REPORTER'S PRIVILEGE: 8TH 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

8TH CIR.

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I. Introduction: History & Background

The reporter's privilege has not been definitively established by the Eighth Circuit Court of Appeals. District courts with the Eighth Circuit are split. District courts in Minnesota and Missouri have adopted a qualified privilege in the civil context. However, the court in the Eastern District of Arkansas found no reporter's privilege existed in either the criminal or the grand jury context. The Eighth Circuit's decision in *Cervantes* has been recognized by treatises and cases as establishing a qualified privilege. *See Cervantes v. Time, Inc.*, 464 F.3d 986 (8th Cir. 1972). However, in a subsequent case arising from the Starr investigation in Arkansas, the Eighth Circuit Court of Appeals stated that the question of whether a reporter's privilege exists "is an open one in this circuit." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997).

II. Authority for and source of the right

The *Cervantes* case was decided shortly after the Supreme Court's decision in *Branzburg v. Hayes*, 407 U.S. 665 (1972). *Cervantes* interpreted *Branzburg* to rule out the privilege in the grand jury context, but leave it an open question in other contexts. *Cervantes* treated the *Branzburg* decision as an anti-privilege case. However, the more common modern interpretation is to read Powell's concurrence in *Branzburg* (which provided the crucial fifth vote and approved of a reporter's privilege in other contexts) to establish a qualified reporter's privilege. *Cervantes* fails to mention the concurring opinion or any pro-privilege interpretation of *Branzburg*, except to quote some pro-privilege language from the opinion.

III. Scope of protection

A. Generally

The Eighth Circuit has not explicitly recognized a reporter's privilege. Several district courts within the Eighth Circuit have examined the issue. Where applicable, these district court decisions are discussed and/or quoted below for their persuasive authority. They are controlling law only in the jurisdiction in which they were decided, however.

B. Absolute or qualified privilege

The District of Minnesota adopted a qualified privilege in *J.J.C. v. Fridell*, 165 F.R.D. 513 (D.Minn., 1995). The court applied a balancing test, as follows:

> the reporter's privilege is defeated only where the information sought is: 1) critical to the maintenance or the heart of the claim; 2) highly material and relevant; and 3) is unobtainable from other sources.

The Eastern District of Missouri and the Easter District of Arkansas have similarly adopted a qualified privilege, applying the same balancing test as the court in *Fridell*. *See Continental Cablevision, Inc. v. Storer Broad. Co.*, 583 F. Supp. 427 (E.D. Miss. 1984); *Richardson v. Sugg*, 220 F.R.D. 343 (E.D. Ark. 2004).

C. Type of case

1. Civil

The Eighth Circuit has not ruled on this issue, but lower courts in *Fridell*, *Continental Cablevision* and *Richardson* have recognized a qualified privilege in the civil context.

2. Criminal

No district court cases within the Eighth Circuit have recognized the privilege in this type of case and one has explicitly rejected it. *See United States v. Hivley*, 202 F. Supp. 2d 887 (E.D. Ark. 2002).

3. Grand jury

The Eastern District of Arkansas in *In re Grand Jury Subpoena ABC, Inc.*, 947 F. Supp. 1314 (1996), held that there is no reporter's privilege in the grand jury context, at least absent bad faith or an abuse of grand jury function. The court found the Supreme Court's decision in *Branzburg* controlling on the question, interpreting Justice Powell's concurring opinion narrowly.

D. Information and/or identity of source

While the Eighth Circuit has not ruled on this issue, the lower court in *Fridell* noted that "most federal courts have assumed the privilege protects a reporter's underlying work product as well as an informant's identity." 165 F.R.D. at 516.

The *Continental Cablevision* court held that "reporters enjoy a qualified privilege . . . to withhold from discovery in a civil case confidential or non-confidential *sources, materials, or other information* where such discovery would impinge on the ability of the media to gather and disseminate news." 583 F. Supp. at 435.

E. Confidential and/or non-confidential information

The Eighth Circuit has not ruled on this issue, but two lower courts have.

In *Continental Cablevision* the district court held that "the [F]irst [A]mendment qualified reporter's privilege is not limited to discovery which seeks the revelation of confidential sources. The [F]irst [A]mendment interest in preserving the vitality of the press is implicated any time civil litigants seek discovery or testimony from the media, regardless of whether confidential or non-confidential sources or material are sought." Nonetheless, "a lesser showing of need and materiality may be required in the situation where discovery of non-confidential material is sought than where the identity of confidential sources is sought." 538 F. Supp. at 434.

