REPORTER'S PRIVILEGE: 6TH CIR.

The Reporters Committee for Freedom of the Press

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

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

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The Reporter's Privilege Compendium: An Introduction

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

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

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

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

Above the law?

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

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

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

6TH CIR.

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I. Introduction: History & Background

While the 6th Circuit definitely recognizes some sort of privilege for reporters faced with subpoenas from litigants, the scope and contours of that privilege are as yet not entirely defined. For instance, whereas the privilege is relatively strong in the civil context, its application in criminal cases is less certain, due to dictum in a case decided in 1987 stating that no such protection exists, under the First Amendment, for grand jury subpoenas. It is also unclear whether the privilege protects nonconfidential information and/or information beyond the mere identity of confidential sources. The U.S. Court of Appeals for the 6th Circuit has decided only two cases on the topic, and district courts within the circuit have also had relatively few opportunities to develop the privilege.

II. Authority for and source of the right

Courts recognizing the privilege derive it from the First Amendment. However, the most recent Court of Appeals case discussed the privilege in terms of the commercial speech doctrine, rather than the traditional First Amendment analysis based on the U.S. Supreme Court case, *Branzburg v. Hayes*. *See NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998). The 6th Circuit Court of Appeals has rejected the theory that a privilege exists under the First Amendment for criminal cases, but this language has been dismissed as dictum in later district court cases. *See In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303 (W.D. Mich. 1996).

More recent district court decisions have found no First Amendment privilege in criminal or civil cases. *See Lentz v. City of Cleveland*, 410 F. Supp. 2d 673 (N.D. Ohio 2006); *Hade v. City of Fremont*, 233 F. Supp. 2d 884 (N.D. Ohio 2002) (criticizing *Southwell's* dismissal of *In re Grand Jury Proceedings'* language as dicta and finding no privilege in criminal or civil cases); *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

III. Scope of protection

A. Generally

While the 6th Circuit definitely recognizes some sort of privilege for reporters faced with subpoenas from litigants, the scope and contours of that privilege are as yet not entirely defined. For instance, whereas the privilege is relatively strong in the civil context, its application in criminal cases is less certain, due to dictum in a case decided in 1987 stating that no such protection exists, under the First Amendment, for grand jury subpoenas. It is also unclear whether the privilege protects nonconfidential information and/or information beyond the mere identity of confidential sources.

B. Absolute or qualified privilege

The privilege is qualified. A court faced with a claim of privilege must balance certain factors in determining whether compelled disclosure is proper.

C. Type of case

1. Civil

In upholding a newspaper's refusal to comply with a civil administrative subpoena from a federal agency in the context of a labor dispute, the Sixth Circuit has recognized the right of the press to avoid compelled disclosure of commercial information received from a source to whom the newspaper promised anonymity. *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998). *Midland Daily News* is the only 6th Circuit ruling in a civil context addressing a newspaper's constitutional right to resist complying with a subpoena.

In *Midland Daily News*, the Court affirmed a district court's refusal to enforce an NLRB subpoena for the identity of an advertiser who placed a "blind" employment ad. Because of the commercial context, the Sixth Circuit applied the standards of the First Amendment's commercial speech doctrine. The Court examined whether a sub-

stantial government interest supported enforcement of the NLRB subpoena, whether enforcement of the subpoena would directly advance the asserted government interest, and whether the subpoena was more extensive than necessary to achieve the government's asserted goal. The NLRB said that it wanted the information to determine the accuracy of a union's charges that the employer discriminated against union members. Ruling that the NLRB failed to demonstrate that its use of subpoena power was not more extensive than necessary to acquire the desired information, the Sixth Circuit observed: "if this court permitted the Board to obtain the identity of Midland's advertiser, without demonstrating a reasonable basis for seeking such information, the chilling effect on the ability of every newspaper and periodical to publish lawful advertisements would clearly violate the Constitution."

The logical conclusion of *Midland Daily News* is that a court would more strictly scrutinize a civil subpoena in a noncommercial context because regulation of noncommercial speech usually is subject to more demanding judicial scrutiny.

Where the press is subpoenaed in the context of criminal litigation or a grand jury investigation, there is doubt as to whether the Sixth Circuit recognizes any special prerogative of the press to resist the subpoena. In *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987), the Sixth Circuit opined that the First Amendment provides the press with protection only from grand jury subpoenas issued in bad faith to harass the press or to disrupt its relationship with its sources, and upheld the use of a grand jury subpoena to obtain video outtakes recorded by a television journalist in a context in which the taped subjects expected anonymity.

However, the court's apparent negation of any greater First Amendment protection appears to have been nonbinding dicta because the court found that, even if strict First Amendment protection applied, its demands were satisfied given the evidence. *See Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996) (Sixth Circuit's negation of First Amendment reporters' privilege was "dictum").

Addressing the test for strict First Amendment scrutiny, the Sixth Circuit ruled that the government had succeeded in making a "clear and convincing showing" that the journalist had "information that is clearly relevant to a specific violation of criminal law," and that "the information is not available from alternative sources." That test would be more demanding of the proponent of disclosure than is the commercial speech test of *Midland Daily News*.

The United States District Court for the Western District of Michigan has ruled that the First Amendment affords a reporters' privilege against forced disclosure of confidential sources in the context of civil litigation. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996).

Three cases from Sixth Circuit district courts have decided in civil cases that there is no First Amendment privilege. *Lentz v. City of Cleveland*, 410 F. Supp. 2d 673 (N.D. Ohio 2006); *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003); *Hade v. City of Fremont*, 233 F. Supp. 2d 884 (N.D. Ohio 2002).

