REPORTER'S PRIVILEGE: CALIFORNIA

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

CALIFORNIA

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I. Introduction: History & Background

California has a reporter's privilege embodied both in Article I, § 2(b) of the California Constitution and in California Evidence Code § 1070. California courts also have recognized a reporter's privilege under the First Amendment. The California Supreme Court has interpreted these provisions to give broad protection to reporters. In addition, in response to a number of highly-publicized reporter subpoenas, the California Legislature adopted procedural mechanisms designed to confer greater protection for reporters.

However, there are limits on the protection of California's state shield laws. Because the state laws only prevent a finding of contempt, they provide minimal protection to reporters who are parties to litigation. Moreover, although California's state shield laws are absolute in civil cases where a party seeks information from a non-party reporter, in criminal cases the defendant's right to a fair trial must be balanced against the reporter's rights.

II. Authority for and source of the right

A. Shield law statute

California Evidence Code § 1070 currently provides as follows:

> § 1070. Newsmen's Privilege—Unpublished Information.
>
> (a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> (b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> (c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Cal. Evid. Code § 1070.

As the California Supreme Court has explained, California's shield law was first adopted in 1935 as Code of Civil Procedure § 1881. *Delaney v. Superior Court*, 50 Cal. 3d 785, 795-96 (Cal. 1990). At that time, it provided an immunity from contempt for a newspaper employee's refusal to disclose source information, but it did not explicitly protect other unpublished information or other forms of media. *Id.* Amendments added employees of radio and television stations, press associations, and wire services to the shield law's protection. *Id.* In 1965, the shield law was transferred to Evidence Code § 1070. *Id.* In 1972, apparently in response to the United States Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) (which held that a newsperson did not have a qualified privilege against disclosing source information to a grand jury), the California Legislature amended § 1070 to protect "unpublished information," in addition to protecting the identity of confidential sources. *Id.*

The reporter's privilege in the California Evidence Code is essentially identical to the provision of the California Constitution that was adopted in 1980, discussed below. Consequently, the cases applying the reporter's privilege typically rely on the Constitution for support, rather than applying the statutory protection.

B. State constitutional provision

In 1980, California voters elevated the reporter's privilege to the state Constitution. "The proposition incorporated language virtually identical to section 1070 into the California Constitution, article I, section 2, subdivision (b)." *Delaney*, *supra*, 50 Cal. 3d at 796. It provides as follows:

> (b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Cal. Const. art. I, § 2(b). This provision was enacted by an overwhelming majority of California voters (4,340,108 to 1,575,486). As the pamphlet that accompanied this proposed amendment explained:

> The free flow of information to the public is one of the most fundamental cornerstones assuring freedom in America. Guarantees must be provided so that information to the people is not inhibited. However, that flow is currently being threatened by actions of some members of the California Judiciary. They have created exceptions to the current Newsman's Shield Law, which protects the confidentiality of reporters' news sources. And the use of confidential sources is critical to the gathering of news. *Unfortunately, if this right is not protected, the real losers will be all Californians who rely on the unrestrained dissemination of information by the news media*.
>
> This amendment merely places into the state's Constitution protection already afforded journalists by statute. That law, enacted in 1935, in clear and straightforward language, provides that reporters cannot be held in contempt of court for refusing to reveal confidential sources of information. At least six reporters in California in recent years have spent time in jail rather than disclose their sources to a judge. By giving existing law constitutional status, judges will have to give the protection greater weight before attempting to compel reporters to breach their pledges of confidentiality.
>
> A reporter's job, of course, is not to withhold information, but to convey it to the public. In most cases, a reporter is able to reveal corruption and malfeasance within government only with the help of an honest employee. If such an individual feels that a reporters' pledge of confidentiality may be broken under the threat of jail, that person simply will not come forward with his or her information.
>
> If our democratic form of government — of the people, by the people, for the people — is to survive, citizens must be informed. *A free press protects our basic liberties by serving as the watchdogs of our nation.* Citizens may agree or disagree with reports in the media, but they have been informed, and the final choice is made by the individual.

> To jail a journalist because he protected his source is an assault not only on the press but on all Californians as well.

Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec. (June 3, 1980) p. 19 (italics in original). Some California courts have explained that the amendment was intended to overrule *Rosato v. Superior Court*, 51 Cal. App. 3d 190 (1975) and *Farr v. Superior Court*, 22 Cal. App. 3d 60 (1971), both of which affirmed orders compelling reporters to divulge sources of information regarding pending criminal trials. *E.g.*, *Liggett v. Superior Court*, 260 Cal. Rptr. 161, 168 (1989) (unpublished decision); *Delaney v. Superior Court*, 249 Cal. Rptr. 60, 65 (1988) (unpublished decision).

California courts have recognized the significance of elevating the privilege from a statute to the Constitution. As one court explained:

> The elevation to constitutional status must be viewed as an intention to favor the interest of the press in confidentiality over the general and fundamental interest of the state in having civil actions determined upon a full development of material facts.
>
> It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state.

Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d 13, 27-28 (1984).

California cases reflect a deference to the shield law as a result of its constitutional status. For example, in *New York Times Co. v. Superior Court*, 51 Cal. 3d 453 (1990), the California Supreme Court held that a civil litigant has no interests sufficient to overcome the constitutional reporter's privilege. *Id.* at 456. Similarly, in *Miller v. Superior Court*, 21 Cal. 4th 883 (1999), the Supreme Court held that a prosecutor in a criminal action has no interests sufficient to overcome the reporter's privilege. *Id.* at 901. As the Court explained in *Miller*, "the absoluteness of the immunity embodied in the shield law only yields to a conflicting federal or, perhaps, state constitutional right." *Id.*

C. Federal constitutional provision

In 1984, the California Supreme Court held that the First Amendment to the federal Constitution confers a qualified privilege on reporters. *Mitchell v. Superior Court*, 37 Cal. 3d 268 (1984). The Supreme Court held that courts should evaluate five factors in determining whether disclosure by a reporter should be compelled: (1) whether the reporter is a party to the litigation; (2) whether the information sought "goes to the heart of the party's claim"; (3) whether the party seeking the information has exhausted all alternative sources; (4) the importance of protecting confidentiality, including whether the information "relates to matters of great public importance" and whether the risk of harm to the source is "substantial"; and (5) whether the party seeking disclosure has made a prima facie showing on its underlying claim. *Id.* at 279-83. A number of other cases have applied the qualified privilege, reaching different results regarding the protection afforded. *E.g.*, *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1466-79 (2006) (refusing to compel disclosure of confidential source information, largely because the journalists were not parties and the proponent had not exhausted alternative sources); *Anti-Defamation League of B'Nai Brith v. Superior Court*, 67 Cal. App. 4th 1072, 1095-97 (1998) (compelling disclosure of some unpublished information because it "might lead to admissible evidence" and other *Mitchell* factors satisfied); *Dalitz v. Penthouse Int'l, Ltd.*, 168 Cal. App. 3d 468, 479 (1985) (compelling disclosure of confidential sources in defamation case because need for disclosure "compelling"); *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 386 (1982) (refusing to compel disclosure of unpublished information because alternative source of information); *Star Editorial, Inc. v. United States District Court*, 7 F.3d 856, 859-62 (9th Cir. 1993) (applying California law) (compelling disclosure of confidential sources where their identity "goes to the heart of the claim").

D. Other sources

There are no other sources of a reporter's privilege in California.

III. Scope of protection

A. Generally

California's shield law generally is very protective, although there are limits to the protection it provides in criminal cases and in cases where the reporter is a party to the litigation. In addition, because the language of the privilege identifies certain types of news organizations, it is unclear whether it protects all varieties of journalists, such as book authors.

B. Absolute or qualified privilege

California's reporter's privilege only prevents a finding of contempt for refusal to comply with a subpoena; consequently, it provides virtually no protection to reporters who are parties to the litigation. *See Mitchell*, *supra*, 37 Cal. 3d at 274. In addition, the California Supreme Court has held that the privilege must be balanced against the criminal defendant's right to a fair trial. *See Delaney*, *supra*, 50 Cal. 3d at 805-06. The California Supreme Court also has held, however, that the prosecution in a criminal case has no constitutional or other rights sufficient to overcome the reporter's privilege. *See Miller*, *supra*, 21 Cal. 4th at 901. Moreover, in civil cases in which the reporter is not a party, the privilege provides essentially absolute protection, regardless of the type of information sought. *See New York Times*, *supra*, 51 Cal. 3d at 456.

