REPORTER'S PRIVILEGE: ALABAMA

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

ALABAMA

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I. Introduction: History & Background

In Alabama, a reporter has an absolute privilege to refrain from disclosing sources of information obtained in the newsgathering process under Alabama's shield statute, codified at Ala. Code § 12-21-142, provided that the information obtained from the source has been published, broadcast, or televised. Alabama also recognizes a qualified reporter's privilege under the First Amendment to the United States Constitution. Although the case law addressing the shield statute and the qualified privilege under the First Amendment is not extensive, Alabama courts have demonstrated a willingness to uphold the privilege.

II. Authority for and source of the right

A. Shield law statute

Originally enacted in 1935, Alabama's shield statute provides an absolute privilege to persons engaged in a newsgathering capacity on behalf of a newspaper, radio station, or a television station. The shield statute prohibits those persons from being compelled to disclose "sources" of information provided that the information was obtained or procured by the reporter and published in a newspaper, broadcast on a broadcasting station, or televised by a television station. Specifically, the statute provides as follows:

> No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity, shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the legislature or elsewhere the sources of any information procured or obtained by him and published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.

Ala. Code § 12-21-142. As originally enacted, the privilege extended only to newspaper employees, but as the forms of news media expanded to include radio and television broadcasting, the privilege was extended to reporters working in those media as well.

B. State constitutional provision

Alabama has not adopted a reporter's privilege based on the Alabama Constitution, but Article I, Section 4 provides a basis for the argument that the Alabama Constitution provides such a privilege. The preamble and Article I, Section 4 state:

> That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:
>
> That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects being responsible for the abuse of that liberty.

ALA. CONST. of 1901, art. I, § 4.

C. Federal constitutional provision

Alabama courts recognize a qualified reporter's privilege under the First Amendment to the United States Constitution; however, there is not a significant amount of case law that discusses the scope of the privilege. When considering whether the qualified privilege protects a newspaper reporter's unpublished testimony and documents, an Alabama court held that the following three-part test must be satisfied: 1) The reporter must have information highly relevant to a claim or defense in the underlying litigation; 2) There must be a compelling need for disclosure sufficient to override the First Amendment privilege; and 3) The party seeking the information must have unsuccessfully attempted to obtain the information from other sources less chilling of First Amendment freedoms. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986). At least one court in another jurisdiction has also acknowledged that Alabama law provides a

qualified reporter's privilege under the First Amendment to the United States Constitution. *See In re American General Life & Accident Ins. Co.*, No.: 107784/96, 26 Med. L. Rptr. 1606 (Bronx County, N.Y. Sup. Ct., Jan. 14, 1996).

D. Other sources

There are no other sources of a reporter's privilege in Alabama, but as in any case, a court may quash a subpoena on the grounds that the subpoena is unduly burdensome, ALA. R. CIV. P. 45 (c)(3)(A)(iv), or unreasonable, oppressive, or unlawful. ALA. R. CRIM. P. 17.3 (c). *See Williams v. State*, 489 So.2d 4, 8 (Ala. Crim. App. 1986) (holding that the trial court properly granted a motion to quash a subpoena duces tecum because it was unduly burdensome and the newspaper articles sought were available through other means.)

III. Scope of protection

A. Generally

The scope of the reporter's privilege in Alabama has been interpreted broadly. For example, in *Brothers v. Brothers*, No.: DR-86-200107, 19 Med. L. Rptr. 1031 (DR-86-200107, Marshall County, Ala., Cir. Ct., Jan. 9, 1989) the court applied Alabama's shield statute, which protects "sources," to quash a subpoena that sought all of a reporter's documents, notes and materials relating to an interview she had conducted that had been broadcast on television. In *Ex parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953), the court applied the shield statute to confidential sources of information, but did not limit the application of the statute to confidential sources, stating that the statute "clearly privileges" a reporter's "sources of information." *Id.* at 353. Other courts have, however, indicated that "sources" under the shield statute may mean only confidential sources of in-formation. *Pinkard v. Johnson*, 118 F.R.D. 517 (M.D. Ala. 1987)(stating that although court was not bound to follow Alabama law, the court would not ignore Alabama's policy of giving protection to confidential "sources of information" obtained by reporters); *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986)(stating that Alabama's shield statute governs "confidential sources"). In those cases, it is unclear whether the court was using "confidential" to mean that the source was confidential because the reporter had not disclosed the source, thereby waiving the privilege, *or* whether the source was confidential because the source provided information to the reporter with the understanding that his or her identity would not be disclosed by the reporter. Arguably, in *Pinkard*, the court used "confidential" to mean the former - that sources are confidential and privileged only if the reporter has not previously disclosed the identity of the source. Nevertheless, the shield statute, by its terms, does not require that a source be confidential in order for the privilege provided by the statute to be available. Ala. Code § 12-21-142.