2. Criminal

In civil contexts, federal courts within the Sixth Circuit have applied the First Amendment to bar compelled disclosure of a newspaper's confidential sources. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996); *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

In the context of a grand jury investigation of a homicide, the Sixth Circuit refused to overturn a contempt conviction of a television reporter who refused to comply with a grand jury subpoena for video outtakes showing the likenesses of potential suspects who expected anonymity when the journalist taped them. *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

If the First Amendment bars enforcement of subpoenas against the press in the context of criminal litigation or investigations, the federal courts have given no indication as to whether it would apply to information that might lead to the identity of a confidential source, whether it would apply only to the information that actually identifies a confidential source, or whether it would apply at all. In *Grand Jury Proceedings*, the Sixth Circuit opined that there is no special First Amendment protection from grand jury subpoenas, but that opinion is likely nonbinding dicta. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996); *see NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

In the civil context, federal courts have applied the First Amendment to bar compelled disclosure of the actual identities of confidential sources, but have not addressed whether the First Amendment would bar compelled disclosure of information likely to lead to the identity of a confidential source. *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998); *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996).

3. Grand jury

Where the press is subpoenaed in the context of a grand Jury investigation, there is no doubt as to whether the Sixth Circuit recognizes any special prerogative of the press to resist the subpoena. In the only reported federal decision within the Sixth Circuit that addresses the reporters' privilege in a grand Jury context, the Sixth Circuit opined that the First Amendment provides the press with protection from grand jury subpoenas only where issued in bad faith to harass the press or to disrupt its relationship with its sources, and upheld the use of a grand jury subpoena to obtain video outtakes recorded by a television journalist in a context in which the taped subjects expected anonymity. *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

However, the courts' apparent negation of any greater First Amendment protection appears to have been nonbinding dicta because the court found that, even if strict First Amendment protection applied, its demands were satisfied given the evidence in the case. *See Southwell v. Southern Poverty Law Ctr.*, 949 F.Supp. 1303 (W.D. Mich. 1996) (Sixth Circuit's negation of First Amendment reporter's privilege was "dictum").

Addressing the test for strict First Amendment scrutiny, the Sixth Circuit ruled that the government had succeeded in making a "clear and convincing showing" that the journalist had "information that is clearly relevant to a specific violation of criminal law," and that "the information is not available from alternative sources." The Sixth Circuit asserted, however, that the First Amendment requires no such standard, making successful resistance to a grand jury subpoena quite difficult.

Nevertheless, 11 years later, the Sixth Circuit applied the First Amendment to uphold a newspaper's refusal to comply with a National Labor Relations Board civil subpoena seeking the identity of a confidential advertiser. *NLRB v. Midland News*, 151 F.3d 472 (6th Cir. 1998). Although in *Midland Daily News*, the Sixth Circuit made no mention of its earlier ruling in *Grand Jury*, its application of the First Amendment to bar enforcement of the NLRB subpoena buttresses the assertion that the court's opinion in *Grand Jury* was dicta to the extent that it denied the existence of a First Amendment reporter's privilege.

D. Information and/or identity of source

In civil contexts, federal courts within the Sixth Circuit have applied the First Amendment to bar compelled disclosure of a newspaper's confidential sources. *Southwell v. Southern Poverty Law Ctr*., 949 F. Supp. 1303 (W.D. Mich. 1996); *NLRB v. Midland Dailey News*, 151 F.3d 472 (6th Cir. 1998).

In the context of a grand jury investigation of a homicide, the Sixth Circuit refused to overturn a contempt conviction of a television reporter who refused to comply with a grand jury subpoena for video outtakes showing the likenesses of potential suspects who expected anonymity when the journalist taped them. *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

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Even when a First Amendment privilege is not recognized, some courts have protected journalists. A Sixth Circuit district court found that the reporters at issue did not have to disclose information from, or names of, confidential sources because the information sought could be obtained from other sources, the request was overly broad and burdensome, and the information may duplicate of information gathered from other sources. *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

Another Sixth Circuit district court found the relationship between the information sought and the plaintiff's claim too tenuous and declined to subpoena a reporter. The reporter had gained access to pre-employment psychological evaluations of a police officer who was making a claim for discrimination. *Lentz v. City of Cleveland*, No. 1:04CV0669, 2006 U.S. Dist. LEXIS 32078 (N.D. Ohio May 22, 2006). However, earlier in the same case, the court had found that the reporter could be subpoenaed for the same information when it related to invasion of privacy claims against his employer, as there was a clear relationship between the information and those claims. *Lentz v. City of Cleveland*, 410 F. Supp. 2d 673 (N.D. Ohio 2006).

Disclosure may be compelled where 1) the reporter is not being harassed, 2) the information is being sought in good faith, 3) the information has more than a remote or tenuous relationship with the case, and 4) there is a legitimate need for disclosure, the identity of a source may be compelled. *Hade v. City of Fremont*, 233 F. Supp. 2d 884 (N.D. Ohio 2002) (citing the test devised in *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987)).

E. Confidential and/or non-confidential information

In civil contexts, federal courts within the Sixth Circuit have applied the First Amendment to bar compelled disclosure of a newspaper's confidential sources. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996); *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

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Federal courts in the Sixth Circuit have not addressed whether the First Amendment would bar compelled disclosure of unpublished, nonconfidential information gathered by a journalist. *See NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998); *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996).

Given that the very existence of First Amendment protection may be at issue within the Sixth Circuit, doubts should be resolved against First Amendment protection from subpoenas seeking unpublished, nonconfidential information.

