REPORTER'S PRIVILEGE: DELAWARE

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

DELAWARE

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I. Introduction: History & Background

Delaware has a long common law history of respecting journalistic privilege. Although a reporter may only refuse to testify by claiming a privilege expressly granted under the Reporters' Privilege Act (*see* D.R.E., Rule 513), those privileges both originated in and continue to be shaped by case law. Both common law and statutory law presume that once a reporter's privilege has been asserted, it is valid unless and until the party seeking the information proves that the privilege should not apply. The burden of overcoming the presumption is difficult. Several issues surrounding reporters' privilege have not yet been addressed in Delaware. However, this should not be interpreted as potential weakness in the doctrine, as the case law that does exist indicates a strong commitment to the privilege.

II. Authority for and source of the right

Although Delaware's reporters' privilege has developed largely from the common law, the reporters' privilege is now codified in the Delaware Reporters' Privilege Act. The state has developed its privilege by drawing from the Supreme Court's decision in *Branzburg* and other federal First Amendment jurisprudence, the state's constitution, and state common law.

A. Shield law statute

10 Del. C. § 4320-26 (Current through January 2007)

§ 4320. Definitions

As used in this subchapter:

(1) "Adjudicative proceeding" means any judicial or quasi-judicial proceeding in which the rights of parties are determined but does not include any proceeding of a grand jury.

(2) "Information" means any oral, written or pictorial material and includes, but is not limited to, documents, electronic impulses, expressions of opinion, films, photographs, sound records, and statistical data.

(3) "Person" means individual, corporation, business trust, estate, trust, partnership or association, governmental body, or any other legal entity.

(4) "Reporter" means any journalist, scholar, educator, polemicist, or other individual who either:

a. At the time he obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or

b. Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.

(5) "Source" means a person from whom a reporter obtained information by means of written or spoken communication or the transfer of physical objects, but does not include a person from whom a reporter obtained information by means of personal observation unaccompanied by any other form of communication and does not include a person from whom another person who is not a reporter obtained information, even if the information was ultimately obtained by a reporter.

(6) "Testify" means give testimony, provide tangible evidence, submit to a deposition, or answer interrogatories.

(7) "Within the scope of his or her professional activities" means any situation, including a social gathering, in which the reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which the reporter intentionally conceals from the source the fact that he or she is a reporter and does not include any situation in which the reporter is an eyewitness to or participant in an act involving physical violence or property damage.

§ 4321. Privilege in nonadjudicative proceedings

A reporter is privileged in a nonadjudicative proceeding to decline to testify concerning either the source or content of information that he obtained within the scope of his professional activities.

§ 4322. Privilege in adjudicative proceedings

A reporter is privileged in an adjudicative proceeding to decline to testify concerning the source or content of information that he or she obtained within the scope of his or her professional activities if the reporter states under oath that the disclosure of the information would violate an express or implied understanding with the source under which the information was originally obtained or would substantially hinder the reporter in the maintenance of existing source relationships or the development of new source relationships.

§ 4323. Exceptions to the privilege in adjudicative proceedings

(a) Unless the disclosure of the content of the information would substantially increase the likelihood that the source of the information will be discovered, the privilege provided by § 4322 shall not prevent a reporter from being required in an adjudicative proceeding to testify concerning the content, but not the source, of information that the reporter obtained within the scope of his or her professional activities if the judge determines that the public interest in having the reporter's testimony outweighs the public interest in keeping the information confidential. In making this determination, the judge shall take into account the importance of the issue on which the information is relevant, the efforts that have been made by the subpoenaing party to acquire evidence on the issue from alternative sources, the sufficiency of the evidence available from alternative sources, the circumstances under which the reporter obtained the information, and the likely effect that disclosure of the information will have on the future flow of information to the public.

(b) The privilege provided by § 4322 shall not prevent a reporter from being required in an adjudicative proceeding to testify concerning either the source or the content of information that the reporter obtained within the scope of his or her professional activities if the party seeking to have the reporter testify proves by a preponderance of the evidence that the sworn statement submitted by the reporter as required by § 4322 is untruthful.