C. Type of case

1. Civil

In civil cases in which the reporter is not a party, the privilege is essentially absolute. As the Supreme Court held in *New York Times*, *supra*, California's shield law provides "absolute protection to nonparty journalists in civil litigation from being compelled to disclose unpublished information." 51 Cal. 3d at 457; *see also Mitchell*, *supra*, 37 Cal. 3d at 274 ("[s]ince contempt is generally the only effective remedy against a non-party witness, the California enactments grant such witnesses virtually absolute protection"); *In re Willon*, 47 Cal. App. 4th 1080, 1091 (1996) (affirming the absolute nature of the protection in civil cases). The reporter's privilege technically is not a "privilege" because it only protects from contempt, meaning that other civil remedies may be available; however, the Supreme Court has recognized that those remedies essentially are meaningless. *See New York Times*, *supra*, 51 Cal. 3d at 463-64 (California Code of Civil Procedure § 1992, which provides civil remedy for disobeying a subpoena, is "not effective as a practical matter" because remedy provided is minimal).

If the reporter is a party, however, California's statutory and state constitutional provisions provide no real protection because contempt is not the only remedy available to force disclosure. As the Supreme Court explained,

> A party to civil litigation who disobeys an order to disclose evidence [] may be subject to a variety of other sanctions, including the entry of judgment against him. ... Neither Evidence Code section 1070 nor article I, section 2, subdivision (b), protects a party against such sanctions.

Mitchell, *supra*, 37 Cal. 3d at 274 (citations omitted).

2. Criminal

The California Supreme Court has held that the reporter's privilege must be balanced against a criminal defendant's right to a fair trial. *Delaney*, *supra*, 50 Cal. 3d at 800. Before a court may compel disclosure, the criminal defendant must show, as a threshold matter, that there is "a reasonable possibility that the information will materially assist his defense." *Id.* at 807-13. This can sometimes be a difficult showing for a criminal defendant to make. *See, e.g.*, *People v. Ramos*, 34 Cal. 4th 494, 525-26 (2004) (criminal defendant failed to satisfy threshold showing); *People v. Sanchez*, 12 Cal. 4th 1, 56-58 (1995) (same); *People v. Vasco*, 131 Cal. App. 4th 137, 153-56 (2005) (same); *People v. Von Villas*, 10 Cal. App. 4th 201, 232-33 (1992) (same); *accord People v. Sapp*, 31 Cal. 4th 240, 275 (2003) (trial court did not commit reversible error in refusing to order disclosure of notes to defendant, although the test the trial court applied was subsequently disapproved by the Supreme Court, because defendant failed to produce evidence of the only possible theory of relevance). If the defendant satisfies this threshold showing, the court then must apply a balancing test, consisting of the following factors:

(1) Whether the information sought is confidential or sensitive;

(2) The interests protected by the reporter's privilege law;

(3) The importance of the information to the defendant; and,

(4) Whether alternative sources for the information exist.

Delaney, *supra*, 50 Cal. 3d at 809-11. The court may compel the reporter to disclose the sought-after information if the balance favors the criminal defendant. However, as one federal court noted, the failure to compel disclosure is reversible error only if it affected the jury's verdict. *See Shine v. Cambra*, 1999 WL 252475, *9 (N.D. Cal. 1999).

Conversely, the California Supreme Court recently held that the prosecution has no right sufficient to overcome the reporter's privilege:

> Nor may we convert an absolute into a qualified immunity merely because it is in accord with a particular conception of the proper balance between journalists' rights and prosecutor's prerogatives. Thus, the absoluteness of the immunity embodied in the shield law only yields to a conflicting federal or, perhaps, state constitutional right. As explained, there is no such conflicting right presented in this case.

Miller, *supra*, 21 Cal. 4th at 901. Thus, reporters have a virtually absolute immunity from testifying pursuant to a prosecution subpoena.

In addition, one California court held that if a criminal defendant subpoenas a reporter to testify only about published information, the defendant might nonetheless be required to satisfy the *Delaney* test if the prosecution's cross-examination would elicit unpublished information. *See Fost v. Superior Court, 80 Cal. App. 4th 724, 732-33 (2000). The court reasoned that admitting the reporter's testimony about published information but not about unpublished information could deprive the prosecution of its right to cross-examine the reporter. Id.* Consequently, the reporter's testimony regarding published information will "be barred or stricken" if the defendant cannot meet the *Delaney* test for disclosing unpublished information that is necessary for full cross-examination. *Id.*

However, the reporter's testimony about published material will not always be barred or stricken simply because the *Delaney* test cannot be overcome. In *Vasco, supra*, defendant argued that the reporter's testimony on published information, introduced by the prosecution, should have been stricken because defendant could not meet the *Delaney* threshold test. 131 Cal. App. 4th at 158. The court distinguished *Fost*, where the prosecution successfully prevented the defendant from relying on published information, on the ground that the prosecution was not permitted to obtain unpublished information from the reporter even if it was material to the prosecution. Instead, in the underlying case, the court noted that the defendant — who was seeking unpublished information in response to the prosecution's use of published information — was unable to meet his burden of proof under the *Delaney* test. Thus, analyzing "how *Delaney* and *Miller* affect the respective parties' rights and interests," the court rejected defendant's reliance on *Fost*, reasoning that "if defendant fails to show a reasonable possibility the undisclosed information will materially assist the defense, it follows that defendant has no right to elicit unpublished information on cross-examination and therefore does not suffer prejudice in the same manner as the prosecution when it is denied cross-examination on issues crucial to its case." *Id.* at 158-59. In other words, if the unpublished information was of material assistance, defendant would have been able to overcome the *Delaney* test. However, because the unpublished information was not of material assistance to the defense, the defendant was not prejudiced by the court's refusal to permit testimony regarding the unpublished information or to strike the reporter's testimony regarding the published information. The court noted that other interests, such as defendant's right to test the credibility of a witness, may justify striking that witness's testimony. However, because "any conceivable error was harmless beyond a reasonable doubt" the court did not address the issue there.

3. Grand jury

There is no statutory or case law addressing this issue.

D. Information and/or identity of source

California's reporter's privilege explicitly protects "the source of any information" and "any unpublished information" procured while gathering information for communication to the public. Cal. Const. art. 1, § 2(b); Cal. Evid. Code § 1070. California cases have recognized that these enactments protect against disclosure of the iden-

tity of a source *or* any information that might lead to the identity of the source. *E.g.*, *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 218 (1975).

In addition, a trio of cases have considered whether a reporter can be required to divulge the source of information regarding a pending trial. Two of these cases, *Farr v. Superior Court*, 22 Cal. App. 3d 60 (1971), and *Rosato, supra*, 51 Cal. App. 3d 190, were decided before the reporter's privilege was elevated to the California Constitution. In both cases, the court held that to protect the integrity of the judiciary and the rights of the defendant, the reporter could be required to divulge the source information. *Farr, supra*, 22 Cal. App. 3d at 70; *Rosato, supra*, 51 Cal. App. 3d at 222-24. However, these cases presumably were overruled when the shield law was incorporated into the constitution. *See Liggett, supra*, 260 Cal. Rptr. at 168 (unpublished decision); *Delaney, supra*, 249 Cal. Rptr. at 65 (unpublished decision). A more recent case, *In re Willon, supra*, 47 Cal. App. 4th 1080 (1996), questioned the continuing viability of these cases in light of the constitutional amendment. *Id.* at 1096-97. The court held that "Article I, section 2(b) offers no real protection if it can be overridden merely by a conclusive presumption that nondisclosure will be harmful to the accused." *Id.* Consequently, the court held that,

> [W]here a violation of a protective or "gag" order has already occurred, a court should determine the necessity of disclosure of the newsperson's source by addressing two principal considerations in light of all the relevant circumstances: (1) If the newsperson does not disclose the identity of the source, is there a substantial probability of future violations, or "leaks," that will impair the defendant's ability to obtain a fair trial? and (2) Are there reasonable alternatives to disclosure that will protect the interests asserted by both the newsperson and the defendant?
>
> The first inquiry suggests two secondary questions: (a) is there any indication that further leaks are likely to occur; and (b) will those leaks, if published, make it impossible to obtain an impartial jury in the chosen venue? Factors relevant to these determinations include the nature and extent of the publicity, the amount of information already in the public domain, the existence of prejudicial information not yet released to the public, the size of the county from which prospective jurors will be drawn, and the potential of voir dire or other measures to eliminate any prejudice caused by the publicity.

Id. at 1099.

E. Confidential and/or non-confidential information

The reporter's privilege in California explicitly protects "any unpublished information." Cal. Const. art. 1, § 2(b); Cal. Evid. Code § 1070. The California Supreme Court has interpreted these provisions to protect *both* confidential and non-confidential information. As the Supreme Court explained, "the use of the word 'any' makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence." *Delaney, supra*, 50 Cal. 3d at 798. *Accord New York Times, supra*, 51 Cal. 3d at 461-62. A recent decision questioned whether the privilege applies where the defendant is both the source of the information and the person seeking its disclosure. *Vasco, supra*, 131 Cal. App. 4th at 152 n.3. The court considered the issue "troublesome," opining that in this circumstance, "there is no risk the reporter's source (the defendant) will complain her confidence has been breached. … Nor is the separate policy of safeguarding press autonomy in any way compromised. … And, where the defendant is the reporter's source of information, there appears no reason to assume disclosure would hinder the reporter's ability to gather news in the future." *Id.* (citations omitted). It held, however, that under *Delaney* "we may only consider this factor in the balancing stage." *Id.* Because defendant did not meet *Delaney*'s threshold test, the court concluded that "this factor plays no part in the equation."