On the other hand, the district court in *Hively* found that "in the absence of any showing that this information is sought in bad faith or for purposes of harassment, this Court declines to recognize any constitutional privilege concerning the *nonconfidential* testimony sought by the defense." 202 F. Supp. 2d at 892. However, *Hively* was a criminal case.

F. Published and/or non-published material

The district court in *Continental Cablevision* held that material characterized as "unpublished information" is privileged, though a lesser showing of need and materiality may be required to overcome the privilege. (*See* <A:08:3E>Section 3.E.</A> above — the court arguably treated "unpublished" and "non-confidential" as synonymous).

G. Reporter's personal observations

There is no Eighth Circuit law specifically addressing this issue.

H. Media as a party

Continental Cablevision: "It is easier for a party seeking to overcome the privilege to do so . . . in a libel case where there is a media defendant . . . than in a civil case where the reporter is a non-party."

I. Defamation actions

The Eighth Circuit's decision in *Cervantes* involved a defamation action. The *Cervantes* court held that it was proper to grant summary judgment for the defendant in a defamation case even though the court had not resolved the plaintiff's motion to compel testimony from a reporter claiming privilege. The court said that lower courts should not be forced to breach reporter confidentiality before passing on the merits of the case in the context of summary judgment.

A later decision from the Western District of Arkansas, however, states that: "the newsman's privilege, . . whether based upon common law or the First Amendment, must give way, even as to confidential sources, in a libel case where such is necessary to establish actual malice or reckless disregard of the truth on a given Defendant's part." *Williams v. ABC Inc.*, 96 F.R.D. 658, 665 (W.D. Ark. 1983).

IV. Who is covered

A. Statutory and case law definitions

No Eighth circuit case law addresses these details.

1. Traditional news gatherers

No Eighth circuit case law addresses this issue.

2. Others, including non-traditional news gatherers

No Eighth circuit case law addresses this issue.

B. Whose privilege is it?

No Eighth circuit case law addresses this issue.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

No Eighth circuit opinion addresses procedures required for issuing and contesting subpoenas in a manner specific to the reporter's privilege. Litigants should follow the Federal Rules of Civil Procedure or the local rules of the relevant district court concerning these issues. Rule 45 of the Federal Rules addresses subpoenas. Many district courts within the Eighth Circuit follow this rule without modification or supplementation.

If a subpoena of the news media is being sought by a federal prosecutor, special rules apply. Most importantly, the subpoena must be specifically approved by the attorney general. *See* 28 C.F.R. 50.10 for the full text of the regulation.

Some district courts within the Eighth Circuit that have addressed the reporter's privilege discuss special procedures for issuing and contesting subpoenas in this context. Relevant portions are discussed below.

1. Service of subpoena, time

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

2. Deposit of security

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

3. Filing of affidavit

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

4. Judicial approval

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

5. Service of police or other administrative subpoenas

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

B. How to Quash

The local district court rules address the filing of motions. The links to the local rules are below:

Eastern District of Arkansas: *See* Local Rule 7.2 *at* http://www.are.uscourts.gov/rules/r7-2.html

Western District of Arkansas: *See* Local Rule 7.2 *at* http://www.are.uscourts.gov/rules/r7-2.html

Northern District of Iowa: *See* Local Rule 7.1 *at* http://www.iand.uscourts.gov/iand/Documents.nsf/2ed3c15f7aaed4ac8625669f006ebe9f/8d9eca58d19138c6862569c1007169f6?OpenDocument

Southern District of Iowa: *See* Local Rule 7.1 *at* http://www.iasd.uscourts.gov/iasd/CourtInfo.nsf/7f77af8ebdbeff2288256448005e75b0/77ae57ed006dfd03862569f3007bda2f/$FILE/LocalRules2001 (2-15-01).PDF

District of Minnesota: *See* Local Rule 7.1 *at* http://www.mnd.uscourts.gov/localrules.htm#civil_motion_practice

Eastern District of Missouri: *See* Local Rule 4.1 *at* http://www.moed.uscourts.gov/moed/Documents.nsf/3a55ca523f1ad3ef882563fb0080c38f/1d4ad85f6dd6c00f862566170056c62d?OpenDocument (follow the link to download the .pdf file containing the local rules)

Western District of Missouri: *See* Local Rule 7.1 *at* http://www.mow.uscourts.gov/General_Information/newrules/lr_7_1_.pdf

District of Nebraska: *See* Local Rule 7.1 *at* http://www.ned.uscourts.gov/local/forms/nlr01.pdf

District of North Dakota: *See* Local Rule 7.1 *at* http://www.ndd.uscourts.gov/Rules.htm#RULE 7.1

District of South Dakota: *See* Local Rule 7.2 *at* http://www.sdd.uscourts.gov/docs/rules01.pdf

To the extent that district courts in the Eighth Circuit have said addressed these issues as they relate to the reporter's privilege, they are discussed below.

