REPORTER'S PRIVILEGE: 11TH 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

11TH CIR.

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I. Introduction: History & Background

In 1980, Congress created the Eleventh Circuit Court of Appeals from the Fifth Circuit Court of Appeals. The newly created Eleventh Circuit included Alabama, Florida, and Georgia, each consisting of three district courts. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Court held that Fifth Circuit decisions up to September 1981 would be binding in the Eleventh Circuit. Neither the Fifth nor the Eleventh Circuit, however, have produced a great deal of caselaw discussing the reporter's privilege. As there are few decisions on the subject, many aspects of this area of law are still unclear and undefined.

When a reporter gathers or receives information and/or documents during the course of professional newsgathering, the reporter's privilege may protect against compelled disclosure of such information. Where confidential sources and/or information are involved, the reporter's privilege further recognizes the proposition that the public's interest in the confidentiality between a journalist and his or her news sources often outweighs the private interest in compelled disclosure. *See Loadholtz v. Fields*, 389 F. Supp. 1299, 1301-02 (M.D. Fla. 1975). Even in the absence of confidentiality, the privilege is recognized. *See United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982), *aff'd* 730 F. 2d 1425 (11th Cir. 1984).

II. Authority for and source of the right

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the United States Supreme Court held that it is not a violation of the First Amendment to require newsmen appear and testify before state or federal grand jury proceedings to answer questions relating to criminal investigations. Justice Powell, however, limited the scope of this holding in his concurrence. He stated that newsmen are not without their constitutional rights, and in essence recognized what is commonly referred to as a "qualified privilege." This qualified privilege requires a balancing of interests between the right to compelled disclosure and the right to properly gather news through confidential information.

Following the Supreme Court's decision in *Branzburg*, the 11th Circuit adopted the principle of a qualified reporters' privilege to protect the information gathered by reporters during the course of newsgathering. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *see also United States v. Caporale*, 806 F.2d 1487, 1504 (11th Circuit 1986). In *Miller v. Transamerican Press, Inc.*, the Court held that a reporter has a First Amendment privilege not to reveal the identity of confidential informants, but limited this holding by stating that the privilege is not absolute. *See Miller* at 725. Among the decisions on which the Court based its decision was *Branzburg v. Hayes*, *supra*.

In *United States v. Caporale*, 806 F.2d at 1504, citing *Miller*, *supra*, the Eleventh Circuit referred to the three part test that must be satisfied before a reporter will be compelled to reveal information. The governing standard is that such information may only be compelled if the party requesting the information can show: (1) that the information is highly relevant, (2) that it is necessary to the proper presentation of the case, and (3) that it is unavailable from other sources. *See also Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005); *see also United States v. Blanton*, 534 F. Supp. 295, 296 (S.D. Fla. 1982), *aff'd* 730 F.2d 1425 (11th Cir. 1984).

A. Shield law statute

Florida has a shield statute, which appears at §90.5015, Florida Statutes. Alabama has a shield statute, which appears at Ala. §12-21-142. Georgia has a shield statute, O.C.G.A. §24-9-30.

III. Scope of protection

A. Generally

Eleventh Circuit courts generally allow for a qualified reporter's privilege, applicable to both confidential and non-confidential information, both published and non-published, which is gathered in the course of newsgathering. The decisions have been generally limited to mainstream newspaper reporters, thus, the extent of the privi-

lege, and whom it protects, has not been fully developed.*See, e.g., Price v. Time, Inc., supra,* at 1343, which held Alabama's shield statute did not extend to magazine reporters.

B. Absolute or qualified privilege

Following the Supreme Court's decision in *Branzburg v. Hayes*, the courts in this Circuit have recognized only the qualified privilege. The standard governing the exercise of the reporter's privilege is based on a balancing test, such that information may only be compelled from a reporter only if the party requesting the information shows that it is highly relevant, necessary to the presentation of the case and unavailable from other sources. *See Caporale* at 1504, *citing Miller* at 726.