F. Published and/or non-published material

California's reporter's privilege explicitly protects "any *unpublished* information." Cal. Const. art. 1, § 2(b); Cal. Evid. Code § 1070 (emphasis added). Consequently, it has been argued that a reporter can be compelled to testify regarding any information that has been published. One California court held, however, that the prosecution's right to cross-examine a reporter who was subpoenaed to testify about only published information may require the defendant to satisfy the *Delaney* test if the cross-examination would elicit unpublished information. *See Fost, supra*, 80 Cal. App. 4th at 732-33. The court reasoned that admitting the reporter's testimony about published information but not about unpublished information could deprive the prosecution of its right to cross-examine the reporter. *Id.* Consequently, the reporter's testimony regarding published information will "be barred or stricken" if

the defendant cannot meet the *Delaney* test for disclosing unpublished information that is necessary for full cross-examination. *Id.* This reasoning also should apply to civil cases, and provide a basis for quashing a subpoena — even one that seeks only published information — if a reasonable cross-examination would necessarily require the reporter to divulge unpublished information.

However, the reporter's testimony about published material will not always be barred or stricken simply because the *Delaney* test cannot be overcome. In *Vasco, supra*, defendant argued that the reporter's testimony on published information, introduced by the prosecution, should have been stricken because defendant could not meet the *Delaney* threshold test. 131 Cal. App. 4th at 158. The court distinguished *Fost*, where the prosecution successfully prevented the defendant from relying on published information, on the ground that the prosecution was not permitted to obtain unpublished information from the reporter even if it was material to the prosecution. Instead, in the underlying case, the court noted that the defendant — who was seeking unpublished information in response to the prosecution's use of published information — was unable to meet his burden of proof under the *Delaney* test. Thus, analyzing "how *Delaney* and *Miller* affect the respective parties' rights and interests," the court rejected defendant's reliance on *Fost*, reasoning that "if defendant fails to show a reasonable possibility the undisclosed information will materially assist the defense, it follows that defendant has no right to elicit unpublished information on cross-examination and therefore does not suffer prejudice in the same manner as the prosecution when it is denied cross-examination on issues crucial to its case." *Id.* at 158-59. In other words, if the unpublished information was of material assistance, defendant would have been able to overcome the *Delaney* test. However, because the unpublished information was not of material assistance to the defense, the defendant was not prejudiced by the court's refusal to permit testimony regarding the unpublished information or to strike the reporter's testimony regarding the published information. The court noted that other interests, such as defendant's right to test the credibility of a witness, may justify striking that witness's testimony. However, because "any conceivable error was harmless beyond a reasonable doubt" the court did not address the issue there.

In addition, relying on the plain language of the statute, the courts have strictly construed what it means for information to be "published." For example, in *In re Howard*, 136 Cal. App. 2d 816 (1955), the Court of Appeal held that the publication of an article containing attributed quotations did not deprive the author of his right to decline to answer whether he ever had a conversation with the purported source when that specific information was not contained in the article. "[I]n the absence of any showing other than the published news story," the court reasoned, the reporter had not disclosed the source of the published information. *Id.* at 819. As the court explained:

> It cannot be assumed from the use of quotation marks that the statement attributed to [the source] was made directly to the petitioner. As [petitioner] notes, his information could have been secured in many ways; that is, … he might have learned of [the source's statements] from another person; he might have received his information from a printed press release; he might have listened to a recording of the speech; or the story might have been telephoned to his newspaper and rewritten by someone else under his by-line.

Id. See also Playboy Enterprises, supra, 154 Cal. App. 3d at 23-24 (requested "material falls squarely within the ambit of Article I, Section 2 protection whether the published information is an exact transcription of the source material or paraphrases or summarizes it"); *Shaklee Corp. v. Gunnell*, 110 F.R.D. 190, 192-93 (N.D. Cal. 1986) (shield law protects documents obtained by reporter in addition to documents prepared by reporter).

G. Reporter's personal observations

The California Supreme Court held in *Delaney, supra*, 50 Cal. 3d 785, that the reporter's privilege protects a reporter's personal observations of an event. Interpreting Article 1, § 2(b) of the California Constitution, the Court stated:

> This attempted distinction between observations and information is unpersuasive. … "Information" includes "reception of knowledge" and "knowledge obtained from reading, observation, or instruction." … When a reporter or other person is called on to testify as to his observations of an event, he is being asked to disclose information. Moreover if the distinction between observations and information were logical, the result would be that even a newsperson's confidential observations would not be protected. That result would be contrary to the manifest purpose and language of article I, section 2(b).

Id. at 799-800.

H. Media as a party

The California reporter's privilege only protects against a finding of contempt; consequently, if the reporter is a party, the state statutory and constitutional reporter's privilege provides no real protection. As the Supreme Court explained,

> A party to civil litigation who disobeys an order to disclose evidence [] may be subject to a variety of other sanctions, including the entry of judgment against him. … Neither Evidence Code section 1070 nor article I, section 2, subdivision (b), protects a party against such sanctions.

Mitchell, *supra*, 37 Cal. 3d at 274 (citations omitted).

However, the California Supreme Court has held that the First Amendment to the federal Constitution confers a qualified privilege on reporters even when they are parties to a lawsuit. *Mitchell*, *supra*, 37 Cal. 3d 268. The Supreme Court held that courts should evaluate five factors in determining whether disclosure by a reporter should be compelled: (1) whether the reporter is a party to the litigation; (2) whether the information sought "goes to the heart of the party's claim"; (3) whether the party seeking the information has exhausted all alternative sources; (4) the importance of protecting confidentiality, including whether the information "relates to matters of great public importance" and whether the risk of harm to the source is "substantial"; and (5) whether the party seeking disclosure has made a prima facie showing on its underlying claim. *Id.* at 279-83. A number of other cases have applied the qualified privilege, reaching different results regarding the protection afforded. *E.g.*, *Anti-Defamation League of B'Nai Brith*, *supra*, 67 Cal. App. 4th at 1095-97 (compelling disclosure of some unpublished information because it "might lead to admissible evidence" and other *Mitchell* factors satisfied); *Dalitz*, 168 Cal. App. 3d at 479 (compelling disclosure of confidential sources in defamation case because need for disclosure "compelling"); *KSDO*, 136 Cal. App. 3d at 386 (refusing to compel disclosure of unpublished information because alternative source of information); *Star Editorial*, 7 F.3d at 859-62 (applying California law) (compelling disclosure of confidential sources because "goes to the heart of the claim").

I. Defamation actions

There is no statutory or case law addressing the issue of whether the application of the privilege in defamation actions is treated differently than in other types of cases.

IV. Who is covered

California's reporter's privilege explicitly protects (1) "[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication or by a press association or wire service, or any person who has been so connected or employed" and (2) "a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed." Cal. Const. art. I, § 2(b). Consequently, it is unclear whether it protects other types of journalists, such as book authors. No California case has addressed this issue.

However, the courts generally have been liberal in defining these terms, for example, by including freelance reporters in the protection of the privilege. *E.g.*, *Von Villas*, *supra*, 10 Cal. App. 4th at 231-32; *Playboy Enterprises*, *supra*, 154 Cal. App. 3d at 28-29. California courts also have extended the privilege to bloggers engaged in the gathering and dissemination of news. *O'Grady*, *supra*, 139 Cal. App. 4th at 1457. One Court of Appeal held that to be entitled to protection, "the person or entity invoking the shield law [must] be engaged in legitimate journalistic purposes, or have exercised judgmental discretion in such activities." *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538, 1544-45 (1999) (citing *Delaney*, *supra*, 50 Cal. 3d at 798 n.8.) Consequently, this case requires "a prima facie showing" that the information was obtained "for the journalistic purpose of communicating information to the public." *Id.* at 1546. Another Court of Appeal asserted that the reporter's burden is "to show that they were in a class of persons protected by the shield law and that the information provided by their source was 'procured … for news or news commentary purposes on radio or television.'" *In re Willon*, *supra*, 47 Cal. App. 4th at 1092-93 (1996) (citations omitted).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

California's shield laws explicitly protect reporters, but do not define the term or limit its application. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. However, two California cases have held that the reporter's privilege extends to freelance journalists. *Von Villas*, *supra*, 10 Cal. App. 4th at 231-32; *Playboy Enterprises*, *supra*, 154 Cal. App. 3d at 28-29.

b. Editor

California's shield laws explicitly protect editors, but do not define the term or limit its application. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. There is no case law addressing this issue.

c. News

One California court held that to be entitled to protection, "the person or entity invoking the shield law [must] be engaged in legitimate journalistic purposes, or have exercised judgmental discretion in such activities." *Rancho Publications*, *supra*, 68 Cal. App. 4th at 1544-45 (citing *Delaney*, *supra*, 50 Cal. 3d at 798 n.8.) Consequently, this case requires "a prima facie showing" that the information was obtained "for the journalistic purpose of communicating information to the public." *Id.* at 1546. Another Court of Appeal asserted that the reporter's burden is "to show that they were in a class of persons protected by the shield law and that the information provided by their source was 'procured … for news or news commentary purposes on radio or television.'" *In re Willon*, *supra*, 47 Cal. App. 4th at 1092-93 (citations omitted).

d. Photo journalist

California's reporter's privilege protects all persons "connected with or employed upon" a media organization, which presumably extends to photo journalists. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. The enactments do not specifically mention photo journalists in their scope of protection; however, the California Supreme Court has applied the privilege to protect photographers. *See New York Times*, *supra*, 51 Cal. 3d 453.

e. News organization / medium

California's shield laws protect persons presently or previously "connected with or employed upon" a "newspaper, magazine, or other periodical publication or by a press association or wire service" or a radio or television station. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070.