With respect to the First Amendment privilege, the privilege applies to materials other than "confidential sources." *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986).

B. Absolute or qualified privilege

The privilege provided by Alabama's shield statute, Ala. Code § 12-21-142, appears to be absolute. In *State v. Powers*, No.: CC-03-593-JMH, 34 Med. L. Rptr. 1062, 1063 (Colbert County, Ala. Cir. Ct., May 28, 2004), the court granted a reporter's motion to quash a subpoena, holding that the Alabama shield statute "absolutely protects news reporters from disclosing any source of information." Similarly, when deciding whether to compel a reporter to answer questions that would require him to disclose a source of information, a federal court sitting in the state recognized the absolute nature of the privilege afforded by the statute. *Ex parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953). Although the federal court was not bound to apply the statute, the court stated that "it would not be justified in ignoring such a clear and unequivocal pronouncement of the public policy of the state in which it sits, merely to reach out and apply a rule against the asserted privilege established in a non-federal jurisdiction." *Id.* at 353. The Eleventh Circuit has also indicated that the privilege provided by the Alabama shield statute is absolute. *See Price v. Time, Inc.*, 416 F.3d 1327, 1335 (11th Cir. 2005) (ruling that Alabama shield statute did not apply but stating that statute "bestows an absolute privilege").

With respect to the reporter's privilege under the First Amendment, the privilege is qualified, and to overcome the privilege, the subpoenaing party must meet the following test: 1) The reporter must have information highly relevant to a claim or a defense; 2) There must be a compelling need for disclosure sufficient to override the First Amendment privilege; and 3) The party seeking the information must have unsuccessfully attempted to obtain it from other sources less chilling of First Amendment freedoms. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986).

C. Type of case

1. Civil

There is no statutory or reported case law in Alabama that addresses the issue of whether the reporter's privilege is applied differently in civil cases than in criminal cases, but a federal court sitting in the state has cited the principal that, in civil cases, the public interest in nondisclosure of journalists' news sources will often be weightier than the private interest in compelled disclosure. *Pinkard v. Johnson*, 118 F.R.D. 517 (M.D. Ala. 1987).

2. Criminal

There is no statutory or reported case law in Alabama that addresses the issue of whether the reporter's privilege is applied differently in criminal cases than in civil cases, but a federal court sitting in the state has cited the principal that, in criminal cases, the courts are more inclined to rule in favor of disclosure. *Pinkard v. Johnson*, 118 F.R.D. 517 (M.D. Ala. 1987).

3. Grand jury

There is no statutory or case law in Alabama that addresses the standards for asserting the reporter's privilege to overcome a grand jury subpoena.

D. Information and/or identity of source

Alabama's shield statute, Ala. Code § 12-21-142, specifically protects "sources," which has been interpreted to include the identity of a source as well as a reporter's documents, notes and other materials related to an interview. *Ex parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953)(holding that Alabama's shield statute protected the identities of sources who had given information in confidence); *Brothers v. Brothers*, No.: DR-86-200107, 19 Med. L. Rptr. 1031 (Marshall County, Ala. Cir. Ct., Jan. 9, 1989)(holding that a reporter's documents, notes, materials, and even the location of the interview were privileged under Alabama's shield statute).