C. Type of case

District courts within the Eleventh Circuit have recognized that the reporters' privilege will apply in both civil and criminal proceedings. *See Pinkard v. Johnson,* 118 F.R.D. 517, 520-21 (M.D. Ala. 1987).

1. Civil

In *Loadholtz v. Fields,* 389 F. Supp. 1299 (M.D. Fla. 1975), the court dealt specifically with the implications of a reporter's privilege in civil cases. The plaintiff filed a motion to compel discovery after a reporter refused to turn over documents relating to a published article. This motion was denied for failure to show that the information sought could not be retrieved from any other sources. *See Id.*

In *Pinkard v. Johnson*, 118 F.R.D. 517, 520-21 (M.D. Ala. 1987), the court differentiated between the treatment of criminal cases and the treatment of civil cases. That court opined that in civil cases, the interest in non-disclosure is often weightier than the interest in compelled disclosure. *See Id.* (In *Kidwell v. McCutcheon,* 962 F. Supp. 1477 (S.D. Fla. 1996), however, the interest in disclosure in that criminal case was outweighed by the interest in non-disclosure.)

2. Criminal

In criminal cases, the First Amendment requires that a reporter be immune from a subpoena regarding his or her work product, unless the party seeking the information "makes a showing of sufficient interest and need to overcome the reporter's constitutional privilege, and then only under appropriate safeguards to prevent abuse by those having court processes available to them." *See Kidwell v. McCutcheon,* 962 F. Supp. 1477 (S.D. Fla. 1996). Furthermore, the information will not be compelled unless there is a showing that the information is relevant, necessary, and unavailable from other sources. *See Id.*; *see also United States v. Blanton,* 534 F. Supp. 295, 297, *aff'd* 730 F.2d 1425 (11th Cir. 1984).

3. Grand jury

In *Miller v. Transamerican Press, Inc.*, the court refers to the *Branzburg* decision, and points to the fact that the decision was based on whether reporters could be compelled to testify in grand jury proceedings. While the *Miller* court did not disagree that the reporter's privilege could apply in grand jury proceedings, it did, however, determine that in libel cases there is a stronger interest in protecting confidentiality of journalist's sources as opposed to the need for protection in grand jury proceedings.

D. Information and/or identity of source

In the Eleventh Circuit, there does not appear to be a difference between the information being protected or the identity of the source who provided the information. Both are protected under the qualified reporters' privilege. For instance, in *Loadholtz v. Fields*, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975), the court stated that "compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants." The defendant attempted to argue that since there was not a confidential source involved in the case, no confidential relationships would be harmed. The court disagreed and explained that the adverse "chilling effect" on the flow of information would be equally harmful even without the presence of a confidential source. *Id.*

E. Confidential and/or non-confidential information

In *Kidwell v. McCutcheon*, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996), the court addressed the question of whether the qualified privilege extended to non-confidential information obtained by journalists. The court specifically stated that "even when no confidential source is involved, the government is not entitled to subpoena a reporter to testify regarding the product of a newsgathering activity" unless the three-part balancing test is satisfied. The court continued by explaining that whether or not confidential information is involved "is irrelevant to the chilling effect" that "enforcement of a subpoena would have on information obtained by a journalist in his professional capacity." *Id. Citing United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982) (emphasizing that there is no difference between confidential and non-confidential sources, in a case where a reporter was subpoenaed to reveal information gathered in his professional newsgathering capacity).

F. Published and/or non-published material

Although the Eleventh Circuit court has not specifically addressed this issue, the Middle District of Florida held that reporters maintain a privilege, which keeps them from turning over both unpublished materials and published documents, developed and/or received in the course of newsgathering. *See Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975).

G. Reporter's personal observations

In *Kidwell v. McCutcheon*, the court was presented with the question of whether the qualified reporter's privilege extended to non-confidential, eyewitness observations obtained by journalists in newsgathering activities. The court concluded that when information is obtained either from a confidential source or based on non-confidential, second-hand information, the balancing test must still be fulfilled. The information must be highly relevant, necessary, and unavailable from other sources. *See Kidwell*, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996).