§ 4324. Determination of privilege claim

A person who invokes the privilege provided by this subchapter may not be required to testify in any proceeding except by court order. If a person invokes the privilege in any proceeding other than a court proceeding, the body or party seeking to have the person testify may apply to the Superior Court for an order requiring the claimant of the privilege to testify. If the Court determines that the claimant does not qualify for the privilege under the provisions of this subchapter, it shall order him to testify.

§ 4325. Waiver

If a reporter waives the privilege provided by this subchapter with respect to certain facts, he or she may be cross-examined on the testimony or other evidence he or she gives concerning those facts but not on other facts with respect to which the reporter claims the privilege. A reporter does not waive or forfeit the privilege by disclosing all or any part of the information protected by the privilege to any other person.

§ 4326. Short title

This subchapter may be cited as the "Reporters' Privilege Act."

B. State constitutional provision

Del. Const. Art. I, § 5

§ 5. Freedom of press; evidence in libel prosecutions; jury questions

Section 5. The press shall be free to every citizen who undertakes to examine the official conduct of persons acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty. In prosecutions for publications, investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury may determine the facts and the law, as in other cases.

Amended by 72 L.1999, ch. 136, § 4, eff. June 24, 1999.

C. Federal constitutional provision

The Delaware free press provision has been determined to have the same scope as the First Amendment to the federal constitution. *See In re Opinion of the Justices*, 324 A.2d 211 (Del. 1974).

D. Other sources

Delaware has long recognized a common law reporters' privilege. Although a reporter may only refuse to testify by claiming a privilege expressly granted under the Reporters' Privilege Act (*see* D.R.E. 513 ("A reporter may not decline to testify except as provided by statute.")), those privileges both originated in and continue to be shaped by case law.

III. Scope of protection

A. Generally

The privilege, appropriately claimed, is very strong.

B. Absolute or qualified privilege

The First Amendment privilege afforded to reporters is a qualified privilege; it is not absolute.

The statutory privilege is limited to information obtained within the scope of the reporter's professional activities. 10 *Del. C.* §§ 4321, 4322. "Professional activities" may include social gatherings, § 4320 (7), but do not include instances of intentional concealment of the reporter's identity as a reporter, or instances wherein the reporter personally witnesses or participates in acts of physical violence or property damage. *Id.*

A claim of privilege may be successfully challenged in several ways:

• If the reporter concealed her identity, or was eyewitness to or participant in the act, the privilege does not apply. *Id. But see, e.g., Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376, 2378 (Del. Super. 1994) (applying the privilege to "out takes" of television news camera footage of a live event); *State v. Hall*, 16 Med. L. Rptr. 1414 (Mun. Ct., M-88-10-1948, Fraczkowski, C.J. (March 8, 1989) (quashing subpoena *ad testificandum* when reporters attended a rally in their official capacities and personally witnessed the disorderly conduct in question); *State v. Cordrey*, Del. Super., C.A. No. 88-07-0000A, Barbiarz, J. (September 28, 1988) (Transcript) (finding a qualified privilege attaches "[e]ven though no confidential sources are involved").

• In nonadjudicative hearings, both content and source are unequivocally protected, so long as they were obtained within the scope of professional activities. *See* 10 *Del. C.* §§ 4321, 4320 (7).

• In an adjudicative context, a reporter may be required to testify to the content of information, while the sources themselves remain protected. 10 *Del. C.* § 4323 (a). The threshold issue is whether disclosing the content would reveal the source of the information. This appears to be the case whether the information would directly or implicitly identify the source of the information. If disclosure would not reveal the source, the judge uses abalancing test

to determine whether that the public interest in disclosure outweighs the public interest in confidentiality. § 4323 (a).

• If the untruthfulness of the reporter's claim is demonstrated by a preponderance of the evidence in an adjudicative hearing, the reporter must testify, disclosing *both source and content*. 10 *Del. C.* § 4323 (b); *see also* §§ 4322 (noting the adjudicative context and oath requirement), 4320 (6) (defining "testimony" as giving testimony, providing tangible evidence, submitting to a deposition, or answering interrogatories).