In one California case, the court applied the First Amendment's qualified immunity to the Anti-Defamation League of B'nai Brith, which publishes magazines and newsletters, although the court noted that the ruling conferring protection on this entity was not challenged. *Anti-Defamation League of B'Nai B'rith*, 67 Cal. App. 4th at 1079-80. However, the court pointed out that the Anti-Defamation League was protected "only to the extent its activities or those of its agents constitute journalism." *Id.* at 1098. Similarly, in *O'Grady*, *supra*, 139 Cal. App. 4th at 1460-66, the court concluded that a website devoted to news regarding Apple Computers was a covered entity because it could be considered a "periodical publication" protected by the shield law. The court reasoned that "there is no apparent link between the core purpose of the law, which is to shield the gathering of news for dissemination to the public, and the characteristic of appearing in traditional print, on traditional paper." *Id.* at 1462. After thoroughly analyzing the method of publication on the internet and comparing the web pages at issue to traditional print publications, the court concluded that "[i]t seems likely that the Legislature intended the phrase 'periodical publication' to include all ongoing, recurring news publications while excluding nonrecurring publications such as books, pamphlets, flyers, and monographs." *Id.* at 1466.

2. Others, including non-traditional news gatherers

California's reporter's privilege was intended to be broad in its reach, because it protects all persons "connected with or employed upon" a media organization. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. Two California cases have applied the reporter's privilege to freelance reporters. *Von Villas*, *supra*, 10 Cal. App. 4th at 231-32; *Playboy Enterprises*, *supra*, 154 Cal. App. 3d at 28-29. In addition, one California Court of Appeal extended the

protections of the privilege to bloggers on a website devoted to information about Apple Macintosh computers, who purportedly disclosed confidential information about a rumored new Apple product. *O'Grady*, *supra*, 139 Cal. App. 4th at 1457. The court "decline[d] the implicit invitation to embroil ourselves in questions of what constitutes 'legitimate journalis[m].' The shield law is intended to protect the gathering and dissemination of *news* and that is what petitioners did here." *Id.* (emphasis in original). Because the court could "think of no workable test or principle that would distinguish 'legitimate' from 'illegitimate' news," it rejected "[a]ny attempt by courts to draw such a distinction." *Id.*

B. Whose privilege is it?

Because the reporter's privilege protects against a finding of contempt, its language suggests that it is personal to the reporter. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. However, at least one case allowed an organization, CBS, to claim the privilege. *See CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 249 (1978). This court also held the privilege was waived when the reporter's previously confidential sources testified in open court. *Id.* at 250. The court reasoned that "[s]ince this information is now a matter of public record, it is difficult to see how the production of tapes which will merely confirm — or at worst very slightly amplify — what has already been revealed, will materially erode the vicarious interest in confidentiality asserted by CBS." *Id.*

Another court rejected this reasoning, asserting that arguments based on the *CBS* decision "are manifestly in direct conflict with the statutory construction adopted herein. We find no support of these positions in the language of the statute." *Playboy Enterprises*, *supra*, 154 Cal. App. 3d at 23. The court in *Playboy Enterprises* pointed out that the express language of the statute "does not allow the conclusion that protection of unpublished materials or information is dependent upon the continued confidentiality of the source." *Id.*; *see also Los Angeles Memorial Coliseum Comm'n*, *supra*, 89 F.R.D. at 494 (asserting that federal "journalist's privilege belongs to the journalist alone and cannot be waived by persons other than the journalist").

V. Procedures for issuing and contesting subpoenas

California courts are bound by the state-wide Codes of Civil Procedure and Court Rules. In addition, individual jurisdictions may have "local rules" that contain both procedural and substantive requirements. This section focuses on the state-wide rules of procedure. The appropriate local rules for the judicial district also should be reviewed before responding to a subpoena.

A. What subpoena server must do

1. Service of subpoena, time

California Code of Civil Procedure § 1986.1 generally requires five days' notice before a reporter can be required to appear at a trial or hearing. It provides, in relevant part:

> Because important constitutional rights of a third-party witness are adjudicated when rights under subdivision (b) of Section 2 of Article I of the California Constitution are asserted, except in exigent circumstances a journalist who is subpoenaed in any civil or criminal proceeding shall be given at least five days' notice by the party issuing the subpoena that his or her appearance will be required.

Cal. Code Civ. Proc. § 1986.1(b).

2. Deposit of security

There is no statutory or case law addressing this issue.

3. Filing of affidavit

There is no statutory or case law addressing this issue.

4. Judicial approval

California law allows for the issuance of a subpoena without prior judicial approval. *See* Cal. Code Civ. Proc. § 2020.210. The subpoena may be issued by the court clerk or by any attorney of record in the case. *Id.*

5. Service of police or other administrative subpoenas

There is no statutory or case law addressing this issue.

B. How to Quash

California law allows persons subject to a subpoena to either move to quash the subpoena, pursuant to California Code of Civil Procedure § 1987.1, or for a protective order, pursuant to California Code of Civil Procedure § 2025.420. Motions typically ask for both forms of relief. In addition, one California court held that serving objections to a "records only" subpoena sufficed to preserve the deponent's objections to the subpoena and placed the onus on the subpoenaing party to move to compel. *See Monarch Healthcare v. Superior Court*, 78 Cal. App. 4th 1282, 1290 (2000).

1. Contact other party first

A motion for a protective order requires the movant to provide "a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." Cal. Code Civ. Proc. § 2016.040; *see also* Cal. Code Civ. Proc. § 2025.420. There is no such requirement for a motion to quash, except in limited circumstances (which generally do not apply to reporters). However, the party issuing the subpoena often is not familiar with the privilege, and may voluntarily withdraw the subpoena. In addition, because California cases have interpreted the reporter's privilege to provide absolute protection under most circumstances, and because California judges generally expect parties to attempt informal resolution before filing a motion, it is almost always a good idea to contact opposing counsel and attempt to negotiate withdrawal of the subpoena.

2. Filing an objection or a notice of intent

California law allows a non-party to serve written objections to a subpoena under limited circumstances. *E.g.*, Cal. Code Civ. Proc. § 1985.3(g) (subpoena duces tecum for consumer's personal records); § 1985.6(f) (subpoena duces tecum for employment records). In addition, California law provides that privileges may be preserved by a timely objection during the deposition. *See* Cal. Code Civ. Proc. § 2025.460. However, one California court took these provisions a step further, and held that serving objections to a "records only" subpoena sufficed to preserve the deponent's objections to the subpoena and placed the onus on the subpoenaing party to move to compel. *See Monarch Healthcare*, *supra*, 78 Cal. App. 4th at 1290. Although this case arose in the context of a "records only" subpoena, its reasoning also may apply to subpoenas seeking testimony.

3. File a motion to quash

a. Which court?

The motion to quash or for a protective order should be filed in the same court as the court that is hearing the case.

b. Motion to compel

The party subpoenaed should move to quash or for a protective order before the scheduled appearance date, or it will risk being held in contempt for failing to appear.

c. Timing

For civil cases in state court, the California Code of Civil Procedure requires 16 court days' notice of the motion to quash or for a protective order, and more if the papers are served other than by personal delivery. *See* Cal. Code Civ. Proc. §§ 1005, 1013. California Rule of Court 4.111 requires 10 calendar days' notice of a pre-trial motion filed in a criminal matter. More notice should be given if the motion is served other than by personal delivery, consistent with the Code of Civil Procedure. *See* Cal. Code Civ. Proc. § 1013. In addition, the judicial district's local rules may contain different timing requirements for criminal cases.

Frequently the requisite notice period cannot be given, because the subpoena was served on short notice. Under those circumstances, the approach should differ, depending on whether the subpoena is for deposition testimony or testimony at a court appearance. If the subpoena seeks deposition testimony, it is probably safe to file the motion giving the requisite 16 court or 10 calendar days' notice, and merely advise opposing counsel in writing that

in light of the motion the reporter will not appear at the deposition. There is, however, no statutory or case law addressing this issue.