In *Pinkard v. Johnson*, the court stated specifically that federal courts have compelled reporters to testify, like other members of the public, when questioned about incidents he or she may have witnessed. 118 F.R.D. 517, 521 (M.D. Ala. 1987), *citing Miller v. Mechlenburg County*, 602 F. Supp. 675 (W.D.N.C. 1985). The court reasoned that there is no intrusion into newsgathering or into the special functions of the press when one is a witness to a crime. *See Id*.

H. Media as a party

In *Price v. Time, Inc., supra*, the Eleventh Circuit applied the First Amendment qualified privilege in a libel suit against *Sports Illustrated* and its reporter, who were attempting to shield a confidential source. The defendants in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980) were a media outlet and the outlet's editor and publisher.

I. Defamation actions

In *Price v. Time, Inc.*, supra, the Eleventh Circuit applied the First Amendment qualified privilege in a libel suit against Sports Illustrated and its reporter, who were attempting to shield a confidential source. In *Miller v. Transamerican Press, Inc*., 621 F.2d 721 (5th Cir. 1980), the court held that a plaintiff in a libel suit could compel discovery of the identity of a journalist's confidential source. In this libel case, the plaintiff discovered that the contents of an article were the result of a confidential source's information, and as a result, he filed three motions to compel disclosure of the source's identity. Each was subsequently denied by the district court. The plaintiff then filed an affidavit swearing that the allegations in the article were false.

Following an in camera inspection of the documents used in preparation for the article, the court ordered the defendants to produce summaries of the non-privileged portions used. Then, after the plaintiff's fourth motion for disclosure of the identity of the confidential source, the district court agreed that disclosure went to the "heart of the matter." *See Id*. at 723. The defendants appealed and argued that as reporters, they retained a First Amendment privilege against disclosure.

The court disagreed, however, and stated that while "a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants…the privilege is not absolute and in a libel case as is here presented, the privilege must yield." *See Id*. at 725.

IV. Who is covered

The Eleventh Circuit has not clearly defined relevant terms such as "editor" and "news" for the purposes of the reporter's privilege, but it did extensively discuss the meaning of the word "newspaper" in discussing Alabama's shield statute in *Price v. Time, Inc.*

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The federal decisions discussing the privilege use the terms reporter and journalist almost interchangeably, but do not define what a reporter is or what his or her job entails. *See United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986) (Stating that reporters are individuals who write articles); *see also Miller v. Transamerican Press, Inc.*, 628 F.2d 932 (5th Cir. 1980) (Using the terms journalist and reporter interchangeably throughout the decision); *see also United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) (Discussing a subpoena that requested information gathered, developed, or received by a reporter in his professional newsgathering capacity).

b. Editor

No reported decisions.

c. News

No reported decisions.

d. Photo journalist

No reported decisions.

e. News organization / medium

No reported decisions.

2. Others, including non-traditional news gatherers

No reported decisions.

B. Whose privilege is it?

There are no decisions that address the issue of whether the privilege applies solely to reporters, to reporters' sources, and/or to reporters' employers.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

According to Rule 45 of the Federal Rules of Civil Procedure and by the standards set forth in Rule 17 of the Federal Rules of Criminal Procedure, a subpoena must state the name of the court from which it was issued, the title of the action, the name of the court in which the action is pending, and command the persons named to attend and give testimony. *See* F. R. Civ. P. 45; F. R. Crim. P. 17. In both civil and criminal cases, one may be required to produce documents or other tangible things in his or her custody or to permit inspection of premises. In criminal cases, if a motion is promptly made, then the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. *See* F. R. Civ. P. 45(a)(1); F. R. Crim. P. 17(a), (c).

