules of procedure

Subpoenas in criminal cases may not be overbroad or frivolous and must represent a good faith effort to identify evidence. Fed. R. Crim. P. 17(c). In civil cases, the subpoenaing party must avoid imposing undue burden or expense. Fed. R. Civ. P. 45(c)(1).

8. Other elements

Courts in the Third Circuit do not appear to have addressed other elements.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Courts in the Third Circuit have described a number of actions and circumstances that do *not* constitute a waiver of the privilege. For example, because the privilege belongs to the reporter, it cannot be waived by the source, even where the source voluntarily identifies herself. *Criden*, 633 F.2d at 359-60; *but see id.* at 360 (although not a waiver, source's self-identification tipped balance of interests between party's need for testimony and reporter's First Amendment rights). Courts have also found that partial testimony does not waive the privilege as to other matters. *See, e.g., Sklar*, 752 F. Supp. at 1267. Finally, the presence of a third party during an interview does not constitute a waiver if the third party is in some fashion connected to the interview. *Damiano v. Sony Music Entm't, Inc.*, 168 F.R.D. 485, 498-99 (D. Del. 1996) (holding that reporter's decision to permit Bob Dylan's publicist to attend interview with Dylan did not waive privilege). And, as noted above in section III.F., with respect to the federal privilege, the courts have held that publication is not itself a waiver. (Publication can, however, operate as a waiver under state shield laws. *See* § III.F *supra*.)

By the same token, however, the Court of Appeals has suggested that a reporter might waive the privilege if he or she filed suit to vindicate his or her own rights in a matter to which the privileged information was somehow relevant. *See Riley*, 612 F.2d at 716.

2. Elements of waiver

a. Disclosure of confidential source's name

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context. As noted in the <A:03:6C1>preceding section, however, disclosure of a source's name by the source does not waive the reporter's privilege.

b. Disclosure of non-confidential source's name

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context. As noted above, however, disclosure of a source's name by the source does not waive the reporter's privilege.

c. Partial disclosure of information

At least one court in the Third Circuit has expressly held that partial disclosure of information does not waive the privilege as to other matters, *Sklar*, 752 F. Supp. at 1267, and such a principle is implicit in cases cited elsewhere in this outline in which courts have held that disclosure waives the privilege only as to the matter disclosed. *See* § VI.C.1 *supra*.

d. Other elements

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context.

3. Agreement to partially testify act as waiver?

District courts have at least suggested that partial testimony and even voluntary appearances at depositions do not waive the privilege. *See, e.g., Damiano*, 168 F.R.D. at 498-99; *Sklar*, 752 F. Supp. at 1267.

VII. What constitutes compliance?

A. Newspaper articles

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context, although one district court has held that, notwithstanding that newspaper articles are self-authenticating pursuant to Fed. R. Evid. 902(6), "there may still remain questions of authority and responsibility for statements contained therein" that may require testimony from the reporter or other person with knowledge. *In re Vmark Software, Inc. Sec. Litig.*, No. Civ. 97-227, 1998 WL 42252, at *2 (E.D. Pa. Jan. 8, 1998) ("*Vmark*"); *see also, In re Subpoena of Maykuth*, 34 Media L. Rep. (BNA) 1476, 2006 WL 724241, at *3 (E.D. Pa. 2006).

B. Broadcast materials

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context.

C. Testimony vs. affidavits

At least one district court in the Third Circuit has held that an affidavit from a reporter concerning a published article is insufficient since, although admissible for purposes of motions for summary judgment, the matter in the affidavit would be hearsay for purposes of trial. *Vmark*, 1998 WL 42252, at *3.

D. Non-compliance remedies

1. Civil contempt

a. Fines

Where a reporter or news organization fails to comply with a subpoena after a court has ruled that it is valid and the recipient is not entitled to invoke the reporter's privilege, courts in the Third Circuit typically will hold the re-

porter in civil contempt and daily fines are the penalty most often imposed. Such fines often are stayed pending the appeal of the contempt citation, however. *See, e.g., In re Gronowicz*, 764 F.2d 983, 984 (3d Cir. 1985) (affirming contempt citation imposing fine of \$500 per day on author, which fine was stayed pending appeal); *United States v. Cuthbertson*, 630 F.2d 139, 143, 149 (3d Cir. 1980) ("*Cuthbertson I*") (affirming contempt citation imposing fine of \$1 per day, which fine was stayed pending appeal).

b. Jail

Although reported opinions do not disclose cases in which a journalist cited for civil contempt for refusal to respond to a valid subpoena has been incarcerated, one lower court initially ordered the journalist placed in the custody of the marshal. The judge then agreed to release her to the custody of her attorney. *United States v. Criden*, 633 F.2d 346, 350 (3d Cir. 1980).