E. Confidential and/or non-confidential information

With respect to the reporter's privilege provided by Alabama's shield statute, Alabama courts have not specifically distinguished confidential information from non-confidential information when analyzing the reporter's privilege, but one state court has suggested that the shield statute applies to "confidential sources." *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986). A federal court sitting in the state indicated in dicta that the statute applies only to confidential sources. *Pinkard v. Johnson*, 118 F.R.D. 517 (M.D. Ala. 1987). In *Pinkard*, it is unclear whether the court was using "confidential" to mean that the source was confidential because the reporter had not disclosed the source, thereby waiving the privilege, *or* whether the source was confidential because the source provided information to the reporter with the understanding that his or her identity would not be disclosed by the reporter. Arguably, in *Pinkard*, the court used "confidential" to mean the former - that sources are confidential and privileged only if the reporter has not previously disclosed the identity of the source. The express terms of Alabama's shield statute, however, do not require that a source be confidential in order for the privilege provided by the statute to be available. The privilege provided by the First Amendment to the United States Constitution applies to materials other than confidential sources. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986).

F. Published and/or non-published material

Alabama's shield statute, Ala. Code § 12-21-142, specifically states that the privilege applies to "sources of any information procured or obtained by [the reporter] and *published* in the newspaper, *broadcast* by an broadcasting

station, or *televised* by any television station . . . ." Ala. Code § 12-21-142 (emphasis added). In *Brothers v. Brothers*, No.: DR-86-200107, 19 Med. L. Rptr. 1031 (Marshall County, Ala. Cir. Ct., Jan. 9, 1989), the court applied the statute to protect a reporter's documents, notes and materials relating to an interview she conducted that had been broadcast on television.

The privilege under the First Amendment extends to non-published information acquired in the normal newsgathering process. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986).

G. Reporter's personal observations

Events that reporters witness as ordinary citizens are not privileged under Alabama law. *Brothers v. Brothers*, No.: DR-86-200107, 19 Med. L. Rptr. 1031 (Marshall County, Ala. Cir. Ct., Jan. 9, 1989). General observations made by a reporter during the newsgathering process (such as the location of the interview), however, are not observations of an ordinary witness, but are events witnessed in a reporting capacity and are privileged. *Id.*

H. Media as a party

There is no Alabama statutory or reported case law distinguishing the application of the reporter's privilege in cases where the media is a party and cases where it is not.

I. Defamation actions

There is no Alabama statutory or reported case law distinguishing the application of the reporter's privilege in defamation cases.

IV. Who is covered

Alabama's shield statute, Ala. Code § 12-21-142, applies to persons "engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a newsgathering capacity." In *Price v. Time, Inc.*, 416 F.3d 1327, 1335-43 (11th Cir. 2005), after the Supreme Court of Alabama had declined to answer a certified question regarding the scope of the shield statute, the Eleventh Circuit held that magazine reporters are excluded from the statute's application. Likewise, in an earlier, unreported opinion, a federal court sitting in the state strictly construed the shield statute to exclude reporters working for trade journals. *Long v. Cooper*, No. CV85-H-801-S (N.D. Ala. Apr. 10, 1986).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Alabama's shield statute does not use the term "reporter," but states that the privilege applies to a person "engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a newsgathering capacity." Ala. Code § 12-21-142.

b. Editor

There is no Alabama statutory or reported case law defining "editor."

c. News

There is no Alabama statutory or reported case law defining "news."

d. Photo journalist

There is no Alabama statutory or reported case law specifically defining "photojournalist"; however, in *Knighten v. Daewoo Motor America*, No.: CV-00-2370, 30 Med. L. Rptr. 2600 (Madison County, Ala. Cir. Ct., Sept. 19, 2001), the court applied, without discussion, Alabama's shield statute, as well as the United States Constitution and the Alabama Constitution, in quashing a subpoena seeking videotapes "in their unedited form" from a television station. The television station had voluntarily produced videotapes of the material that was actually broad-

cast, but the court held the station was protected from disclosure of the unedited videotapes. *Id.* It is logical to assume that the protection provided to the television station in *Knighten* would apply with equal force to videographers and/or photojournalists.