If the subpoena seeks testimony at a court appearance, the motion should be scheduled for the date of the court appearance or earlier. Although many courts will simply accept the motion along with an explanation why more notice could not be given, it is safest to either (1) present the motion itself as an *ex parte* application, pursuant to California Rule of Court 3.1200 et seq.; or (2) to file an *ex parte* application for an Order Shortening Time to hear the motion, pursuant to California Code of Civil Procedure § 1005(b) and California Rule of Court 3.1200 et seq. The option chosen should depend on the time available before the hearing.

d. Language

There is no stock language or preferred text to be included in the motion.

e. Additional material

The Rules require "[a]ny motion involving the content of a discovery request," including motions to compel answers or the production of documents at a deposition, to be accompanied by a separate statement of disputed matters. California Rule of Court 3.1020. However, it is unlikely that this Rule applies to a subpoena issued to a reporter, particularly when the motion is brought before any testimony is taken.

In addition, the motion to quash can seek an award of attorneys' fees and costs if an argument can be made that the motion was "opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." Cal. Code Civ. Proc. § 1987.2.

4. In camera review

a. Necessity

No statute mandates that the trial court conduct an in camera review of the materials before determining whether they should be released, and the Supreme Court has rejected the idea that in camera review is required in every case. *See Delaney*, *supra*, 50 Cal. 3d at 813. However, California case law does "encourage parties to allow disputed materials to be examined by the trial court in camera" as a possible means of resolution. *Sci-Sacramento, Inc. v. Superior Court*, 54 Cal. App. 4th 654, 662 (1997). Moreover, the California Supreme Court concluded that "[w]hen a criminal defendant [] seeks confidential or sensitive information, the practical need for an in camera hearing is obvious." *Delaney*, *supra*, 50 Cal. 3d at 814. The Court held that if a trial court determines that "a newsperson's claim of confidentiality or sensitivity is colorable," "it must then receive the newsperson's testimony in camera." *Id.* Finally, for a defendant to challenge an in camera proceeding, he must show how the in camera proceeding negatively influenced his ability to present a defense or receive assistance from counsel; an unsubstantiated claim is unsufficient. *Ramos*, *supra*, 34 Cal. 4th at 527.

b. Consequences of consent

Consent to in camera review of the reporter's materials will not result in a waiver of the privilege. *Sci-Sacramento*, *supra*, 54 Cal. App. 4th at 662. Moreover, while there is no automatic stay of any order that might be entered following review of the materials, the California Supreme Court has recommended that trial courts enter such stays, and trial courts regularly do so. *See New York Times*, *supra*, 51 Cal. 3d at 460; *Sci Sacramento*, *supra*, 54 Cal. App. 4th at 667.

c. Consequences of refusing

No California statute or case law specifically addresses the consequences of refusing to allow in camera review, although it probably would result in entry of a finding of contempt. However, the California Supreme Court has recommended that trial courts stay contempt orders pending appeal. *See New York Times*, 51 Cal. 3d at 460. Consequently, it is unlikely that refusal to allow in camera review would result in immediate execution of the contempt sentence.

5. Briefing schedule

For civil cases in state court the California Code of Civil Procedure requires 16 court days' notice of the motion, and more if the papers are served other than by personal delivery. *See* Cal. Code Civ. Proc. §§ 1005, 1013. Opposing papers must be served and filed 9 court days before the hearing, and reply papers must be served and filed 5 court days before the hearing. *Id.* § 1005. These deadlines are extended if service is other than by personal delivery, as provided in California Code of Civil Procedure. §§ 1010, 1011, 1012, 1013.

For criminal cases, California Rule of Court 4.111 requires motions to be served and filed at least 10 calendar days, opposition papers 5 calendar days, and replies 2 calendar days before the hearing. More notice should be given if the papers are served other than by personal delivery, consistent with California Code of Civil Procedure § 1013. In addition, the judicial district's local rules may contain separate timing requirements for criminal cases.

6. Amicus briefs

Amicus briefs typically are not filed in California's Superior Courts, although they are routinely accepted in matters pending before the Courts of Appeal and the Supreme Court. California Rules of Court 8.200, 8.500(g) and 8.520(f) provide the procedure for submitting an amicus brief.

Two organizations in California regularly serve as amici on reporter's privilege issues. The California First Amendment Coalition can be reached at cfac.org. CFAC's address is 534 4th Street, Suite B, San Rafael, California 94901, and its telephone and fax numbers are (415) 460-5060 and (415) 460-5155, respectively. The California Newspapers Publishers Association can be reached at cnpa.com. CNPA's address is 708 10th Street, Sacramento, California 95814, and its telephone and fax numbers are (916) 288-6000 and (916) 288-6002, respectively.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The California Supreme Court has stated that "a person claiming a privilege bears the burden of proving he is entitled to the privilege." *Delaney*, *supra*, 50 Cal. 3d at 806 n.20 (citations omitted). Consequently, "[t]he newsperson seeking immunity must prove all the requirements of the shield law have been met." *Id.* One court asserted that the reporter's burden is "to show that they were in a class of persons protected by the shield law and that the information provided by their source was 'procured … for news or news commentary purposes on radio or television.'" *In re Willon*, *supra*, 47 Cal. App. 4th at 1092-93 (citations omitted). Another court held that the reporter must make a prima facie showing that the information was obtained "for the journalistic purpose of communicating information to the public." *Rancho Publications*, *supra*, 68 Cal. App. 4th at 1546.

Once the journalist meets this initial burden, the burden shifts to the criminal defendant seeking discovery to make the showing required to overcome the shield law." *Delaney*, *supra*, 50 Cal. 3d at 806 n.20 (citation omitted). The trial court may require defendant to submit an offer of proof to meet his or her burden under *Delaney*. It is insufficient for the defendant to simply submit the questions he or she hopes to ask the reporter. *Vasco*, *supra*, 131 Cal. App. 4th at 155. In *Vasco*, for example, the court noted that "defendant filed no declarations or investigative reports to support her *Delaney* showing." *Id.* (citing cases holding that "offer of proof must set forth the substance and purpose of the evidence"). Thus, the court concluded that defendant was not entitled to compel disclosure of the reporter's unpublished information. *Id.* at 156.

B. Elements

The elements discussed below are relevant only in two situations, because the reporter's privilege is otherwise absolute. In criminal proceedings, the reporter may be required to disclose unpublished information in response to a defense subpoena. *See Delaney*, *supra*, 50 Cal. 3d at 805-06. The prosecution has no right to compel a reporter's testimony. *See Miller*, *supra*, 21 Cal. 4th at 887. In civil proceedings, the reporter may be required to disclose unpublished information if he or she is a party to the action. *See Mitchell*, *supra*, 37 Cal. 3d at 279. If the reporter is not a party, the privilege is absolute. *See New York Times*, *supra*, 51 Cal. 3d at 456. The elements to compel disclosure differ, depending on the type of case, as discussed below.

1. Relevance of material to case at bar

In criminal cases, the defendant bears the burden of showing "a reasonable possibility the information will materially assist his defense." *Delaney*, *supra*, 50 Cal. 3d at 808. If this threshold showing is established, the court should consider the other elements discussed below. If the defendant does not make this threshold showing, the defendant has no right to the reporter's information. *Id.* at 808-09.

Once the defendant has made the threshold showing, the court should balance four factors, one of which is "the importance of the information to the criminal defendant." *See Delaney*, *supra*, 50 Cal. 3d at 811. The California Supreme Court noted in *Delaney* that "[a] defendant in a given case may be able not only to meet but to exceed the threshold 'reasonable possibility' requirement." *Id.* "If so, the balance will weigh more heavily in favor of disclosure than if he could show only a reasonable possibility the evidence would assist his defense." *Id.*

In civil cases, "disclosure should be denied unless the information goes 'to the heart of the plaintiff's claim.'" *Mitchell*, 37 Cal. 3d at 280 (citations omitted). The Court noted that the trial court should evaluate the information sought from this perspective, and only allow discovery of the information that is essential to the claim of the subpoenaing party. *Id.* at 282.

2. Material unavailable from other sources

In criminal cases, after the threshold showing has been met, one of the four factors the court should consider is whether there is an alternative source for the unpublished information. *Delaney*, *supra*, 50 Cal. 3d at 811. Although this is only one of four factors to be weighed in deciding whether to compel disclosure, one California court has held that where an alternative source has been identified, the trial court may deny access to the reporter's information. *See Von Villas*, *supra*, 10 Cal. App. 4th at 236.

In civil cases, "discovery should be denied unless the plaintiff has exhausted all alternative sources of obtaining the needed information." *Mitchell*, 37 Cal. 3d at 282.

a. How exhaustive must search be?

In criminal cases, defendant may be allowed to compel the reporter's information without conducting an exhaustive search. The California Supreme Court has held "that a universal and inflexible alternative-source requirement is inappropriate in a criminal proceeding." *Delaney*, 50 Cal. 3d at 812-13. The trial court should consider:

> The type of information being sought (e.g., names of potential witnesses, documents, a reporter's eyewitness observations), the quality of the alternative source, and the practicality of obtaining the information from the alternative source.