C. Type of case

The privilege is broader in nonadjudicative proceedings than in adjudicative hearings (those proceedings determining the rights of parties, but not including grand jury proceedings). 10 *Del. C.* § 4320 (1). While, in either case, a reporter may decline to testify regarding either the source or content of information, the privilege applies in adjudicative proceedings only if the reporter states under oath that the disclosure of the information would violate an express or implied understanding with the source under which the information was originally obtained or would substantially hinder the reporter in the maintenance of existing source relationships or the development of new source relationships." § 4322. Even then, testimony divulging the content of information may be required, so long as it will not reveal the information's source, and the judge determines that the public interest in disclosure outweighs the public interest in confidentiality. § 4323 (a). If the truthfulness of a reporter's claim is challenged, the privilege may be overcome by a preponderance of the evidence. § 4323 (b).

1. Civil

To the extent that the proceeding determines the rights of parties, the privilege applies. 10 *Del. C.* § 4320 (1).

Case law demonstrates Delaware's commitment to a strong but qualified privilege in civil claims. In *Fuester v. Conrail*, the Superior Court adapted the Third Circuit's test in *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979), noting that the qualified privilege could only be overcome if the subpoenaing party proves three elements:

(1) that "an attempt was made to obtain the information from other sources";

(2) that "the only access to the information is through the journalists and the requested materials"; and

(3) that "the information is critical to the claim."

Fuester v. Conrail, 22 Media L. Rep. (BNA) 2376, 2378 (Del. Super. 1994) (adopting the Third Circuit's test announced in *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979), following *United States v. Criden*, 633 F.3d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)).

2. Criminal

To the extent that the proceeding determines the rights of parties, the privilege applies. § 4320 (1). Case law also demonstrates Delaware's commitment to the strength of the qualified privilege in a criminal setting.

When the State pursues information from a reporter by subpoena in order to prosecute a defendant, the test requires the court to balance four factors:

(1) the importance of the issue on which the information is relevant;

(2) the State's efforts to acquire the information from alternative sources;

(3) the circumstances under which the reporter obtained the information; and

(4) the likely effect that disclosure of the information will have on the future flow of information to the public.

State v. Rogers, 820 A.2d 1171, 1180-82 (Del. Super. 2003). *See also Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376, 2378 (Del. Super.1994). Cases also cite *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980), *cert. denied*, 479 U.S. 818 (1986) (holding that the *Riley* test applies both to civil and criminal contexts).

When a defendant in a criminal case pursues information from a reporter by subpoena, a modified version of the test applies. In order to sustain a subpoena and obtain a reporter's materials or testimony, the party seeking the information must clearly and specifically demonstrate that the information sought:

(1) is relevant and material to the defense;

(2) is unavailable from other sources;

(3) has been unsuccessfully sought from other sources; and

(4) that nonproduction would violate a substantial right of the defendant.

State v. McBride, Del. Super., Nos. IK-80-5-0058, IK-80-5-0059 and IK-80-06-0227, Wright, J. (May 6, 1981), *affirmed on other grounds*, 477 A.2d 174 (Del. 1984) (adopting the Third Circuit's test in *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)).

It should be noted that the test presents a lowered standard that accounts for a defendant's Sixth Amendment rights to compel witnesses to his defense. *See* U.S. Const. amend.VI. The first component, rather than "critical to the claim," is merely "relevant and material" to the claim. The final component more explicitly addresses the Sixth Amendment concerns. Effectively, the test implements the balancing test required under 10 *Del. C.* § 4323, and shifts the burden of proof to the party opposing the subpoena to demonstrate that retaining the privileged status of the information will not jeopardize the defense. Stated differently, the reporter should demonstrate that withholding the information would not impinge upon the defendant's Sixth Amendment rights.

Notwithstanding the lower standard when a defendant subpoenas the reporter, no cases have successfully challenged a claim of privilege. In *McBride*, the court quashed a subpoena because, on the record, the defendant could not justifiably believe that letters she had sent to a reporter contained information relevant or material to her defense. *State v. McBride*, Slip op. at 1. In *State v. Hall*, the court quashed a subpoena where other witnesses could provide similar information as the subpoenaed reporter. *State v. Hall*, 16 Med. L. Rptr. 1414 (Mun. Ct., M-88-10-1948, Fraczkowski, C.J.) (March 8, 1989).