In an unreported order, a United States magistrate judge addressed the application of the First Amendment privilege to videotapes made by videographers who were working for two television stations. *Ellis v. Hicklen*, No. 01-BU-3290-M (N.D. Ala. Apr. 8, 2002). Although the court held that the television stations must produce the videotapes, the court authorized the television stations to redact any audio or video of interviews to which an independent assertion of the privilege could be made. *Id.* Allowing the television stations to redact privileged information from the videotapes, such as portions of the tapes that would reveal the identity of any undisclosed sources, affirmatively suggests that the magistrate believed that photojournalists are covered by the reporter's privilege.

e. News organization / medium

Alabama's shield statute applies to reporters working for newspapers, radio broadcasting stations, and television stations. Ala. Code § 12-21-142. In *Price v. Time, Inc.*, 416 F.3d 1327, 1335-43 (11th Cir. 2005), after the Supreme Court of Alabama had declined to answer a certified question regarding the scope of the shield statute, the Eleventh Circuit held that magazine reporters are excluded from the statute's application. Likewise, in an earlier, unreported opinion, a federal court sitting in the state strictly construed the shield statute to exclude reporters working for trade journals from the shield statute's application. *Long v. Cooper*, No. CV85-H-801-S (N.D. Ala. Apr. 10, 1986).

2. Others, including non-traditional news gatherers

There is no Alabama statutory or reported case law applying the reporter's privilege to non-traditional news gatherers.

B. Whose privilege is it?

Alabama's shield statute, Ala. Code § 12-21-142, suggests that the privilege belongs to the reporter. With respect to the First Amendment privilege, there is no Alabama statutory or reported case law addressing whether the reporter, the reporter's employer, or the source may assert the privilege.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

If a party in a civil action issues a subpoena for a reporter's documents, notes, or other materials, Rule 45 of the Alabama Rules of Civil Procedure requires the subpoenaing party to serve a notice to every other party, notifying of the intent to serve the subpoena upon the expiration of fifteen (15) days from service of the notice. ALA. R. CIV. P. 45 (a)(3)(A). A copy of the subpoena must be attached to the notice.

In a criminal action, the clerk of the court in which the criminal proceeding is pending may issue subpoenas at any time as required by any party for attendance at trial, hearings, depositions, or any other lawful purpose. ALA. R. CRIM. P. 17.1 (a).

2. Deposit of security

Under Alabama law, there is no requirement that a subpoenaing party deposit any security to procure the reporter's testimony or materials.

3. Filing of affidavit

Under Alabama law, there is no requirement that a subpoenaing party make any sworn statement in order to procure the reporter's testimony or materials.

4. Judicial approval

In Alabama, the issuance of a subpoena does not require judicial approval unless a timely objection has been made. If a person or party serves an objection to the issuance of a subpoena for production or inspection within ten (10) days of the service of the notice of intent to serve a subpoena for production or inspection, the subpoena will not issue without an order from the court. ALA. R. CIV. P. 45 (a)(3)(B).

In certain circumstances, judicial approval may be required to serve a notice of intent to serve a subpoena for production or inspection. Alabama law requires parties to a civil action to provide every other party with a fifteen- (15-) day notice prior to issuing a subpoena for the production or inspection of documents. ALA. R. CIV. P. 45 (a)(3)(A). The subpoenaing party may serve the fifteen-day notice without leave of court upon the expiration of forty-five (45) days after service of the summons and complaint. *Id.* If the defendant has already sought discovery in the action, the subpoenaing party may serve the notice without leave of court within the forty-five- (45-) day period. *Id.*

5. Service of police or other administrative subpoenas

In criminal actions, the district attorney has the authority to issue subpoenas requiring witnesses to appear before the grand jury. ALA. R. CRIM. P. 17.1 (c)(1). As a part of the district attorney's investigatory authority, the district attorney may, at any time the grand jury is not in session, subpoena witnesses whom the district attorney wishes to examine under oath concerning any violations of the laws of the State of Alabama. ALA. R. CRIM. P. 17.1 (c)(2). If the matter being investigated by the district attorney is not before the grand jury, the district attorney has the authority to issue subpoenas when the grand jury is in session. *Id.* In addition to the district attorney, the foreman of the grand jury and the clerk of the circuit court have the authority to subpoena witnesses to appear before the grand jury. ALA. R. CRIM. P. 17.1 (b). The Alabama Rules of Criminal Procedure permit the service of subpoenas by mail or, if requested, by personal service. ALA. R. CRIM. P. 17.4.