Id. In *Delaney*, the Supreme Court found that the reporters were the only disinterested witnesses to the search at issue in the case, and consequently "that there was no meaningful alternative source for the reporters' testimony." *Id.* at 815-16.

In civil cases, a more demanding search generally is required before a court may conclude that the subpoenaing party has exhausted alternative sources. The California Supreme Court held in *Mitchell*, *supra*, that "discovery should be denied unless the plaintiff has exhausted all alternative sources of obtaining the needed information." 37 Cal. 3d at 282. *But see Delaney*, *supra*, 50 Cal. 3d at 811 (distinguishing *Mitchell* on grounds that source there was confidential). The *Delaney* Court asserted that "[w]here the information is shown to be not confidential or sensitive, the primary basis for the requirement is not present and imposing a rigid requirement would be to sustain a rule without a reason." 50 Cal. 3d at 811-12.

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

In criminal cases, defendant may be allowed to compel disclosure of the information without establishing exhaustion of all alternative sources. *See Delaney*, *supra*, 50 Cal. 3d at 811-12. However, in civil cases, the party seeking the information generally will have to provide proof that they exhausted all alternative sources for the information before discovery from the reporter will be allowed. *See Mitchell*, *supra*, 37 Cal. 3d at 282.

c. Source is an eyewitness to a crime

There is no statutory or case law addressing this issue. However, in *Delaney*, *supra*, the court considered it significant that the reporter was an eyewitness to the crime and there were no other disinterested witnesses. 50 Cal. 3d at 815-16.

3. Balancing of interests

As discussed in Section 7, below, California courts balance these and a number of other interests in determining whether to quash the subpoena.

4. Subpoena not overbroad or unduly burdensome

The California Supreme Court made clear in *Mitchell*, *supra*, that trial courts should not enforce overbroad subpoenas. 37 Cal. 3d at 282. Rather, the court must examine each item of information sought, and allow discovery only as to those items that go "to the heart of the claim." *Id.* at 282. As the Court noted, "[t]here may well be an irreducible core of information which cannot be discovered except through the Mitchells, but plaintiffs have not yet reduced their discovery to that core." *Id.*

5. Threat to human life

There is no statutory or case law addressing this issue.

6. Material is not cumulative

There is no statutory or case law addressing this issue.

7. Civil/criminal rules of procedure

Not addressed.

8. Other elements

In criminal cases, in addition to the factors discussed above, the trial court should consider "[w]hether the unpublished information is confidential or sensitive." *Delaney*, *supra*, 50 Cal. 3d at 810. The Court stated that:

> Generally, nonconfidential or nonsensitive information will be less worthy of protection than confidential or sensitive information. Disclosure of the latter types of information will more likely have a significant effect on the newsperson's future ability to gather news. … The protection of that ability is the primary purpose of the shield law.

Id.

In criminal cases, the courts also should consider "[t]he interests sought to be protected by the shield law," *i.e.*, "whether the policy of the shield law will in fact be thwarted by disclosure." *Delaney*, *supra*. 50 Cal. 3d at 810. The Court explained that if "the criminal defendant seeking disclosure is himself the source of the information, it cannot be seriously argued that the source (the defendant) will feel that his confidence has been breached." *Id*; *see also Vasco*, *supra*, 131 Cal. App. 4th at 152 n.3 (citing Delaney for this proposition but not reaching issue).

In civil cases, the courts should consider, in addition to the factors discussed above, "the nature of the litigation and whether the reporter is a party." *Mitchell*, 37 Cal. 3d at 279. The Supreme Court asserted that "[i]n general disclosure is appropriate in civil cases, especially when the reporter is a party to the litigation." *Id.* However, the Court clarified that whether disclosure should be ordered depends "upon the balancing of other relevant considerations." *Id.*

The courts also should consider in civil cases "the importance of protecting confidentiality in the case at hand." *Id.* at 282. As the Supreme Court explained:

> The investigation and revelation of hidden criminal or unethical conduct is one of the most important roles of the press in a free society — a role that may depend upon the ability of the press and the courts to protect sources who may justifiably fear exposure and possible retaliation. Thus, when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information.

Id. at 283.

Finally, the courts "may require the plaintiff to make a prima facie showing that the alleged defamatory statements are false before requiring disclosure." *Id.* This is necessary "because 'to routinely grant motions seeking compulsory disclosure . . . without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles of [*New York Times* and similar cases]." *Id.* The Court clarified, however, that "[a] showing of falsity is not a prerequisite to discovery, but it may be essential to tip the balance in favor of discovery." *Id.*

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Because the shield law protects only unpublished information and the identity of sources, information that has been "published" may not be protected by the shield law. No reported California decision has found the privilege to have been waived as a result of the reporter's disclosure of unpublished information. However, some cases have suggested that waiver might be found. For example, in *Rosato, supra*, the dissenting opinion asserted that

> To protect the privilege the newsman must avoid answering any questions which might result in an actual or constructive waiver of the privilege. By voluntarily answering questions as to some facts which would lead to the source, he will be held to have waived the privilege as to all other facts connected therewith.

51 Cal. App. 3d at 233 (citations omitted). The dissent mentioned *Farr, supra*, as a "clear example of such a waiver," asserting that "by admitting that he had received the information from three persons subject to the court's order, Farr impliedly waived his right not to disclose their identities." *Id.* (discussing *Farr, supra*, 22 Cal. App. 3d at 70). However, because the *Farr* court did not explicitly evaluate any claim of waiver, it does not provide any basis for this argument.

2. Elements of waiver

A party arguing that the reporter's privilege has been waived generally has a high burden. As one California court explained,

> Waiver requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. [] There must be actual or constructive knowledge of the existence of the right to which the person is entitled. ... There must be … an actual intention to relinquish it or conduct so inconsistent with the intent to enforce that right in question as to induce a reasonable belief that it has been relinquished.

Sci-Sacramento, supra, 54 Cal. App. 4th at 661 (citations and quotation marks omitted).

a. Disclosure of confidential source's name

One California court held that the privilege was waived when the previously confidential sources testified in open court. *CBS, Inc., supra*, 85 Cal. App. 3d at 250. The court reasoned "[s]ince this information is now a matter of public record, it is difficult to see how the production of tapes which will merely confirm — or at worst very slightly amplify — what has already been revealed, will materially erode the vicarious interest in confidentiality asserted by CBS." *Id.*

Another court came to the opposite conclusion, however, asserting that arguments based on the *CBS* decision "are manifestly in direct conflict with the statutory construction adopted herein. We find no support of these positions in the language of the statute." *Playboy Enterprises, supra*, 154 Cal. App. 3d at 23. The court in *Playboy Enterprises* pointed out that the express language of the statute "does not allow the conclusion that protection of unpublished materials or information is dependent upon the continued confidentiality of the source." *Id.*

Still another court viewed revelation of the source's identity as a reason for refusing to compel disclosure of additional information from the reporter. In *KSDO, supra*, the reporter revealed the source's identity and the court concluded that:

> [H]ere, the sources have been revealed so that plaintiffs are free to test the reliability of those sources and there is no showing that it is necessary to have [the reporter's] notes to do so. Basically, plaintiffs are now able to get the information they seek from sources other than Brown's notes.

136 Cal. App. 3d at 386.

b. Disclosure of non-confidential source's name

There are no reported decisions addressing this issue.

c. Partial disclosure of information

The statute expressly protects all unpublished information, providing that "'unpublished information' includes information not disseminated to the public … whether or not related information has been disseminated." Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. Consequently, partial disclosure of information should not result in waiver of any information that was not actually disclosed. *Id.*; *see also Playboy Enterprises*, *supra*, 154 Cal. App. 3d at 23; *Fost*, *supra*, 80 Cal. App. 4th at 735. Allowing in camera review of the information sought should not be deemed a waiver of the reporter's privilege. *Sci-Sacramento*, *supra*, 54 Cal. App. 4th at 661-62.

d. Other elements

There is no statutory or case law addressing this issue.

3. Agreement to partially testify act as waiver?

An agreement to testify will not waive the privilege as to any information not actually divulged. California Code of Civil Procedure § 1986.1 provides in part:

> No testimony or other evidence given by a journalist under subpoena in a civil or criminal proceeding may be construed as a waiver of the immunity rights provided by subdivision (b) of Section 2 of Article I of the California Constitution.

Cal. Code Civ. Proc. § 1986.1(a).

In addition, relying on the language of the shield laws, one court explained that:

> Direct testimony regarding published information cannot constitute a waiver of the right to refuse to disclose related information that is unpublished because the shield law explicitly provides that unpublished information remains protected "whether or not related information has been disseminated."

Fost, *supra*, 80 Cal. App. 4th at 735. *See also Playboy Enterprises*, *supra*, 154 Cal. App. 3d at 23 (rejecting argument that privilege waived because virtually identical information published).