1. Contact other party first

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

2. Filing an objection or a notice of intent

No Eighth circuit appellate case law addresses this issue in the context of the reporter's privilege.

The district court in *Continental Cablevision* held that "a reporter must, in addition to claiming the privilege in response to specific requests or questions, provide a court with particularized allegations or facts that support his/her claim of privilege." "Only if a reporter provides such information can a court determine whether the reporter is properly invoking the privilege and whether the balance should be struck in favor on non-disclosure."

The district court in *Hively* held, "Movants must provide the court with particularized allegations or facts to support a privilege claim." (The *Hively* court did not look favorably on the reporter's refusal to show up in court to claim the privilege.)

3. File a motion to quash

a. Which court?

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

b. Motion to compel

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

c. Timing

In *Continental Cablevision*, the district court held, "If [deposers] seek an order to compel [reporter invoking privilege] to respond, despite her claim of privilege, the party seeking said order shall so move within fifteen (15) days after the conclusion of said deposition. . . . [Reporter invoking privilege] shall have seven (7) days from the filing of said party's motion to compel to file a memorandum in opposition."

d. Language

The district court in *Continental Cablevision* held, "If Movant does claim the privilege . . . Movant shall state with particularity the manner in which the answer to the question is alleged to be privileged and the factual basis, to the extent possible without revealing the allegedly privileged information, for the claim of privilege."

e. Additional material

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

4. In camera review

In *Continental Cablevision*, the district court held that "if the court cannot strike the balance on the basis of the showing made by the reporter and the party seeking discovery, a court may conduct *in camera* review of the information sought to the extent necessary."

5. Briefing schedule

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

6. Amicus briefs

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

In *Continental Cablevision*, the district court held that "it is only after a reporter makes a minimal *prima facie* showing that responding to discovery or testimonial requests will impinge on first amendment interests that the burden shifts to the party seeking discovery to demonstrate the efforts made to obtain the information elsewhere and the extent to which the information is relevant."

B. Elements

The Eighth Circuit has not ruled on the test, but the district courts in *Fridell*, *Continental Cablevision* and *Richardson* adopted versions of the common three-part balancing test:

> the reporter's privilege is defeated only where the information sought is: 1) critical to the maintenance or the heart of the claim; 2) highly material and relevant; and 3) is unobtainable from other sources.

1. Relevance of material to case at bar

Under the *Fridell* balancing test set forth above, the material sought must be "critical," "highly material and relevant." The *Continental Cablevision* formulation of the test (adopted from a 1980 Third Circuit case) requires "that the information sought is *crucial* to the claim."

In *Fridell*, the court held that the Plaintiff who was seeking to discover a reporter's notes had not "clearly and specifically demonstrated the materiality of the reporter's notes" to her case. It also held that the notes, which Plaintiff asserted were relevant her claim of retaliatory discharge, were not critical to that claim because it was "but one of several other derivative issues predicated on the sexual harassment claim." The court construed the sexual harassment claim as the "heart" of the case.

The court in *Grand Jury Subpoena ABC* found that unaired material from a television interview would be discoverable because of the "reasonable probability" that it may contain relevant statements. The court explicitly limited this inquiry to the context of a grand jury investigation, where "'some exploration or fishing necessarily is inherent and entitled to exist.'"

2. Material unavailable from other sources

a. How exhaustive must search be?

The *Fridell* court found that when the Plaintiff "merely submits that interviews and depositions, such as the depositions of the two reporters [involved], failed to reveal the source for the articles," the Plaintiff failed to "demonstrate an exhaustion of all reasonable alternative means for obtaining the information."