B. How to Quash

1. Contact other party first

There is no requirement under Alabama law that a person moving to quash a subpoena contact the subpoenaing party prior to filing the motion to quash. Almost invariably, however, unless time does not permit, such contact would be recommended.

2. Filing an objection or a notice of intent

There are two different courses that a reporter may take to attempt to avoid producing documents or other materials requested by subpoena without having to file a motion to quash. The course that the reporter should take depends upon whether only the *notice* of intent to serve a subpoena for production or inspection has been served or whether the *subpoena* has actually issued. If the subpoena has not issued, any person or party may serve an objection to the issuance of subpoena within ten (10) days of service of the notice of intent to serve a subpoena for production or inspection. If the objection is filed within this ten- (10-) day period, the subpoena will not issue, and the party seeking the information must move for an order to compel pursuant to Rule 37(a) of the Alabama Rules of Civil Procedure. ALA. R. CIV. P. 45 (a)(3)(B). If the subpoena has issued and the subpoenaed party wishes to object under a claim of privilege, the subpoenaed party must assert the privilege expressly in an objection and serve the objection upon the subpoenaing party or the attorney designated in the subpoena. The objection should be served before the time specified for compliance in the subpoena. ALA. R. CIV. P. 45 (c)(2)(B) & (d)(2). Once the objection has been made, the subpoenaing party is not entitled to inspect and copy the requested materials until the court has issued an order to that effect. To receive such an order, the subpoenaing party may move for an order to compel. *Id.*

3. File a motion to quash

a. Which court?

The motion to quash should be filed with the court that issued the subpoena. ALA. R. CIV. P. 45 (c)(3)(A).

b. Motion to compel

Whether a subpoena recipient should file a motion to quash before the subpoenaing party files a motion to compel is largely a tactical matter, and the appropriate action often depends upon whether the subpoenaing party is seeking testimony or documents. If the subpoena calls for testimony, it is appropriate to file a motion to quash before the subpoenaing party files a motion to compel. If the subpoena seeks only documents, the subpoena recipient should serve objections pursuant to Rule 45 (c)(2)(B) of the Alabama Rules of Civil Procedure and assess the likelihood of the subpoenaing party filing a motion to compel. If after serving the objections, it appears that the subpoenaing party is going to file a motion to compel, the subpoena recipient should file a motion to quash.

c. Timing

Rule 45 of the Alabama Rules of Civil Procedure requires a motion to quash to be "timely." ALA. R. CIV. P. 45 (c)(3)(A).

d. Language

There is no statutorily required language that must be included in a motion to quash, but as a general matter, the motion to quash should set forth the moving party's claim that the subpoenaed documents or testimony are privileged and the basis for the assertion of the privilege - Alabama's shield statute, the First Amendment to the United States Constitution, or both. When asserting that the subpoenaed testimony or materials are privileged under the First Amendment, the motion should set forth the three elements that the subpoenaing party must prove to obtain the subpoenaed materials, which are: 1) The reporter has information highly relevant to a claim or a defense; 2) There is a compelling need for disclosure sufficient to override the First Amendment privilege; and 3) The party seeking the information has unsuccessfully attempted to obtain it from other sources less chilling of First Amendment freedoms. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986). When applicable, the motion should include the assertion that the subpoena is overbroad, oppressive, and burdensome, in violation of the Alabama Rules of Civil Procedure.

e. Additional material

Generally, copies of the following may be helpful to the court and should be attached to a motion to quash: 1) A copy of the subpoena; 2) Copies of authoritative or persuasive cases cited in the motion to quash; and 3) Copies of any newspaper articles relevant to the subpoena request.

4. In camera review

a. Necessity

There is no Alabama statutory or reported case law addressing whether, prior to deciding a motion to quash, the court must conduct an *in camera* review of the subpoenaed material or interview the subpoenaed reporter.

b. Consequences of consent

There is no Alabama statutory or reported case law addressing the consequences of a reporter's or publisher's consent to an *in camera* review.

c. Consequences of refusing

There is no Alabama statutory or reported case law addressing the consequences of a reporter refusing to consent to an *in camera* review.