VII. What constitutes compliance?

A. Newspaper articles

Newspapers are generally self authenticating in California under Evidence Code § 645.1, which provides that:

> Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months.

Cal. Evid. Code § 645.1. Consequently, if the party issuing the subpoena is only interested in the contents of the article, the reporter's testimony may be unnecessary. Typically, however, the subpoenaing party desires more information than is available in the article itself — even if it is only the reporter's testimony that the article was true and accurate as published — and will insist on the reporter's testimony.

B. Broadcast materials

Broadcast materials may be authenticated by anyone capable of testifying that the materials are an accurate representation of what they purport to be. *See Jones v. City of Los Angeles*, 20 Cal. App. 4th 436, 440 n.5 (1993). As

the court explained, "though the requisite foundation may, and usually will, be laid by the photographer, it may also be provided by any witness who perceived the events filmed." *Id.* (citations omitted).

In addition, Evidence Code § 1553 provides for self-authentication of certain aspects of video and digital tapes:

> A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

Cal. Evid. Code § 1553. Consequently, if the party issuing the subpoena is only interested in the contents of the broadcast materials, the reporter's testimony may be unnecessary. Typically, however, the subpoenaing party desires more information than is available in the materials themselves — even if it is only the reporter's testimony that the materials were true and accurate as broadcast — and will insist on the reporter's testimony.

C. Testimony vs. affidavits

A declaration from the reporter may be sufficient in some circumstances, because declarations are admissible in support of most motions in California courts. As the California Supreme Court explained, "hearing and determination 'in the manner … provided by law for the … hearing of motions' (§ 1290.2) would ordinarily mean the facts are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion." *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal. 4th 394, 413-14 (1996); *see also People v. Superior Court (Zamudio)*, 23 Cal. 4th 183, 201 (2000) ("California law affords numerous examples of a trial court's authority, in ruling upon motions, to resolve evidentiary disputes without resorting to live testimony"); Cal. Code Civ. Proc. § 2009 (listing situations in which declaration admissible in lieu of live testimony).

However, California cases also are clear that the trial court may require live testimony at some types of hearings. *E.g.*, *People v. Hedgecock*, 51 Cal. 3d 395, 415 (1990) (trial court may require evidentiary hearing on motion for new trial in criminal case; distinguishing motions for new trials in civil cases, which must be based on affidavits alone). Moreover, declarations are not admissible at trial in lieu of live testimony. *See Rowan v. City & County of San Francisco*, 244 Cal. App. 2d 308, 314 n.3 (1966) ("[a]ffidavits being hearsay may not be used in evidence except where permitted by statute and section 2009 of the Code of Civil Procedure permitting their use on motion has no relevance [in trial]" (citations omitted)). Consequently, the subpoenaing party normally will refuse to accept a declaration in lieu of live testimony, and the courts will require the reporter to testify.

D. Non-compliance remedies

1. Civil contempt

California law provides that before a reporter may be held in contempt for refusing to testify, the court must enter specific findings to support the contempt order:

> If a trial court holds a journalist in contempt of court in a criminal proceeding notwithstanding subdivision (b) of Section 2 of Article I of the California Constitution, the court shall set forth findings, either in writing or on the record, stating at a minimum, why the information will be of material assistance to the party seeking the evidence, and why alternate sources of the information are not sufficient to satisfy the defendant's right to a fair trial under the Sixth Amendment to the United States Constitution and Section 15 of Article I of the California Constitution.

Cal. Code Civ. Proc. § 1986.1(c). If the trial court enters such findings, California Code of Civil Procedure § 1211 authorizes the court to "punish[] summarily" any contempt committed in the court's immediate view and presence. Any contempt committed outside of the presence of the court may be proven by affidavit. *Id.*

a. Fines

California Code of Civil Procedure § 1218 limits to $1,000 any fine that may be imposed as a result of a contempt order. In addition, for a contempt committed outside of the presence of the court, the party committing the contempt "may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding." *Id.*

b. Jail

California Code of Civil Procedure § 1218 limits to five days any imprisonment that may be ordered as a result of a contempt order. In one case, Tim Crews, publisher, editor and chief reporter and photographer of *The Sacramento Valley Mirror*, chose to go to jail rather than reveal the source of stories he published regarding the arrest of a local California Highway Patrol officer for possession of a stolen gun. In response to this and other publicized journalist subpoenas, the California Legislature enacted Code of Civil Procedure § 1986.1, which contains a number of procedural mechanisms designed to protect reporters.

2. Criminal contempt

California Penal Code § 166 authorizes a trial court to punish as a misdemeanor certain actions that constitute contempt of court. However, no reported California case has applied this provision to a reporter for refusing to comply with a subpoena.

3. Other remedies

California's shield laws only protect against a finding of contempt. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. Consequently, "[a] party to civil litigation who disobeys an order to disclose evidence [] may be subject to a variety of other sanctions, including the entry of judgment against him." *Mitchell*, *supra*, 37 Cal. 3d at 274. A reporter who is not a party to the litigation also may be subject to other civil remedies; however, as the Supreme Court has recognized, those remedies are essentially meaningless. *See New York Times*, *supra*, 51 Cal. 3d at 463-64 (California Code of Civil Procedure § 1992, which provides civil remedy for disobeying a subpoena, is "not effective as a practical matter" because remedy provided is minimal).

VIII. Appealing

A. Timing

1. Interlocutory appeals

Because California's shield laws only protect against a finding of contempt, an appeal may be found to be premature before the trial court has actually found the reporter in contempt. *See New York Times*, *supra*, 51 Cal. 3d at 458. However, as the Supreme Court also made clear in this decision:

> To avoid confinement under a judgment of contempt that may subsequently be set aside, a trial court should stay its judgment of contempt to allow the contemnor newsperson sufficient time in which to seek writ relief if the trial court believes there is any colorable argument the newsperson can make against the contempt adjudication. If the trial court nevertheless declines to issue a stay, a reviewing court should do so pending its decision whether to issue an extraordinary writ.

Id. at 460.

California's rules do not allow for a direct appeal of a civil contempt order. *See* Cal. Code Civ. Proc. § 904.1. Consequently, if a contempt order is entered, the reporter should file a petition for extraordinary relief, seeking a writ of review, mandate or prohibition to the trial court, pursuant to California Code of Civil Procedure §§ 1067, 1084 or 1102. Although California's courts generally do not grant discretionary review of discovery matters, "[e]xtraordinary review will be granted, . . . when a discovery ruling plainly threatens immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy … or where the case presents an opportunity to resolve unsettled issues of law and furnish guidance applicable to other pending or anticipated cases . . . ." *O'Grady*, *supra*, 139 Cal. App. 4th at 1439 (citations omitted).

California's statutes do not impose a time limit for such writs; however, the appellate court "has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent 'extraordinary circumstances' justifying the delay." *Popelka, Allard, McCowan & Jones v. Superior Court*, 107 Cal. App. 3d 496, 499 (1980) (citations omitted; emphasis in original). Moreover, from a practical perspective, if the trial court stays the contempt order for a limited period of time, the deadline for filing the writ petition will be dictated by the duration of the trial court stay.

2. Expedited appeals

The California Code of Civil Procedure authorizes the appellate court to issue a peremptory writ in the first instance, *i.e.*, without a full briefing schedule or oral argument. *See* Cal. Code Civ. Proc. § 1088. However, California law imposes limits on the use of such writs. The Code of Civil Procedure provides that the writ must be preceded by at least ten days' notice to the adverse party. *Id.* This notice typically is issued directly by the Court of Appeal to the respondent. *See, e.g., Swaithes v. Superior Court*, 212 Cal. App. 3d 1082, 1089 (1989). However, the party seeking issuance of a peremptory writ in the first instance should give clear notice of that request in the writ petition.

In addition, California courts have limited the availability of such writs. One California court explained that,

> The second option, i.e., the peremptory writ in the first instance, is subject to severe restrictions. As the exception to the rule, the procedure may only be used in the limited situation where entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue. … Moreover, on those rare occasions that a reviewing court resorts to use of a peremptory writ in the first instance, it is constrained to comply with the procedural safeguards in *Palma [v. U.S. Industrial Fasteners, Inc.*, 36 Cal. 3d 171 (1984)] — that is, to receive or solicit opposition before directing issuance of the writ.

Kernes v. Superior Court, 77 Cal. App. 4th 525, 529 (2000). *See also Ng v. Superior Court*, 4 Cal. 4th 29, 35 (1992) (asserting that court may issue peremptory writ in the first instance "only when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue—for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts—or where there is an unusual urgency requiring acceleration of the normal process"). Other writs are available under California statutory law, but for those writs, the Court of Appeal generally will issue an order to show cause why the lower court's decision should not be reversed, giving the court and the parties an opportunity to brief the issues.