Even without a First Amendment privilege, some courts have nonetheless protected journalists. A Sixth Circuit district court found that the reporters at issue did not have to disclose information from, or names of, confidential sources because the information sought could be obtained from other sources, the request was overly broad and burdensome, and the information may duplicate information gathered from other sources. *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

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F. Published and/or non-published material

The federal courts within the Sixth Circuit have not addressed whether the First Amendment would protect the press from compelled disclosure of published information. The only federal decisions upholding First Amendment protection from subpoenas were in civil contexts and applied to the unpublished identities of confidential sources. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996); *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

G. Reporter's personal observations

Where the reporter personally witnessed the commission of a crime, it is unlikely that the federal courts within the Sixth Circuit would uphold the reporter's assertion of a First Amendment privilege. In *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987), the Sixth Circuit refused to overturn the contempt conviction of a television reporter who had refused to comply with a grand jury subpoena seeking video outtakes of the reporter's interviews of street gang members. As a condition of taping, the reporter agreed not to broadcast or disclose to anyone the portion of the tape showing the faces of gang members, and promised to do future taping in the silhouette. The gang members threatened his safety if he aired the portion of the tape showing their faces.

The grand jury subpoenaed the outtakes to determine the identity of the killer of a police officer. An informant had identified the killer, but refused to testify. Several gang members told police that the killer was among those who were taped by the reporter. In rejecting the reporter's First Amendment argument, the Sixth Circuit opined that the First Amendment did not apply. However, the Court said that, even if the First Amendment privilege had applied, it would have been overcome given the facts of the case. The court stated that the government made "a clear and convincing showing that [the reporter] has information that is clearly relevant to a specific violation of criminal law, that the information is not available from alternative sources, and that the state has a compelling and overriding interest in obtaining the information."

In *Grand Jury proceedings*, the video tape for which the Court granted no First Amendment protection did not record the actual commission of a criminal act, but contained only information "clearly relevant to a specific violation of criminal law." Consequently, it is highly improbable that the Sixth Circuit would uphold First Amendment protection where the journalist resisting a subpoena in a criminal context actually witnessed a crime.

H. Media as a party

Where a libel plaintiff seeking to prove that the defendant reporter published the alleged libel while entertaining serious doubts as to its truth (constitutional actual malice), federal courts within the Sixth Circuit have granted summary judgment to the reporter, while refusing the plaintiff's demand that the reporter reveal the identity of a confidential source. *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551 (E.D. Mich. 1979); *Southwell v. Southern Poverty Law Ctr*., 949 F. Supp. 1303 (W.D. Mich. 1996).

In doing so, those courts stated that they would have compelled the reporters to disclose the identities of their confidential sources if the plaintiff had produced substantial evidence in support of constitutional actual malice [the entertaining by defendants of serious doubts as to truth] or otherwise made a concrete demonstration that the identity of the source would lead to persuasive evidence of actual malice.

In effect, those courts require a libel plaintiff to produce evidence that a confidential source's identity is centrally relevant to an important issue of law and fact in the case. That requirement squares with the usual relevance requirement in cases outside the Sixth Circuit in which courts have applied the First Amendment reporter's privilege where the press was not a litigant. It appears, however, that at least in libel suits against the press, the federal

courts in the Sixth Circuit would not require a plaintiff who proves the central relevance of a source's identity also to exhaust other means of learning the identity before seeking it from a defendant journalist.

I. Defamation actions

Federal courts within the Sixth Circuit have granted summary judgment to libel defendants while refusing to require those libel defendants to disclose the identities of the confidential sources who had supplied the information alleged by the plaintiff to be false and defamatory. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996); *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551 (E.D. Mich. 1979).

Those courts have acknowledged that they would require a libel defendant to reveal a confidential source's identity if the plaintiff had produced concrete evidence demonstrating the central relevance of the source's identity to a legal and factual issue in the case. Where those circumstances exist, those courts apparently would not require the libel plaintiff to try to exhaust other means of learning the identity of the source, a requirement often recognized in non-libel contexts.

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The First Amendment reporters' privilege has been applied to a nonprofit organization which published a periodic newsletter alleged to libel the plaintiff. *Southwell v. Southern Poverty Law Ctr.*, 949 F.Supp. 1303 (W.D. Mich. 1996). Although the court declined to decide whether the First Amendment actually afforded a reporter's privilege , the court applied "public policy" in deciding that a magazine and freelance author did not have to reveal the identities of confidential sources to a plaintiff suing them for libel. *Schultz v. Reader's Digest Ass'n*, 468 F.Supp. 551) E.D. Mich. 1979).

The Sixth Circuit applied the First Amendment to bar enforcement of a civil subpoena directed to a newspaper's advertising dept. in pursuit of the identity of an advertiser who placed a "blind" ad. *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

Even when a First Amendment privilege is not recognized, some courts have nonetheless protected journalists. A Sixth Circuit district court found that the reporters at issue did not have to disclose information from, or names of, confidential sources because the information sought could be obtained from other sources, the request was overly broad and burdensome, and the information may duplicate information gathered from other sources. *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

b. Editor

Although no case decided by federal courts in the Sixth Circuit addressed the issue, where the First Amendment applies, it would likely apply to an editor.

c. News

No federal court in the Sixth Circuit has limited First Amendment protection only in contexts where the information was gathered in pursuit of news, and no federal court in the Sixth Circuit has defined "news."

The Sixth Circuit itself applied the First Amendment to bar enforcement of a civil subpoena seeking to require a newspaper to divulge the identity of an advertiser who placed a "blind ad"; consequently, it seems clear that First Amendment protection applies beyond the context of news.

d. Photo journalist

The Sixth Circuit denied First Amendment protection to a television journalist whose videotape outtakes showed the likeness of a murder suspect. *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987). The reason for denying the journalist protection was not based on his status as , in essence, a photojournalist.

e. News organization / medium

The federal courts in the Sixth Circuit have not defined the parameters of the scope of a reporter's privilege, insofar as the kind of person or organization which enjoys the privilege.