5. Briefing schedule

There is no regular briefing schedule for a motion to quash in Alabama; the schedule will depend upon the practice and preference of the court involved.

6. Amicus briefs

Alabama courts routinely accept amicus briefs, although they are more prevalent at the appellate than at the trial court level. There is no particular organization that regularly files amicus briefs opposing the subpoenaing of reporters in Alabama. Given the right case, however, possible interested organizations might include the following:

The Birmingham News
c/o Mr. Richard A. Bernstein
Sabin, Bermant & Gould LLP
4 Times Square
23rd Floor
New York, New York 10036

The Anniston Star
c/o Mr. Bob Davis
P.O. Box 189
Anniston, Alabama 36202-0189

The Decatur Daily
c/o Mr. Tom Wright
201 First Avenue, S.E.
Decatur, Alabama 35609

Alabama Press Association
c/o Ms. Felicia Mason
3324 Independence Drive
Suite 200
Birmingham, Alabama 35209

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

There is no Alabama statutory or reported case law addressing the standard of proof for overcoming the assertion of the reporter's privilege.

B. Elements

The privilege provided by Alabama's shield statute, Ala. Code § 12-21-142, appears to be absolute.

With respect to the qualified First Amendment privilege, once a reporter demonstrates that the subpoenaed information was procured while engaged in a newsgathering activity, the subpoenaing party must demonstrate the following: 1) The reporter has information highly relevant to a claim or defense; 2) There is a compelling need for the disclosure sufficient to override the qualified First Amendment privilege; and 3) The party seeking the information has unsuccessfully attempted to obtain it from other sources less chilling of First Amendment freedoms. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986).

1. Relevance of material to case at bar

The subpoenaed information must be highly relevant to a claim or defense in the underlying litigation and there must be compelling need for the disclosure. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986). A compelling interest or need has been defined as "going to the very heart of the matter." *Id.* In *Cowan v. Community Home Banc, Inc.*, No.: CV-01-4028, 31 Med. L. Rptr. 2498, 2501 (Jefferson County, Ala. Cir. Ct., Feb. 26, 2003), the court held that if the information sought from a reporter relates to the central inquiry of the case, then the subpoenaing party has a compelling need for disclosure sufficient to override the qualified First Amendment privilege. If, on the other hand, the purpose of the subpoena is to gather information tangential to the central inquiry of the case, such as information used to attack the credibility of testimony, then the subpoenaing party does not have a compelling need for disclosure and the privilege will not be overcome. *Id.*

2. Material unavailable from other sources

Alabama law requires a subpoenaing party to demonstrate that it has unsuccessfully attempted to obtain the information from other sources. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986). Alabama courts have not addressed the meaning of unavailability.

a. How exhaustive must search be?

There is no Alabama statutory or reported case law addressing how exhaustive a search for alternative sources must be.

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

There is no Alabama statutory or reported case law addressing the manner in which the subpoenaing party must demonstrate that it has conducted a search for alternative sources.

c. Source is an eyewitness to a crime

There is no Alabama statutory or reported case law addressing the application of the privilege when the source was an eyewitness to a crime.

3. Balancing of interests

There is no Alabama statutory or reported case law addressing this issue; however, a federal court sitting in the state has cited the principal that, in civil cases, the public interest in nondisclosure of journalists' news sources will often be weightier than the private interest in compelled disclosure, but in criminal cases, courts are more inclined to rule in favor of disclosure. *Pinkard v. Johnson*, 118 F.R.D. 517 (M.D. Ala. 1987). Another federal court sitting in the state has identified the competing interests of First Amendment rights and the right to a fair trial when the reporter's privilege is raised. *Sanders v. Alabama State Bar*, 887 F. Supp. 272, 274-75 (M.D. Ala. 1995). The court stated that these two interests "must be balanced against each other to determine which is more compelling in a specific case." *Id.* at 274.

4. Subpoena not overbroad or unduly burdensome

Rule 45 of the Alabama Rules of Civil Procedure permits a court to quash a subpoena that subjects a person to undue burden if the person files a timely motion. ALA. R. CIV. P. 45 (c)(3)(A)(iv). Rule 17.3 of the Alabama Rules of Criminal Procedure permits a court to dismiss or modify a subpoena duces tecum upon a promptly made motion if the subpoena is unreasonable, oppressive, or unlawful. ALA. R. CRIM. P. 17.3 (c).