Subpoenas are issued by the court clerks. *See*, F. R. Civ. P. 45(2); F. R. Crim. P. 17(a). According to Moore's Federal Practice, the "local rules should be reviewed to determine if they impose any time limits within which a subpoena must be served. Some local rules, for example, require that subpoenas be served at least a certain

amount of time before the compliance date." 9 Moore's Federal Practice § 45.03[4][b][iv] (Matthew Bender 3d ed. 1997).

2. Deposit of security

While some district courts in other circuits have required subpoenaing parties to prepay all costs required to comply with the subpoena, there are no reported cases in the Eleventh Circuit that support the proposition that a security deposit must be made.

3. Filing of affidavit

While there are no reported decisions, the Federal Rules of Civil Procedure, Rule 45, clearly states that:

When information subject to a subpoena is withheld on a claim that it is privileged…the claim shall be made expressly and *shall be supported* by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

See F. R. Civ. P. 45(d)(2)

4. Judicial approval

No reported decisions.

5. Service of police or other administrative subpoenas

No reported decisions.

B. How to Quash

1. Contact other party first

While there is not a specific requirement which mandates that the other party be contacted prior to moving to quash, in the interest of efficiency it is recommended that the subpoenaing party be contacted first. This is more beneficial to the client because the matter may be resolved informally, without involving a great deal of the court's time.

Furthermore, the Local Rules of Procedure of some federal district courts within the Eleventh Circuit require parties to confer in a good faith attempt to resolve discovery issues prior to the filing of a discovery motion.

2. Filing an objection or a notice of intent

The law is unclear as to whether a notice of intent must be filed before the motion to quash. For instance, in *Loadholtz v. Fields*, a reporter was served with a subpoena to testify and to produce documents concerning a published article. He was served on October 14, 1974 and appeared at his deposition on October 23, 1974 with an "Objection to Production of Documents Pursuant to Subpoena Duces Tecum." *See* 389 F. Supp. 1299 (M.D. Fla. 1975). At the deposition, the reporter refused to either testify or produce documents. A motion to compel was then filed by the plaintiffs and opposed by memorandum from the reporter's attorneys.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the same court as would be the case for any witness.

b. Motion to compel

As a practical matter, the media party should not wait for the subpoenaing party to file a motion to compel before filing a motion to quash.

c. Timing

According to Moore's Federal Practice, "a motion to quash a subpoena is 'timely' if made at any time before the date specified in the subpoena for compliance." *See* 9 Moore's Federal Practice § 45.04[3][a] (Matthew Bender 3d ed. 1997).

d. Language

Local practice, more than anything else, dictates the form and language for a motion to quash.

e. Additional material

If an individual is subject to a subpoena to produce documents or to have documents inspected and copied, that person may serve an objection on the requesting party within 14 days of the date that the subpoena was served. *See* Fed. R. Civ. P. 45(c)(2)(B). If a timely objection is made, the party requesting the information through the subpoena will not be allowed to inspect unless there is a court order allowing such inspection. *See Id*.

4. In camera review

a. Necessity

Generally, an in camera review is not necessary or conducted. In *Miller v. Transamerica Press, Inc*., 628 F.2d 721 (5th Cir. 1980), however, the court ordered an in camera inspection of the documents at issue.

b. Consequences of consent

No reported decisions.

c. Consequences of refusing

No reported decisions.

5. Briefing schedule

No reported decisions.

6. Amicus briefs

No reported decisions.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The Eleventh Circuit has held that it is the burden of the party seeking to discover the information to establish that the information is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources. *Price*, *supra*, 416 F.3d at 1343; *United States v. Caporale*, *supra*, 806 F.2d at 1504; *Miller v. Tranamerican Press, Inc.*, *supra*, 621 F.2d at 726; *United States v. Blanton*, 534 F. Supp. 295, 296 (S.D. Fla. 1982), *aff'd*, 730 F.2d 1425 (11th Cir. 1984).

One decision from the Northern District of Florida provides that the party seeking to discover the information must establish each of the three elements of the balancing test by "clear and convincing evidence." *See McCarty v. Bankers Ins. Co*., 195 F.R.D. 39 (N.D. Fla. 1998).