2. Others, including non-traditional news gatherers

Federal courts within the Sixth Circuit have barred compelled disclosure of the identities of confidential sources of a nonprofit organization's newsletter, a freelance author, and a newspaper's advertising dept. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996); *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551 (E.D. Mich. 1979); *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

A non-party professor and research scientist at the University of Michigan enjoyed no protection from a subpoena issued by a corporate defendant in a personal injury suit where the subpoena sought the scientist's unpublished work product generated during a study of motor vehicle crashes. *Wright v. Jeep Corp*., 547 F. Supp. 871 (E.D. Mich. 1982).

B. Whose privilege is it?

The Sixth Circuit has found that Ohio shield law protection does not belong to the source of the information. *Ventura v. Cincinnati Enquirer*, 396 F.3d 784 (6th Cir. 2005).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

A subpoena must be served on a member of the news media within a reasonable time prior to the commanded appearance; otherwise, the court under whose authority the subpoena was issued may quash the subpoena. Fed. R. Civ. P. 45(3)(A)(i).

2. Deposit of security

No security deposit is required to procure testimony or materials pursuant to subpoena..

3. Filing of affidavit

The subpoenaing party need not make any sworn statement for a subpoena to issue.

4. Judicial approval

Neither a judge nor magistrate need to approve a subpoena before its issuance or service. A subpoena duces tecum may be issued by an attorney with no involvement by a court. Fed. R. Civ. P. 45(a)(3).

5. Service of police or other administrative subpoenas

Issuance of administrative subpoenas by federal agencies is governed by the federal regulations for that agency..

B. How to Quash

1. Contact other party first

When attempting to avoid compliance with a subpoena, it is good practice to converse with the attorney responsible for issuing it to see if you can negotiate a limitation on the subpoena or be relieved of having to comply with the subpoena altogether.

Where a subpoena commands a person to produce documents for inspection or copying, that person may object to it. The objection must be in writing, and delivered to the person or attorney designated in the subpoena as being responsible for issuing it. The objection must be made within 14 days after receiving the subpoena. However, if the subpoena gives fewer than 14 days for compliance, then at any time before the time set by the subpoena for compliance. Fed. R. Civ. P. 45(c)(2)(B).

If the objection is made in writing, delivered to the appropriate person, and delivered on time, then the person on whose behalf the subpoena was issued and served has no right to inspect or copy the subpoenaed documents without a court order. Failure to follow the rules for the written objections gives the person responsible for the subpoena the right to move to compel compliance and to seek to hold the person to whom the subpoena is directed in contempt of court. Fed. R. Civ. P. 45(c)(2)(B), (e).

The safest course is to deliver a written objection in accordance with the provisions of Rule 45 even if negotiations with the person responsible for the subpoena are going well. The written objection has the legal effect of suspending the duty to comply with the subpoena until a court decides the matter.

2. Filing an objection or a notice of intent

Where a subpoena commands a person to produce documents for inspection or copying, that person may object to it. The objection must be in writing, and delivered to the person or attorney designated in the subpoena as being responsible for serving it. The objection must be made within 14 days after receiving the subpoena. However, if the subpoena gives fewer than 14 days for compliance, then at any time before the time set by the subpoena for compliance. Fed. R. Civ. P. 45(c)(2)(B).

If the objection is made in writing, delivered to the appropriate person, and delivered on time, then the person on whose behalf the subpoena was issued and served has no right to inspect or copy the subpoenaed documents without a court order. The person responsible for issuing and serving the subpoena may file a motion with the court to compel compliance with the subpoena, or the person receiving the subpoena may move to quash or modify it.

3. File a motion to quash

a. Which court?

Every subpoena in federal court litigation identifies the name of the court under whose authority it was issued. Usually, that is the same federal court in which the litigation that spawned the subpoena is taking place, and where the trial in that litigation would be held. Where the subpoena commands compliance within the territorial district of the court where the litigation is underway, then a motion to quash should be filed with that court.

However, sometimes subpoenas command attendance for deposition at places outside the territorial district of the federal court in which the litigation is taking place. When that happens, the subpoena is supposed to identify a different federal court: the federal court in whose district the deposition is supposed to take place. Similarly, sometimes subpoenas command the production of document, and require the production to take place in a district other than the district in which the litigation is taking place. Again, the subpoena is supposed to identify the federal court in whose district the production of document is supposed to take place. Where the subpoena commands compliance within a federal district other than that in which the underlying litigation is underway, the motion to quash should be filed with the federal court whose district encompasses the location of the deposition or the commanded production of documents. See Fed.R.Civ. P. 45(a)(2), (3); Fed.R.Civ. P. 37(a)(1).

b. Motion to compel

Where a subpoena commands a person to produce documents for inspection or copying, the subpoenaed person may object to it. The objection must be in writing, and delivered to the person or attorney designated in the subpoena as being responsible for issuing it. The objection must be made within 14 days after receiving the subpoena. However, if the subpoena gives fewer than 14 days for compliance, then at any time before the time set by the subpoena for compliance. Fed. R. Civ. P. 45(c)(2)(B).

If the objection is made in writing, delivered to the appropriate person, and delivered on time, then the person on whose behalf the subpoena was issued and served has no right to inspect or copy the subpoenaed documents without a court order. The person responsible for issuing and serving the subpoena may file a motion with the court to compel compliance with the subpoena. Fed. R. Civ. P. 45(c)(2)(B).

The person served with a subpoena need not go through the objection/motion to compel procedure. That person can move to quash or to modify the subpoena. Fed. R. Civ. P. 45(c)(3)(A). Although the Federal Rules of Civil Procedure do not specify a time deadline for moving to quash or to modify a subpoena, a good practice would be

to file the motion within 14 days of receiving the subpoena, or if the deadline for compliance with the subpoena is fewer than 14 days, before the deadline.