5. Threat to human life

There is no Alabama statutory or reported case law addressing the application of the privilege when the subpoenaed matter involves a threat to human life.

6. Material is not cumulative

In Alabama, the subpoenaing party must demonstrate that it has unsuccessfully attempted to obtain requested information from other sources less chilling of First Amendment freedoms. *Norandal USA, Inc. v. Local Union No. 7468*, No.: CV-86-136, 13 Med. L. Rptr. 2167 (Jackson County, Ala. Cir. Ct., Sept. 11, 1986). Alternatively stated, when deciding whether subpoenaed information is privileged, a court should consider whether the information can be obtained by alternative means. *Id.*

7. Civil/criminal rules of procedure

The Alabama Rules of Civil Procedure and Criminal Procedure permit a subpoenaed person to move to quash or modify a subpoena if the motion is made on a prompt or timely basis. ALA. R. CIV. P. 45 (c)(3)(A); ALA. R. CRIM. P. 17.3 (c).

8. Other elements

There are no other elements that must be met before a subpoenaing party can overcome the reporter's privilege.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There is no Alabama statutory or reported case law addressing this issue, but a federal court sitting in the state held that a reporter waived the privilege by discussing a news story with an attorney and by signing an affidavit about a conversation between the reporter and a source. *Pinkard v. Johnson*, 118 F.R.D. 517 (N.D. Ala. 1987).

2. Elements of waiver

a. Disclosure of confidential source's name

There is no Alabama statutory or reported case law addressing the application of the reporter's privilege when the reporter has disclosed the name of a confidential source.

b. Disclosure of non-confidential source's name

There is no Alabama statutory or reported case law addressing the application of the reporter's privilege when the reporter has disclosed the name of a non-confidential source.

c. Partial disclosure of information

There is no Alabama statutory or reported case law addressing the application of the privilege when there has been a partial disclosure of information.

d. Other elements

There is no Alabama statutory or reported case law addressing any other issues concerning waiver of the reporter's privilege.

3. Agreement to partially testify act as waiver?

There is no Alabama statutory or reported case law addressing whether an agreement to partially testify acts as a waiver of the reporter's privilege.

VII. What constitutes compliance?

A. Newspaper articles

Newspaper articles are self-authenticating under ALA. R. EVID. 902 (6).

B. Broadcast materials

There is no Alabama statutory or case law addressing this issue.

C. Testimony vs. affidavits

Although the Alabama Rules of Evidence do not provide as a matter of right for the possibility of substituting an affidavit for live testimony, such substitution is sometimes permitted pursuant to agreement of the parties.

D. Non-compliance remedies

Civil and criminal courts may hold any person who fails to obey a subpoena, without excuse, in civil or criminal contempt. ALA. R. CIV. P. 45 (e), 70A; ALA. R. CRIM. P. 33.1, 33.2.

1. Civil contempt

a. Fines

There is no Alabama statutory or reported case law addressing this issue.

b. Jail

There is no Alabama statutory or reported case law addressing this issue.

2. Criminal contempt

There is no Alabama statutory or reported case law addressing this issue.

3. Other remedies

There is no Alabama statutory or reported case law addressing this issue.

VIII. Appealing

A. Timing

1. Interlocutory appeals

The proper method for seeking review of a denial of a motion to quash a subpoena is to file a petition for a writ of mandamus directing the lower court to quash the subpoena. *Ex parte Fitch*, 715 So.2d 873 (Ala. Crim. App. 1997).

2. Expedited appeals

Rule 2 (b) of the Alabama Rules of Appellate Procedure authorizes an appellate court to expedite cases of pressing concern to the public or the litigants provided that the party seeking an expedited review can demonstrate good cause. ALA. R. APP. P. 2(b).