B. Elements

In *United States v. Caporale*, the court applied a three-part test to determine when information could be compelled from a journalist who claimed that his information was protected under the reporter's privilege. The court described the standards, and stated that that information could only be compelled from a journalist if the party requesting the information showed (1) that the information was highly relevant, (2) that the information was necessary to the proper presentation of the case, and (3) that it was unavailable from other sources. *See Price*, 416 F.3d at 1343; *see also United States v. Blanton*, 534 F. Supp. 295, 296 (S.D. Fla. 1982). The First Amendment requires that this determination be made on a case by case basis. *See Kidwell*, 962 F. Supp. At 1481.

1. Relevance of material to case at bar

The Eleventh Circuit has stated that information may only be compelled if it is "highly relevant" to the case at hand. *See Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

2. Material unavailable from other sources

a. How exhaustive must search be?

The third prong of the reporter's privilege balancing test states that the information must be unavailable from other sources before a reporter will be compelled to reveal any information. *See Caporale* at 1504. It is unclear how hard the subpoenaing party must try. In *Delta Airlines v. Reed*, 191 B.R. 476 (S.D. Fla. 1995) the appellant, Delta, argued that as long as "reasonable efforts to exhaust alternative sources" were made, then this element of the balancing test would be satisfied. *Id*. at 479. The reporter argued, however, that such efforts were insufficient because two other witnesses could have been deposed in the case. The court agreed with the reporter. *Id*. at 480.

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

No reported decisions.

c. Source is an eyewitness to a crime

In *Kidwell v. McCutcheon*, the court was presented with the question of whether the qualified reporter's privilege extended to non-confidential, eyewitness observations obtained by journalists in newsgathering activities. That reporter did not witness the crime, but did obtain and report what amounted to a "jailhouse confession" by the defendant in a criminal case. The court concluded that in such a situation, the qualified privilege still applies. *Kidwell*, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996).

In *Pinkard v. Johnson*, however, the court stated specifically that federal courts have compelled reporters to testify, like other members of the public, when questioned about incidents he or she may have witnessed. 118 F.R.D. 517, 521 (M.D. Ala. 1987), *citing Miller v. Mechlenberg County*, 602 F. Supp. 675 (W.D.N.C. 1985). The court reasoned that there is no intrusion into newsgathering or into the special functions of the press when one is such a witness. *See Id*.

3. Balancing of interests

Each of the decisions recognizes the need for a balancing of interests. For instance, in *Hatch v. Marsh*, the court stated that it must "weigh the first amendment of interest of the press—the independence in selection and choice of material for publication—against the 'interest served by the liberal discovery provisions embodied in the Federal Rules of Civil Procedure." 134 F.R.D. 300, 302 (M.D. Fla. 1990) *citing Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975).

4. Subpoena not overbroad or unduly burdensome

According to Moore's Federal Practice, it is within the court's discretion to modify an overly broad subpoena that might cause undue burden to a witness. *See* 9 Moore's Federal Practice § 45.04[3][b][iv] (Matthew Bender 3d ed. 1997). For instance, in *In re Duque*, 134 B.R. 679, 683 (S.D. Fla. 1991), the court implemented a balancing test between the interests served in complying with the subpoena and those served by quashing it.

5. Threat to human life

No reported decisions.

6. Material is not cumulative

No reported decisions.

7. Civil/criminal rules of procedure

No reported decisions.

8. Other elements

No reported decisions.

C. Waiver or limits to testimony

The Eleventh Circuit decisions have not addressed the issue of whether or not the reporter's privilege may be waived, but one district court decision suggests that waiver is possible.