3. Grand jury

Because grand jury proceedings do not determine the rights of parties, but merely investigate and/or bring charges, they are "nonadjudicative," and a reporter may decline to provide either the source or the content of information without qualification. 10 *Del. C.* § 4321. Grand jury proceedings are explicitly excluded from the definition of adjudicative proceedings. § 4320 (1). Even the ability to challenge the truthfulness of the reporter's statement is precluded in nonadjudicative proceedings. § 4323 (b).

D. Information and/or identity of source

In adjudicative hearings, a reporter may decline to testify regarding either the source or content of information, so long as the reporter affirms the importance of nondisclosure. 10 *Del. C.* § 4322; *see also supra* Part III.C. The threshold issue is whether disclosing the content would reveal the source of the information. This is true whether the information would directly or implicitly identify the source of the information. If disclosure would not reveal the source, the judge uses a balancing test to determine whether that the public interest in disclosure outweighs the public interest in confidentiality. § 4323 (a); *see also Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376 (Del. Super. 1994).

E. Confidential and/or non-confidential information

Delaware makes no distinction between confidential and non-confidential information. *See State v. Hall*, 16 Med. L. Rptr. 1414 (Mun. Ct., M-88-10-1948, Fraczkowski, C.J.) (March 8, 1989). All information—regardless of confidential status—appears to be equally protected. *State v. Cordrey*, Del. Super., C.A. No. 88-07-0000A, Barbiarz, J. (September 28, 1988) (Transcript) (finding a qualified privilege attaches "[e]ven though no confidential sources are involved").

F. Published and/or non-published material

Delaware's privilege applies equally to published and non-published materials. *See Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376 (Del. Super.1994) (quashing subpoena for both published and unpublished photographs); *State v. McBride*, Del. Super., Nos. IK-80-5-0058, IK-80-5-0059 and IK-80-06-0227, Wright, J. (May 6, 1981), *affirmed on other grounds*, 477 A.2d 174 (Del. 1984) (quashing subpoena for unpublished letters sent to a reporter).

G. Reporter's personal observations

The statute explicitly excepts reporters who have personally observed or participated in an act involving physical violence or property damage. 10 *Del. C.* § 4320 (7). However, even this exception has been narrowly construed, and is subject to *Riley*'s tripartite test. *See State v. Hall*, 16 Med. L. Rptr. 1414 (Mun. Ct., M-88-10-1948, Fraczkowski, C.J.) (March 8, 1989) (quashing subpoena *ad testificandum* when reporters attended a rally in their official capacities and personally witnessed the disorderly conduct in question); *State v. Cordrey*, Del. Super., C.A. No. 88-07-00 00A, Barbiarz, J. (September 28, 1988) (Transcript) (quashing subpoena for reporter who witnessed courtroom events).

H. Media as a party

The statute does not specify whether the privilege is different where the media is a party and where it is not. So long as an individual or agency fits the definition of a reporter," the privilege applies. *See* 10 *Del. C.* § 4320 (4).

I. Defamation actions

Neither specified in the statute, nor litigated.

IV. Who is covered

A. Statutory and case law definitions

The statutory privilege is limited to "reporters," who are defined as any journalist, scholar, educator, polemicist, or other individual." 10 *Del. C.* § 4320 (4). To fall under the definition, these individuals must meet one of two additional criteria. First, *at the time he obtained the information*, she must either earn her "principal livelihood" through her reporting, or for 3 weeks prior, or 4 of the 8 previous weeks, worked at least 20 hours as a reporter ("obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images"). *Id.* Second, one may qualify as a reporter under the statute by having received the information "while serving in the capacity of an agent, assistant, employee, or supervisor or a reporter." *Id.* Thus, traditional news gatherers, such as reporters, editors, news, photojournalists, and news organizations are covered by the statute. *See State v. Rogers*, 820 A.2d 1171 (Del. Super. 2003) (applying the privilege to a reporter); *Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376 (Del. Super.1994) (applying the privilege to a photographer).