2. Criminal contempt

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context.

3. Other remedies

Courts in the Third Circuit do not appear to have expressly addressed this point in a relevant context.

VIII. Appealing

A. Timing

1. Interlocutory appeals

The Third Circuit has held that both a reporter who moves to quash a subpoena and receives less protection than was sought and a reporter who declines to comply with a valid subpoena and is therefore cited for contempt may take an immediate appeal on the ground that either order is final for purposes of appeal. *United States v. Cuthbertson*, 651 F.2d 189, 193 (3d Cir. 1981) ("*Cuthbertson II*").

In addition, third parties with an interest in material or testimony to be presented at trial (such as a new organization whose newsgathering material has somehow found its way into the hands of a party without the organization's consent) may intervene in pending matters to seek a protective order. They can obtain immediate appellate review if the request is denied. *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3d Cir. 1979) ("it is settled law that persons affected by the disclosure of allegedly privileged materials may intervene in pending criminal proceedings and seek protective orders, and if protection is denied, seek immediate appellate review").

2. Expedited appeals

In the Third Circuit, expedited appeals are governed by Local Appellate Rule 4.1, which provides that a motion for expedited appeal must be filed within 14 days of the notice of appeal and must set forth the exceptional reason that warrants expedition and be accompanied by a proposed briefing schedule.

B. Procedure

1. To whom is the appeal made?

In certain circumstances, where an initial ruling is made by a magistrate judge, the losing party has a right to file an objection with the district court judge and, in other circumstances, the losing party may have a right to take an appeal to either the district court judge or directly to the Court of Appeals. The applicable rules should be consulted with an eye toward the facts of the particular case. Where a decision is rendered by a district court judge, appeal lies in the Court of Appeals.

2. Stays pending appeal

While the courts in the Third Circuit do not appear to have expressly addressed the standards governing issuance of a stay pending appeal in the context of an order overruling the journalist's privilege, such stays have been granted (without opinion) both by district courts and the Third Circuit. *See, e.g., United States v. Cuthbertson*, 630

F.2d 139, 143 (3d Cir. 1980) ("*Cuthbertson I*"); *In re Gronowicz*, 764 F.2d 983, 984 (3d Cir. 1985). In other contexts, in deciding whether to stay an order pending appeal, courts typically consider (1) the degree to which the movant has shown that he or she is likely to succeed on the merits of the appeal; (2) whether the movant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) whether issuance of the stay will harm the public interest. *See, e.g., Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, No. 00-5361 (WGB), 2001 WL 493266 (D.N.J. Jan. 17, 2001).

3. Nature of appeal

Whether a reporter should seek an appeal or a writ of mandamus (or pursue both avenues of relief simultaneously) depends on the particular circumstances of the case.

4. Standard of review

In *Cuthbertson II*, 651 F.2d at 192-93, the Third Circuit indicated that, on appeals concerning application of the reporter's privilege, it would undertake "plenary" review of questions of law, apply an "abuse of discretion" standard to questions involving the lower court's exercise of discretion, and apply the "clearly erroneous" test to the lower court's findings of fact.

5. Addressing mootness questions

The Third Circuit has held that, as a matter of the dignity of the court and its ability to enforce its orders, a contempt citation does not become moot simply because the proceedings that gave rise to the order have ceased. *United States v. Criden*, 633 F.2d 346, 351-53 (3d Cir. 1980).

6. Relief

A federal court of appeals can reverse (*i.e.*, quash the subpoena), modify the subpoena to make it valid, or remand the matter to the trial court if additional factual findings or other proceedings are necessary to determine whether the subpoena is valid and enforceable.

IX. Other issues

A. Newsroom searches

Courts in the Third Circuit do not appear to have addressed directly the Privacy Protection Act, 42 U.S.C. § 2000aa, in a context relevant to reporters.

B. Separation orders

Courts in the Third Circuit do not appear to have addressed directly the question of whether and under what circumstances a separation order (that is, an order prohibiting a reporter who might be subpoenaed to testify from attending the trial in question) is appropriate.

C. Third-party subpoenas

Courts in the Third Circuit do not appear to have addressed directly the question of what rights, if any, a reporter has in connection with the issuance of a subpoena to a third party, such as a credit card company or telephone service provider, for records concerning a reporter's transactions or calls.

D. The source's rights and interests

No cases in the Third Circuit appear to address directly the question of what rights, if any, the source has against disclosure of his or her identity or to intervene for purposes of attempting to quash a subpoena addressed to a news organization, nor do the courts appear to have addressed directly the question of whether a source may maintain a breach of contract action against a journalist who, in response to a court order, discloses the identity of a source to whom the journalist had promised confidentiality.