1. Is the privilege waivable at all?

In *Pinkard v. Johnson*, the court found that a reporter waived his qualified reporter's privilege after he voluntarily agreed to a taped interview concerning a conversation with the defendant in the case. After the taped interview, the reporter was subpoenaed for a deposition. The reporter refused and asserted his First Amendment reporter's privilege. The court stated, however, that "a reporter is not free to give a sworn statement to a litigant, and later invoke the qualified privilege to keep this information from the court." *Pinkard v. Johnson*, 118 F.R.D. 517, 523 (M.D. Ala. 1987). The reporter was then ordered to comply with the plaintiff's subpoena.

2. Elements of waiver

a. Disclosure of confidential source's name

No reported decisions.

b. Disclosure of non-confidential source's name

No reported decisions.

c. Partial disclosure of information

There are no "partial disclosure of information" decisions other than the decision of the Middle District of Alabama in *Pinkard v. Johnson, supra*.

3. Agreement to partially testify act as waiver?

No reported decisions.

VII. What constitutes compliance?

No reported decisions.

A. Newspaper articles

No reported decisions.

B. Broadcast materials

No reported decisions.

C. Testimony vs. affidavits

No reported decisions.

D. Non-compliance remedies

1. Civil contempt

Under Rule 45(e) of the Federal Rules of Civil Procedure, if the subpoenaed party fails to obey a subpoena without an excuse, he or she will be found in contempt of court. *See* F. R. Civ. P. 45(e).

a. Fines

No reported decisions.

b. Jail

No reported decisions.

2. Criminal contempt

Under Rule 17(g) of the Federal Rules of Criminal Procedure, if an individual fails to obey a subpoena he will likewise be held in contempt of court "for the district in which it was issued if it was issued by a United States magistrate judge.

In *Kidwell v. McCutcheon*, 962 F. Supp. 1477 (S.D. Fla. 1996), a newsreporter filed petition for writ of habeas corpus after he was held in contempt of court, sentenced to seventy days in jail, and fined $500 by a state court judge. The petition was granted based on federal constitutional grounds.

3. Other remedies

No reported decisions.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Price was an interlocutory appeal from an order compelling a magazine and its reporter to identify a confidential source.

2. Expedited appeals

No reported decisions.

B. Procedure

1. To whom is the appeal made?

Price does not say, but it was an appeal from the district court to the court of appeals, as would be the case generally.

2. Stays pending appeal

The district court in *Price* stayed its decision pending appeal. It also initially stayed its decision pending a decision on a certified question to the Alabama Supreme Court, but that court declined to answer the certified question.

3. Nature of appeal

No reported decisions.

4. Standard of review

While there are no reporter's privilege cases that specifically state the standard of review, it has been accepted that the standard for granting or denying a motion to quash an order is an abuse of discretion standard. *See* 9 Moore's Federal Practice § 45.04[8][b] (Matthew Bender 3d ed. 1997). According to Moore's Federal Practice, an "abuse of discretion is found if the district court's decision rests upon a clearly erroneous finding of fact, upon an errant conclusion or law, or upon improper application of law to the facts. 9 Moore's Federal Practice § 206.05[1] (Matthew Bender 3d ed. 1997). On the other hand, the *Price* Court noted that the determination of the applicability of Alabama's shield statute was reviewed on a *de novo* standard, 416 F.3d at 1334, and although the Court did not state what the standard of review was on the merits of the application of the qualified privilege test, it would appear it conducted its own independent analysis, and did not defer to the district court on factual findings.

5. Addressing mootness questions

No reported decisions.

6. Relief

In *Kidwell v. McCutcheon*, the reporter was held in criminal contempt of court, fined, and sentenced to seventy days in jail by the state court judge. 962 F. Supp. 1477 (S.D. Fla. 1996). The federal district judge ordered him

released. Due to the uncertainty of the state law, and the requirement that federal cases be determined on a case by case basis, the court concluded that the reporter did not have to complete his sentence. *See Id*. at 1481.

IX. Other issues

A. Newsroom searches

No reported decisions.

B. Separation orders

No reported decisions.

C. Third-party subpoenas

No reported decisions.

D. The source's rights and interests

No reported decisions.