1. Traditional news gatherers

a. Reporter

Explicitly covered. 10 *Del. C.* § 4320 (4)(a). To qualify as a reporter, one must earn her principal living by, or for 3 consecutive weeks, or 4 of the past 8 weeks, worked at least 20 hours as a reporter. *Id.*

b. Editor

Explicitly covered. 10 *Del. C.* § 4320 (4)(b). The statute explicitly covers an "agent, assistant, employee, or supervisor of an individual who qualifies as a reporter." *Id.*

c. News

The statute covers "information," not just "news." Information is defined as "any oral, written or pictorial material and includes, but is not limited to, documents, electronic impulses, expressions of opinion, films, photographs, sound records, and statistical data." 10 *Del. C.* § 4320 (2). Although the expansive definition indicates a liberal attitude toward what may be considered information, the definition has not been litigated in Delaware.

d. Photo journalist

Implicitly covered by the statute, and recognized by common law. 10 *Del. C.* § 4320 (4); *Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376 (Del. Super. 1994).

e. News organization / medium

Covered under the definition of "reporter." *See* 10 *Del. C.* § 4320 (4)(b).

2. Others, including non-traditional news gatherers

Delaware's statute defines "person" to include individuals, corporations, business trusts, estates, trusts, partnerships or associations, governmental bodies, or any other legal entities. 10 *Del. C.* § 4320 (3). Furthermore, "reporters" include journalists, scholars, educators, polemicists, and other individuals meeting the requirements of the definition laid out *supra*, Part IV.A.1.a. *See also* § 4320 (4).

B. Whose privilege is it?

The privilege belongs to a person or entity who is designated a "reporter." *See* 10 *Del. C.* §§ 4320-22, 4325.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Although Delaware Code does not specifically address the time by which a subpoena must be served, a subpoena may be quashed for failure to provide "reasonable time for compliance." Super. Ct. Civ. R. 45 (c)(3)(A)(i). The Rules of Civil Procedure acknowledge that subpoenas will sometimes be issued with less than 14 days notice. Super. Ct. Civ. R. 45 (c)(2)(B).

2. Deposit of security

No deposits are required under Delaware law.

3. Filing of affidavit

Delaware has no requirement of affidavits to accompany subpoenas.

4. Judicial approval

"The Prothonotary shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. A Delaware attorney, as an officer of the Court, may also issue and sign a subpoena." Super. Ct. Civ. R. 45 (a)(3). "A subpoena may be served by the Sheriff or by any person who is not a party and is not less than 18 years of age." Super. Ct. Civ. R. 45 (b)(1).

5. Service of police or other administrative subpoenas

See above.

B. How to Quash

The best practice is to begin the process of quashing the subpoena immediately after its service. After contacting the other party to gain information, the usual practice is to file the motion as soon as practicable. While the timing may vary depending on the circumstances and the parties, quick and comprehensive action typically serves the moving party well. Along with the motion to quash, include a notice of the motion, certification of service, a brief, affidavits both from the reporter (asserting the privilege) and the editor (describing the chilling effect of compelled testimony on freedom of the press), and a copy of the subpoena. Judges have been particularly amenable to hearing motions quickly.

1. Contact other party first

The party objecting to subpoenas for the inspection and copying documents must serve its objection upon the issuing party or attorney designated in the subpoena within 14 days of the service of the subpoena. Super. Ct. Civ. R. 45 (c)(2)(B). Claims that documents are privileged or subject to protection must be stated "expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Rule 45 (d)(2).

Although the statute does not require contacting the other party prior to filing a motion to quash a subpoena for testimony, prudence and timing considerations strongly warrant doing so. By contacting the other party prior to filing the motion, one may gain access to information regarding the purpose for which the testimony is being sought. Including such information in the motion often strengthens the quality of the motion. Contacting the other party also speeds the process.

2. Filing an objection or a notice of intent

For subpoenas regarding inspection and copying of documents, the objecting party must serve its objection upon the issuing party or attorney designated in the subpoena within 14 days of service. Super. Ct. Civ. R. 45 (c)(2)(B). The objection must include sufficient detail to enable the opposing party to contest the claim. *Id*. The party issuing the subpoena must then move for an order to compel production. *Id.*

3. File a motion to quash

a. Which court?