In a reporters' privilege situation, do not wait for a motion to compel. The best practice is to deliver the written objection, and follow that with a motion to quash or modify [fitting at least one attempted negotiation in between].

c. Timing

The Federal Rules of Civil Procedure do not specify time deadlines for moving to quash or modify a subpoena. Virtually always, the motion should be filed before the date and time designated on the subpoena for compliance, and within 14 days of the compliance date if the subpoena gives the movant at least 14 days in which to comply.

d. Language

A motion to quash a subpoena issued under the authority of a federal court should show the name of the court to which the motion is directed, the name of the case, the case no. assigned to the case, and a title for the motion. For example:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Parson Brown, Plaintiff,

v.

Barn Door Co., Defendant.

Case No. CV 007 Motion of nonparty Paul Utzer to quash subpoena

The motion should state in a few sentences what the movant nonparty wants [to quash the subpoena], the Rule of Civil Procedure being invoked [usually Rule 45], when the subpoena was served, the deadline stated on the subpoena for compliance, that the movant nonparty is a journalist, and the essential reason for quashing the subpoena [First Amendment, reporter's privilege]. For example:

"Nonparty Paul Utzer, a journalist, hereby moves pursuant to Rule 45 of the Federal Rules of Civil Procedure to quash a subpoena served upon him on June 1, 2002, commanding compliance on July 1, 2002. The grounds for this motion are that the subpoena seeks movant to produce unpublished information gathered during the course of his duties as a journalist which, if produced, would disclose the name of a news source to whom movant has promised confidentiality. As explained more fully in the attached memorandum, which movant incorporates here, the First Amendment bars compelled disclosure of the confidential sources of the press."

The bottom of the motion should show the signature of the attorney for the movant, or if the movant is not represented by an attorney, the movant should sign the motion.

Typically, a motion would be accompanied by an attached memorandum that sets forth case law and argument that supports the ground for the motion.

e. Additional material

Attached to a motion to quash should be (1) a memorandum arguing the law and (2) a copy of the subpoena with its attachments. Attaching other materials is not recommended.

4. In camera review

a. Necessity

Federal law does not require federal courts to conduct an in camera inspection of subpoenaed materials claimed to be privileged. Where information subject to a subpoena is withheld because it is claimed to be privileged (such as the reporter's privilege), the reporter should assert the First Amendment reporter's privilege expressly in any written objection delivered to the litigant or attorney responsible for the subpoena and in any papers filed with the court. Depending on the nature of the contested materials, the reporter may be required to put together what is

called a "privilege log." The privilege log is supposed to describe the nature of the assertedly privileged information in such a way as to "enable the demanding party to contest the claim" of privilege. The privilege log's descriptions would be brief, but include facts that are relevant to the claim of privilege, such as whether confidentiality was promised, or whether the record was generated by the journalist pursuant to his newsgathering duties. See Fed.R.Civ. P. 45(d)(2).

Federal law does not preclude the subpoenaed person from asking for an in camera inspection of the contested materials by the court. If the court orders an in camera inspection, and the journalist does not desire one (for example, to protect the identity of a confidential source), the journalist should object.

b. Consequences of consent

If a journalist consents to an in camera review, the court requires disclosure, and the journalist appeals, there is no automatic stay of the court's ruling. The journalist would have to move the court to stay its ruling pending appeal, and if denied, would have to seek an order from the Sixth Circuit court of appeals staying the district court's ruling.

c. Consequences of refusing

If a reporter or publisher does not consent to in camera review the consequences are potential contempt of court with consequent punishment.

5. Briefing schedule

Typically the movant files a motion to quash the subpoena and the person issuing the subpoena has ten days to oppose the motion.

6. Amicus briefs

United States District Courts within the Sixth Circuit will sometimes accept amicus briefs. The Sixth Circuit itself usually accepts them. Amicus briefs submitted to District Courts opposing reporter' subpoenas are rare.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

To overcome a journalist's claim of First Amendment privilege, the subpoenaing party must produce "credible evidence," "compelling evidence," a "concrete demonstration" that the subpoenaed materials will be centrally relevant to an important legal issue in the case and that the information is not otherwise available from another source. *Southwell v. Southern Poverty Law Ctr.*, 949 F.Supp. 1303 (W.D. Mich. 1996).

B. Elements

At least where the subpoena occurs in a civil setting, the subpoenaing party would have to establish all of the following: (1) that the requested information is centrally relevant to an important legal issue in the underlying litigation, and (2) that the subpoenaing party has exhausted all other means of obtaining the information. Also, the court must consider the potential harm that may be caused to a source or to the First Amendment interest in news gathering generally if the court requires compliance with the subpoena. *Southwell v. Southern Poverty Law Ctr*, 949 F. Supp. 1303 (W.D. Mich. 1996).

In the context of commercial speech, where a newspaper sought to avoid disclosure of the identity of an advertiser who placed a "blind" ad, the Sixth Circuit ruled that a federal agency's failure to exhaust other means of investigation before subpoenaing the newspaper defeated the agency's attempt to overcome the newspaper's invocation of First Amendment protection from the subpoena. *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

In the context of a grand jury subpoenaing video outtakes that likely would identify a murder suspect, the Sixth Circuit emphasized in nonbinding dictum that no First Amendment protection from the subpoena exists. However, the court listed the elements other courts have prescribed for overcoming the First Amendment, and ruled that

the evidence showed that the government had satisfied those elements. The elements listed by the Sixth Circuit were "a clear and convincing showing that [the journalist] has information that is clearly relevant to a specific violation of criminal law, that the information is not available from alternative sources, and that the state has a compelling and overriding interest in obtaining the information." *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

More recently, Sixth Circuit district courts have applied a four part test derived from *In re Grand Jury Proceedings*. Where 1) the reporter is not being harassed, 2) the information is being sought in good faith, 3) the information has more than a remote or tenuous relationship with the case, and 4) there is a legitimate need for disclosure, the reporter can't block compelled disclosure of information. *Lentz v. City of Cleveland*, 410 F. Supp. 2d 673 (N.D. Ohio 2006); *Hade v. City of Fremont*, 233 F. Supp. 2d 884 (N.D. Ohio 2002).