B. Procedure

1. To whom is the appeal made?

Except in cases where a direct appeal to the Courts of Civil or Criminal Appeals is provided by law or rule, the circuit court generally has appellate jurisdiction over civil, criminal, and juvenile cases in the district court and over prosecutions for ordinance violations in municipal court. Ala. Code § 12-11-30 (3). With respect to decisions of administrative agencies, boards, and commissions, the applicable statutes typically require a party to appeal to the circuit court before appealing to the Court of Civil Appeals.

The Alabama Court of Civil Appeals and Court of Criminal Appeals have original jurisdiction over the issuance and determination of writs of mandamus concerning matters over which the court has appellate jurisdiction. Ala. Code § 12-3-11. The Court of Civil Appeals has appellate jurisdiction over all civil cases where the amount involved does not exceed $50,000. Ala. Code § 12-3-10. The Court of Criminal Appeals has appellate jurisdiction over all misdemeanors, including violation of town and city ordinances, habeas corpus, and all felonies, including all post conviction writs in criminal cases. Ala. Code § 12-3-9.

The Supreme Court of Alabama has general appellate jurisdiction over all of the courts of the State of Alabama. Ala. Code § 12-2-7. The Supreme Court has original jurisdiction in the issue and determination of writs of mandamus for matters over which no other court has jurisdiction. Ala. Code § 12-2-7 (2).

2. Stays pending appeal

In civil cases, an appellant may make an application for a stay of the judgment or order of a trial court pending appeal, and the request should be made first to the trial court. ALA. R. APP. P. 8 (b). If an appellant seeks a stay from the appellate court, the motion must set forth one of the following grounds for requesting the stay from the appellate court: 1) Making application to the trial court is not practicable; 2) The trial court has denied the application; or 3) The trial court has failed to provide the relief requested by the applicant. *Id.* When making such an application to the trial court, the appellant must set forth the reasons given by the trial court for its action and should also show the appellant's reasons for seeking the relief requested and the facts the appellant is relying upon. *Id.* The motion should include any relevant affidavits and relevant portions of the trial record. Reasonable notice of the motion must be given to all parties, and the motion must be filed with the clerk of the appellate court. *Id.*

Generally, in criminal cases, the court will stay a sentence of imprisonment or a sentence to pay a fine if an appeal is taken. ALA. R. CIV. P. 8 (d). If the sentence is to pay a fine, the court may require the defendant to deposit the whole or part of the fine with the clerk of the court while the appeal is pending. *Id.*

3. Nature of appeal

Typically, the appropriate procedure for challenging the denial of a motion to quash a subpoena duces tecum is filing a petition for a writ of mandamus directing the lower court to quash the subpoena duces tecum. *Ex parte Fitch*, 715 So.2d 873 (Ala. Crim. App. 1997).

4. Standard of review

Alabama courts view writs of mandamus as extraordinary remedies that will be granted only when there has been an abuse of discretion by the lower court. *Ex parte Wisconsin Physicians Service Ins. Corp.*, 800 So.2d 588 (Ala. 2001). For example, in *Ex parte Fitch*, 715 So.2d 873 (Ala. Crim. App. 1997), the court held that the trial court erred by not quashing subpoenas duces tecum issued by a district attorney to defendants in a criminal case. Because the district attorney did not have the authority to issue the subpoenas duces tecum to the defendants, the appellate court held that the trial court erred by not quashing the subpoenas. *Id.*

5. Addressing mootness questions

There is no Alabama statutory or reported case law addressing whether an appeal becomes moot because the trial or grand jury session for which the reporter was subpoenaed has concluded.

6. Relief

If, at the trial court level, the judge denies the reporter's motion to quash, the reporter's attorney should seek a writ of mandamus from the appropriate appellate court, directing the lower court to quash the subpoena.

IX. Other issues

A. Newsroom searches

There is no Alabama statutory or reported case law addressing newsroom searches or the application of the federal Privacy Protection Act.

B. Separation orders

In Alabama, the scope of separation orders are typically a matter of negotiation with the attorneys for the parties and the court.

C. Third-party subpoenas

There is no Alabama statutory or reported case law addressing the issuance of subpoenas to third parties in an attempt to discover a reporter's source.

D. The source's rights and interests

There is no Alabama statutory or reported case law addressing the rights and interests of a source to intervene anonymously and halt the disclosure of his or her identity.