After rejecting the existence of a reporter's privilege in the grand jury context, the district court in *Grand Jury Subpoena ABC* analyzed the case under the three-prong test for the sake of argument. In that case, Independent Counsel Ken Starr was seeking to discover unaired portions of a television interview with Susan McDougal. Under the test, the court would have found that the tape was discoverable, in part because "there is no other source for the information that is contained on the videotape and transcript" of that interview. While the court acknowl-

edged that "other media interviews [with McDougal] . . . are available, ... [s]uch interviews do not . . . shed any light on the specific information that may be contained on the non-broadcast videotape and transcript" of the interview sought.

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

The district court in *Fridell* held that more than a "plain assertion" is required.

But the district court in *Grand Jury Subpoena ABC* held that the mere assertion of a "reasonable probability" that unaired portions of a television interview may contain relevant evidence, and that this videotape and transcript were the only evidence of that interview, would have been enough to overcome the (hypothetical) privilege.

c. Source is an eyewitness to a crime

No Eighth Circuit case law addresses this issue.

3. Balancing of interests

In districts where the three-prong balancing test has been adopted, the obligation of citizens to provide testimony is balanced against First Amendment interests in the freedom of the press and the free flow of information. This balancing test is based on Justice Powell's concurrence in *Branzburg*.

In a civil case, where the privilege is recognized and a prima facie case of privilege has been established, the balance favors shielding confidential information from discovery. Where the information is non-confidential, "a lesser showing of need and materiality may be required" to overcome the privilege.

The district court in *Hively*, a criminal case, held that the defendant's "Sixth Amendment right to present a defense must be factored in to the analysis."

The district court in *Grand Jury Subpoena ABC* held that the balancing test should tilt towards allowing discovery in the grand jury context, because the grand jury "'is an investigative body charged with the responsibility of determining whether or not a crime has been committed,' and it 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'"

4. Subpoena not overbroad or unduly burdensome

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

5. Threat to human life

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

6. Material is not cumulative

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

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

No Eighth circuit case law addresses other elements in the context of the reporter's privilege.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Fridell suggests that the privilege is waivable, but finds no waiver under the facts of the case.

2. Elements of waiver

a. Disclosure of confidential source's name

Fridell: Where "the newspaper did not disclose the identity of the informant to a third party, as such, the newspaper did not waive the reporter's privilege and is not compelled to produce reporter's notes."

b. Disclosure of non-confidential source's name

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

c. Partial disclosure of information

Fridell: "Voluntary disclosure of information covered by a privilege could constitute, but does not mandate, a waiver of the privilege." "Mentioning who is not an informant is not the same as indicating who *is* the informant."

d. Other elements

No Eighth circuit case law addresses other elements in the context of the reporter's privilege.

3. Agreement to partially testify act as waiver?

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

VII. What constitutes compliance?

A. Newspaper articles

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

B. Broadcast materials

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

C. Testimony vs. affidavits

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

D. Non-compliance remedies

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

1. Civil contempt

In *United States v. Hively*, the court ordered the reporter to appear before the court to testify, and warned that "the Court is prepared to exercise its inherent contempt powers if [the reporter] declines to testify in spite of being directed to do so by this Court."

a. Fines

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

b. Jail

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

2. Criminal contempt

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

3. Other remedies

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

VIII. Appealing

A. Timing

Because the Eighth Circuit has never squarely dealt with these issues in the context of a claim of reporter's privilege, the following information is general in nature.

1. Interlocutory appeals

Interlocutory appeals in the federal courts are governed by statute. *See* 28 U.S.C. 1292(b).

2. Expedited appeals

The Eighth Circuit has adopted a plan to expedite appeals in criminal cases. The text of this plan can be found at the following link:

http://www.ca8.uscourts.gov/newcoa/coaFrame.html.

B. Procedure

1. To whom is the appeal made?

Appeals from district court rulings are made to the Eighth Circuit Court of Appeals.

2. Stays pending appeal

Federal Rule of Appellate Procedure 8 is followed in the Eighth Circuit. *Visit* http://pacer.ca6.uscourts.gov/rules/rules08.htm.

3. Nature of appeal

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

4. Standard of review

The applicable standard of review is abuse of discretion.

5. Addressing mootness questions

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

6. Relief

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

IX. Other issues

A. Newsroom searches

The Eighth Circuit overturned a decision for the news media over the execution of a search warrant, finding that the district court had to examine the exceptions more closely. *Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir. 1996).

B. Separation orders

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

C. Third-party subpoenas

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.

D. The source's rights and interests

No Eighth circuit case law addresses this issue in the context of the reporter's privilege.