A Sixth Circuit district court found that the reporters did not have to disclose information from, or names of, confidential sources because the information sought could be obtained from other sources, the request was overly broad and burdensome, and the information may duplicate sinformation gathered from other sources. *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

1. Relevance of material to case at bar

To overcome the First Amendment reporter's privilege, the subpoenaed information must go to "the heart" of the case, in other words, it must be centrally relevant to an important legal and factual issue. *Southwell v. Southern Poverty Law Ctr.*, 949 F.Supp. 1303 (W.D. Mich. 1996); *see In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

2. Material unavailable from other sources

To overcome the First Amend reporter's privilege, the subpoenaing party must demonstrate that it has tried other sources without success. *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998); *Southwell v. Southern Poverty Law Ctr.*, 949 F.Supp. 1303 (W.D. Mich. 1996); *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003); *see In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

The courts in the Sixth Circuit have not elaborated on this requirement. In *Midland Daily News*, the Sixth Circuit ruled that the NLRB could not enforce an administrative subpoena against a newspaper where the NLRB had not attempted any other form of investigation. In *Grand Jury Proceedings*, the Sixth Circuit ruled that a police informant's refusal to identify a murder suspect in court entitled a grand jury to subpoena a television journalists' outtakes through which police could pinpoint the suspect's likeness and identity.

a. How exhaustive must search be?

The federal courts have not elaborated on the extent to which a subpoenaing party must exhaust alternative from other sources. Where the NLRB initiated a civil investigation of a claim of unfair labor charge against a business by subpoenaing a newspaper's advertising dept. to see if the business was responsible for a "blind" newspaper ad, the Sixth Circuit ruled that the NLRB could not overcome the newspaper's First Amendment protection because the NLRB had not tried other investigative methods first. *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

Where a grand jury could have subpoenaed street gang members to identify the murderer of a police officer, but where a police informant refused to identify the murderer in court, the Sixth Circuit ruled that the First Amendment did not protect a television journalist who sought to avoid a grand jury subpoena of his outtakes. The outtakes allegedly showed the face of the accused murderer. *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

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

The federal courts in the Sixth Circuit have not stated what the subpoenaing party must do to demonstrate that it has already conducted an unsuccessful search for the subpoenaed information before subpoenaing the press.

c. Source is an eyewitness to a crime

The federal courts in the Sixth Circuit have not addressed a situation where a journalist or news organization witnesses the commission of a crime. However, the Sixth Circuit ruled that videotapes outtakes from which police could identify a murderer, whose identity a police informant refused to confirm through court testimony, were clearly relevant to a specific violation of law and not available from other sources. Hence, the court found no First Amendment protection for the television journalist who recorded the outtakes. *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

3. Balancing of interests

The elements required for overcoming First Amendment protection represent a judicial balancing of interests. Thus, the court considers the degree to which the subpoenaed information is relevant, the efforts made to obtain the information without disrupting the press, and the potential harm likely to result if the press must comply with the subpoena. *Southwell v. Southern Poverty Law Ctr.*, 949 F.Supp. 1303 (W.D. Mich. 1996).

Sixth Circuit district courts have also applied a four part test derived from *In re Grand Jury Proceedings*. Where 1) the reporter is not being harassed, 2) the information is being sought in good faith, 3) the information has more than a remote or tenuous relationship with the case, and 4) there is a legitimate need for disclosure, the reporter can't block compelled disclosure of information. *Lentz v. City of Cleveland*, 410 F. Supp. 2d 673 (N.D. Ohio 2006); *Hade v. City of Fremont*, 233 F. Supp. 2d 884 (N.D. Ohio 2002).

A Sixth Circuit district court found that the reporters did not have to disclose information from, or names of, confidential sources because the information sought could be obtained from other sources, the request was overly broad and burdensome, and the information may duplicate of information gathered from other sources. *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

4. Subpoena not overbroad or unduly burdensome

The court is required by the Fed. R. Civ. P. 45(c)(1) in civil proceedings to determine whether the party issuing a subpoena is imposing an undue burden or expense on the person or entity subject to the subpoena. Similarly, Fed. R. Crim. P. 17(c) allows the court in a criminal proceeding to quash a subpoena duces tecum that it determines to be unreasonable or oppressive.

Where information requested in a subpoena is unduly burdensome, disclosure of the information may be denied. *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

5. Threat to human life

The court is required to weigh the potential harm, such as ultimate death or bodily injury that might occur as a result of the disclosure of a source's identity. *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303 (1996).

6. Material is not cumulative

Where information requested in a subpoena may duplicate with other information gathered elsewhere, disclosure of the information may be denied. *In re Daimler Chrysler*, 216 F.R.D. 395 (E.D. Mich. 2003).

7. Civil/criminal rules of procedure

If a prompt motion is filed before the time specified in the subpoena for compliance, the court will quash or modify the subpoena if it finds the demands of the subpoena to be unreasonable or oppressive. Fed. R. Civ. P. 45(c)(1); Fed. R. Crim. P. 17(c).

8. Other elements

The federal courts in the Sixth Circuit have identified no additional elements related to First Amendment protection of the press from subpoenas.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There is no statutory or case law addressing this issue. In *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987), the Sixth Circuit suggested, but did not decide, that a journalist's interview of confidential sources in plain view in a public place might defeat the journalist's asserted need to maintain the confidentiality of the sources.