B. Procedure

1. To whom is the appeal made?

An appeal or petition for extraordinary relief from a superior court proceeding, other than a limited civil proceeding, should be made to the appropriate district of the California Court of Appeal. *See* Cal. Code Civ. Proc. §§ 904.1, 1085, 1103. An appeal or petition for extraordinary relief from a limited civil proceeding or a municipal court order should be made to the appellate division of the superior court. *See* Cal. Code Civ. Proc. §§ 904.2, 1085, 1103; Cal. Rule of Court 8.490. An appeal is initiated by filing a "Notice of Appeal" with the court that entered the order being appealed. *See* Cal. Rule of Court 8.100. However, a petition for extraordinary relief should be filed directly with the court from which relief is sought. *See* Cal. Code Civ. Proc. § 1107.

2. Stays pending appeal

The reporter may seek a stay pending the appeal by request within the petition for writ of mandamus, or by filing a separate petition for writ of supersedeas. *See* Cal. Rule of Court 8.112. If the stay request is contained in a separate petition for writ of supersedeas, the petition must be filed in the court in which the writ petition is pending, be verified, and contain a supporting memorandum of points and authorities. *See id.* If the stay request is contained within the petition for writ of mandamus, "the cover shall bear the conspicuous notation 'STAY REQUESTED' or words of like effect." *See* Cal. Rule of Court 8.116.

The California Supreme Court directed trial and appellate courts to stay any contempt order if a colorable argument can be made on appeal. *See New York Times, supra*, 51 Cal. 3d at 460. The Supreme Court held that,

> To avoid confinement under a judgment of contempt that may subsequently be set aside, a trial court should stay its judgment of contempt to allow the contemnor newsperson sufficient time in which to seek writ relief if the trial court believes there is any colorable argument the newsperson can make against the contempt adjudication. If the trial court nevertheless declines to issue a stay, a reviewing court should do so pending its decision whether to issue an extraordinary writ.

Id. Consequently, a stay of the trial court order should issue under most circumstances.

3. Nature of appeal

California's rules do not allow for a direct appeal of a civil contempt order. *See* Cal. Code Civ. Proc. § 904.1. Consequently, if a contempt order is entered, the reporter should file a petition for extraordinary relief, seeking a writ of mandate or prohibition to the trial court, pursuant to California Code of Civil Procedure §§ 1084 or 1103.

4. Standard of review

The standard of review of a contempt order is not clear. One California court held that the standard of review is "whether there is substantial evidence to sustain the order." *In re Willon*, *supra*, 47 Cal. App. 4th at 1089 (citations omitted). That court explained that the contempt order will be sustained only if the record "demonstrate[s] on its face the existence of all the necessary facts upon which jurisdiction depended." *Id.* However, the California Supreme Court declined to decide whether the appellate court is required to exercise its independent judgment in reviewing an order of contempt because of the constitutional interests at stake. *See Delaney*, 50 Cal. 3d at 816. It did note, however, that "Article I, section 2(b) makes no provision for such a standard of review" and that no authority had been cited to support such a review. *Id.; see also Vasco*, *supra*, 131 Cal. App. 4th at 152 (also declining to adopt a standard of review for shield law cases).

In reviewing an order denying a protective order, one California court held that controversies that turn on questions of statutory interpretation are subject to independent review, and that when the controversy "implicates interests in freedom of expression" the court must "review *all* subsidiary issues, including factual ones, independently in light of the whole record." *O'Grady*, *supra*, 139 Cal. App. 4th at 1456 (emphasis in original). That court exercised the equivalent of *de novo* review because the case was decided on "a paper record fully duplicated" in the Court of Appeal (as opposed to "controverted live testimony," which would warrant deference). *Id.*

The *O'Grady* court enunciated a different standard for evaluating application of a reporter's privilege under the free press guarantees of the First Amendment or the California Constitution — "the relatively searching . . . constitutional fact review." *O'Grady*, *supra*, 139 Cal. App. 4th at 1466-67 (internal quotes omitted). This requires the court to independently review any factual findings. Thus:

> Facts that are germane to the First Amendment analysis must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact. . . . And the reviewing court must examine for itself the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect. We must therefore make an independent examination of the entire record . . . , and determine whether the evidence in the record supports the factual findings necessary to sustain the trial court's order denying a protective order.

Id. (internal quotes, citations omitted). It would appear that under this standard, even factual findings deriving from live testimony would be reviewed *de novo* to the extent they impact on constitutional free press rights.

5. Addressing mootness questions

The possibility of mootness often will arise in criminal proceedings, when the trial proceeds without the reporter's testimony. However, the issues frequently will remain alive because the contempt order is outstanding and the reporter will be subject to punishment if the order is not reversed. *E.g.*, *In re Willon*, *supra*, 47 Cal. App. 4th at 1088 n.2. Nevertheless, one Court of Appeal asserted that "[e]ven if the trial court were to withdraw its decision to punish petitioners, this case would not be moot, since it presents important public issues that are 'capable of repetition, yet evading review.'" *Id.* (citations omitted).

6. Relief

The reporter generally should seek a reversal of the contempt citation or the order compelling disclosure. California's appellate courts routinely enter orders disposing of the controversy, rather than remanding to the trial court for reconsideration. *E.g.*, *Mitchell*, *supra*, 37 Cal. 3d at 284; *Playboy Enterprises*, *supra*, 154 Cal. App. 3d at 29. The appellate court will remand to the trial court for consideration if the decision answers a question of first impression, but rarely in other circumstances. *E.g.*, *In re Willon*, *supra*, 47 Cal. App. 4th at 1102.

IX. Other issues

A. Newsroom searches

California Penal Code § 1524(g) provides that "[n]o warrant shall issue for any item or items described in Section 1070 of the Evidence Code." This statute would seem to flatly forbid the issuance of a search warrant to obtain confidential source information or unpublished information from a news organization.

Under different circumstances, a California Court of Appeal affirmed a trial court's seizure of a roll of film taken in open court. *See Marin Independent Journal v. Municipal Court*, 12 Cal. App. 4th 1712 (1993). California Rule of Court 1.150 prohibits photography of courtroom proceedings without a prior written order. In this case, the photographer took pictures of a suspect in open court without written permission, and the judge ordered that the film be seized. *Id.* at 1716. The Court of Appeal upheld the seizure, concluding that it was not a prior restraint on speech. *Id.* at 1718-19. The Court asserted, however, that even if it was a prior restraint, it was permissible because the photographs had been obtained illegally.

B. Separation orders

There is no statutory or case law addressing this issue.

C. Third-party subpoenas

There is no statutory or case law addressing the media's interest in contesting a subpoena issued to discover a reporter's unpublished information. However, California law does generally prohibit the release of personal information without notice to the affected party. *See* Cal. Code Civ. Proc. § 1985.3 (requiring notice before "consumer's personal records" may be subpoenaed); Cal. Code Civ. Proc. § 1985.6 (requiring notice before employment records may be subpoenaed). In addition, telephone records may not be released without the consumer's consent. Cal. Code Civ. Proc. § 1985.3(f).

The California Constitution includes a "right of privacy," which has been extended to include a variety of personal information, from financial records to classroom discussions. *E.g.*, *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652 (1975); *White v. Davis*, 13 Cal. 3d 757 (1975). For example, in *Valley Bank of Nevada*, the Supreme Court held that when a bank receives a subpoena seeking personal information about one if its depositors,

> [T]he bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered.

Id. at 658. This holding has been applied in other areas and presumably would require notice before disclosing any of the reporter's personal information. *E.g.*, *Sehlmeyer v. Department of General Srvcs.*, 17 Cal. App. 4th 1072 (1993) (notice must be given before physicians, psychotherapists and attorneys can be required to disclose information about person who initiated administrative proceedings against current psychologist); *Olympic Club v. Superior Court*, 229 Cal. App. 3d 358 (1991) (notice must be given before private club released names of applicants rejected during past decade).

D. The source's rights and interests

In *CBS, Inc.*, *supra*, 85 Cal. App. 3d at 250, the court held that the privilege was waived when the reporter's previously confidential sources testified in open court. The court reasoned that "[s]ince this information is now a matter of public record, it is difficult to see how the production of tapes which will merely confirm — or at worst very slightly amplify — what has already been revealed, will materially erode the vicarious interest in confidenti-

ality asserted by CBS." *Id.* In addition, a recent decision questioned whether the privilege applies where the defendant is both the source of the information and the person seeking its disclosure. *Vasco, supra*, 131 Cal. App. 4th at 152 n.3. The court considered the issue "troublesome," opining that in this circumstance, "there is no risk the reporter's source (the defendant) will complain her confidence has been breached. … Nor is the separate policy of safeguarding press autonomy in any way compromised. … And, where the defendant is the reporter's source of information, there appears no reason to assume disclosure would hinder the reporter's ability to gather news in the future." *Id.* (citations omitted). It held, however, that under *Delaney* "we may only consider this factor in the balancing stage." *Id.* Because defendant did not meet *Delaney*'s threshold test, the court concluded that "this factor plays no part in the equation."