Failing to expressly assert First Amendment protection when formally objecting to a subpoena may be a waiver. *See* Fed. R. Civ. P. 45(d).

2. Elements of waiver

a. Disclosure of confidential source's name

There is no statutory or case law addressing this issue.

b. Disclosure of non-confidential source's name

There is no statutory or case law addressing this issue.

c. Partial disclosure of information

There is no statutory or case law addressing this issue.

d. Other elements

There is no statutory or case law addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law addressing the issue.

VII. What constitutes compliance?

Where a subpoena commands the production of documents, but does not command that an individual appear, *e.g.* for deposition, in person, then the individual need not appear so long as the documents are produced at the locale and time commanded by the subpoena. Fed. R. Civ. P. 45(c)(2)(A).

Where a subpoena commands an individual to appear at a specified place and time, the individual must appear at that place and time. Fed R. Civ. P. 45(a).

Documents may be produced in response to a subpoena as they are kept in the usual course of business, or organized and labeled to correspond with the categories listed in the subpoena. Fed. R. Civ. P. 45(d)(1).

When claiming that the content of subpoenaed records are privileged, the subpoenaed person must assert the privilege explicitly and describe the assertedly privileged content sufficiently to enable the party responsible for the subpoena to contest the claim of privilege. Fed. R. Civ. P. 45(d)(2).

A. Newspaper articles

Newspapers are self-authenticating. Fed. R. Evid. 902(6). Therefore, a journalist should not be required to testify in court as to whether a particular article actually appeared in a newspaper. If the court nevertheless requires authenticating testimony, an administrative person should be qualified to give the testimony.

B. Broadcast materials

Where the subpoenaing party seeks only confirmation that a videotape or audiotape accurately depicts a broadcast, any qualified administrative person should be able to substitute for a subpoenaed journalist; although substitution should be worked out in advance.

C. Testimony vs. affidavits

Where the accuracy of the substance of a publication is at issue, an affidavit attesting to its accuracy is not admissible as evidence. However, as a practical matter, the attorney issuing the subpoena often will accept an affidavit rather than engage in a protracted legal battle over an asserted First Amendment privilege or some other form of litigated resistance.

D. Non-compliance remedies

If a reporter fails to comply with a subpoena and has no adequate justification, it may be deemed a contempt of the court from which the subpoena was issued. Fed. R. Civ. P. 45(e). The advice of an attorney that a subpoena does not need to be obeyed is not a sufficient excuse for disobedience. The reporter may also be confined until he complies with the subpoena, or until the expiration of the grand jury, if he is involved in a grand jury proceeding. *See In re Grand Jury Proceedings*, 810 F.2d 580, 583 (6th Cir. 1987).

1. Civil contempt

a. Fines

The court derives its civil contempt statute from the Recalcitrant Witness statute codified in 28 U.S.C.S. § 1826(a) (2002). The statute provides that whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify, the court may order his confinement until he is willing to give his testimony, or provide such information.

b. Jail

Jail sentences are usually limited to such time that the reporter has complied with the subpoena, or in a grand jury proceeding until the expiration of the term of the grand jury. *See In re Grand Jury Proceedings*, 810 F.2d 580, 583 (6th Cir. 1987) (reporter confined until he agreed to release video outtakes.)

2. Criminal contempt

No federal courts in the Sixth Circuit have imposed criminal contempt upon journalists who refused to comply with subpoenas. In general, a defiant flouting of a court order in the presence of the court may lead to criminal contempt.

3. Other remedies

Federal courts in the Sixth Circuit have not recognized any remedies for refusal to comply with a subpoena other than contempt.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Fed. R. Civ. P. 74(a) provides that, within a certain time frame, a party may file an appeal of the magistrate judge's decision. 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice And Procedure* § 3074, 426 (2d ed. 1997). Generally, the reporter should file a notice of a appeal within 30 days of judgment from a magistrate judge's decision. *Id.* If, however, the United States or an officer or agency of the United States is a party, the notice of appeal may be filed within 60 days of the magistrate judge's entry of judgment. *Id.* Other parties may also file a notice of appeal within 14 days once a timely motion of is filed by any party. *Id.* It should be noted that the filing of four specific types of motions will stop the running of time limits for the filing of a notice of appeal under Rule 74(a). *Id.* at 427. These motions include a motion for judgment under Rule 50(b), a motion to amend or make additional findings of fact under Rules 52(b), a motion under Rule 59(e) to alter or amend judgment, and a motion for a new trial under Rule 59(a). *Id.* at 432.

Where a court orders a journalist to disclose the identity of a confidential source, the order should be appealed immediately, despite the general refusal of appellate discovery orders. That is because compliance with the order by disclosing the source's identity would have the effect of preventing an appellate court from protecting the asserted need for confidentiality. Alternatively, the subpoenaed reporter may risk disobeying the subpoena and then appeal the resulting contempt order. *Id.* If the reporter, however, is found guilty of criminal contempt for failing to comply with the subpoena, the contempt proceeding is then considered independent of the underlying action. *Id.* at 88. Therefore, the order punishing the contempt is a final judgment and is appealable. *Id.*

Alternatively, if the failure to obey the subpoena is treated as a civil contempt, the order that results is theoretically not appealable since it is part of an ongoing civil case and is not final. *Id.* One exception to these limitations is, for example, when a subpoena is issued in one district for discovery regarding a case pending in a different district. *Id.* The order of the district court that issued the subpoena to quash the subpoena is considered final and appealable. *Id.* at 89. If the motion to quash the subpoena is denied there is no exception granted.

2. Expedited appeals

There is no provision in federal law for expedited appellate review of the merits of a court order requiring a reporter to comply with a subpoena. The best way to get expedited relief is to seek a stay of the court's disclosure order pending resolution of the merits of an appeal.

B. Procedure

1. To whom is the appeal made?

When a subpoena is levied by a magistrate judge the reporter, within 10 days after being served with a copy of the magistrate judge's order, may file and serve objections to the order. Fed. R. Civ. P. 72(a). The district judge to whom the case is assigned will then consider the objections and respond to any portion of the magistrate judge's order that is clearly erroneous or contrary to the law. *Id.* An appeal from a judgment by a magistrate judge in a civil case is addressed in the same way as an appeal from any other district court judgment. Fed. R. App. P. 3. When parties consent to trial before a magistrate judge, appeal lies directly, and as a matter of right, to the court of appeals. *Id.*

Generally, in a civil case after the judgment or order is entered at the district court level a notice of appeal must be filed with the district clerk no more than 30 days later. Fed. R. Civ. P. 4(1)(A). At the time of filing in a criminal case, where the reporter is the defendant, the notice of appeal must be filed in the district court within 10 days after the entry of the judgment or order being appealed, or the filing of the government's notice of appeal. *Id.*

Pursuant to Fed. R. App. P. 3, at the time of filing a notice of appeal the appellant must furnish the clerk with enough copies of the notice to enable the clerk to serve notice to all parties required by the statute. An appellant's failure to make a timely notice of appeal does not affect the validity of the appeal, but is grounds for the circuit court to dismiss the appeal. Fed. R. App. P. 3.

2. Stays pending appeal

A stay may be sought even before a notice of appeal is filed. David G. Knibb, *Federal Court of Appeals Manual* § 18.2 (2d ed. 1990). The district court, however, does not lose jurisdiction to grant a stay after the appeal is taken. *Id.* If the district court fails to act within a reasonable time, the appellant may apply to the court of appeals for a stay pending appeal. *Id.*

The factors that govern the issuance of a stay pending are (i) whether the applicant has successfully shown that he will likely succeed on the merits; (ii)whether the applicant will be permanently injured (prejudiced) without the stay; (iii) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (iv) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987); *Michigan. Coalition of Radioactive Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

No case or statute addresses the precise issue of obtaining a stay in the context of a reporter's privilege issue.

3. Nature of appeal

Mandamus Action

A party seeking a writ of mandamus must file a petition with the circuit clerk along with proof of service on all parties to the proceeding in the trial court. Fed. R. App. P. 21. A copy of the petition must also be given to the trial court judge. *Id.* All parties to the proceeding in the trial court, other than the petitioner, now become respondents for all purposes. *Id.*

The petition must be titled "In re [name of petitioner]," and must also state the kind of relief sought along with the issues presented. *Id.* The facts necessary to understand the issue presented by the petition and the reasons why

the court should issue the writ should be included in the petition. *Id.* The petition must also include a copy of any order or opinion or parts of the record that my be essential to understanding the matters presented in the petition. *Id.*

Because an interlocutory appeal most likely would be available in a reporter's privilege situation, federal mandamus would most likely be unavailable. When unsure, do both: appeal and petition for mandamus.

Appeal By Right

In the Sixth Circuit, an appeal as of right is taken in accordance with the Federal Rules of Appellate Procedure. An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from another district court judgment. *Id.* An appeal as of right from a district court to the Sixth Circuit Court of Appeals may be taken only by filing a notice of appeal with the district court within. Fed. R. App. P. 3. A mandamus action alternatively requires that a petition be filed with the circuit court. Fed. R. App. P. 21. Failure on the part of the party seeking the appeal to file a timely notice of appeal does not affect the validity of the appeal, but is grounds for the circuit court to dismiss the appeal. *Id.*

The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record, except for the appellant's. At the time of filing the notice of appeal, the appellant must furnish the clerk with sufficient copies of the notice to enable the clerk to serve notice to all parties required by statute. *Id.* In the mandamus action the party petitioning the writ is responsible for furnishing the circuit clerk with proof of service of the petition on all parties to the proceeding in the trial court. Fed. R. App. P. 21.

When the defendant in a criminal case appeals, the district clerk must also serve a copy of the notice of appeal on the defendant. Fed. R. App. P. 3. The clerk is required to promptly send a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named on the notice. *Id.* Finally, upon filing a notice of appeal, the appellant must pay the district court all fees. *Id.*

4. Standard of review

Because the predominant issue in reporter's privilege situations will be pure issues of constitutional law, or issues of whether the subpoenaing party has adduced sufficient evidence to satisfy constitutional requirements, the Sixth Circuit is unlikely to defer at all to a district court's order that a journalist disclose a confidential source or other unpublished work product. The Sixth Circuit is likely to review such orders *de novo* (without deference). However, the Sixth Circuit has not explicitly addressed its standard for review in that context.

5. Addressing mootness questions

There is no statute or case law that addresses the mootness issue in the context of an assertion of reporter's privilege.

6. Relief

On appeal from a contempt order or a disclosure order, a reporter who has refused to comply with a subpoena should ask the Sixth Circuit to reverse and vacate the contempt judgment or disclosure order.

Whether the Sixth Circuit. would remand to the district court, rather than vacate the orders at issue, is not predictable.

IX. Other issues

A. Newsroom searches

There is no statutory or case law addressing this issue.

B. Separation orders

There is no statutory or case law addressing this issue.

C. Third-party subpoenas

There is no statutory or case law addressing this issue.

D. The source's rights and interests

There is no statutory or case law addressing a situation where the courts allowed sources to intervene anonymously to halt disclosure of their identities. Similarly, there is no reported federal case in the Sixth Circuit where a reporter's source sued the reporter for disclosing the source's identity.