Motions to quash should be filed in the court where the case is pending. In nonadjudicative proceedings, the motions should be filed with the Superior Court.

b. Motion to compel

Motions to compel are rare. In the event that one is necessary, it should be filed in the court where the case is pending. If the privilege was not asserted in a court proceeding, the motion to compel must be filed in the Superior Court. 10 *Del. C.* § 4324.

c. Timing

Objections to subpoenas requiring inspection and copying should be made within 14 days of the issuance of the subpoena, or if production is required sooner than 14 days, before the time specified for compliance. Super. Ct. RCP Rule 45 (c)(2)(B).

The timing requirement is unspecified for subpoenas to testify, although the Rules say that the motion should be timely. Rule 45 (c)(3)(A).

See above regarding practical considerations regarding timing. *See supra*, Part V.B.3.c.

d. Language

The motion should make clear reference to at least one of the statutory reasons for quashing or modifying a subpoena: failure to allow reasonable time for compliance, privileged or protected materials, or undue burden, among others. *See* Super. Ct. Civ. R. 45 (c)(3)(A).

e. Additional material

Although none is required by statute, practicality and timing mandate attaching a notice of the motion, certification of service, a brief, affidavits of reporter asserting the privilege, affidavit of editor describing the chilling effect of compelled testimony on freedom of the press, and a copy of the subpoena.

4. In camera review

a. Necessity

Case by case.

b. Consequences of consent

Not specified.

c. Consequences of refusing

Failure to obey a subpoena may be deemed a contempt of court. Super. Ct. Civ. R. 45(e).

5. Briefing schedule

Case by case. Although briefing schedules may vary, speed is typically helpful. See above.

6. Amicus briefs

Amicus briefs are rarely filed in courts other than the Delaware Supreme Court.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Once asserted, the privilege is presumed applicable, and the party seeking the information is required to overcome the presumption. 10 *Del. C.* § 4324.

B. Elements

1. Relevance of material to case at bar

The material must be "necessary" or "critical" to civil claims and criminal claims asserted by the state. *See Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376, 2378 (Del. Super. 1994).

The material must be "relevant and material" to criminal claims when a defendant is seeking the information. *State v. McBride*, Del. Super., Nos. IK-80-5-0058, IK-80-5-0059 and IK-80-06-0227, Wright, J. (May 6, 1981), *affirmed on other grounds*, 477 A.2d 174 (Del. 1984). The lower standard reflects the concern for the defendant's Sixth Amendment rights. *See supra*, Part III.C.2.

2. Material unavailable from other sources

Materials must be unavailable from other sources. Whether in a civil or criminal context, unavailability has two components. First, the party seeking to compel testimony must demonstrate that it has sought the information from other sources. Second, the party must demonstrate that the information is unavailable elsewhere. *See Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376, 2378 (Del. Super. 1994); *State v. McBride*, Del. Super., Nos. IK-80-5-0058, IK-80-5-0059 and IK-80-06-0227, Wright, J. (May 6, 1981), *affirmed on other grounds*, 477 A.2d 174 (Del. 1984).

Although the scope of searching for information has not been litigated, unavailability requires more than that the information sought provides a different perspective than available through other sources. *See, e.g., Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376, 2378 (Del. Super. 1994) (applying the privilege, in a civil case, to outtakes of television news camera footage of a live event because police were also witnesses); *State v. Hall*, 16 Med. L. Rptr. 1414 (Mun. Ct., M-88-10-1948, Fraczkowski, C.J.) (March 8, 1989) (quashing subpoena *ad testificandum* in a criminal case when other witnesses, besides reporters, personally witnessed the disorderly conduct in question); *State v. Cordrey*, Del. Super., C.A. No. 88-07-0000A, Barbiarz, J. (September 28, 1988) (Transcript) (quashing subpoena where reporter was not the only one present who witnessed procedural events in courtroom that may have created jeopardy).

a. How exhaustive must search be?

The circumstances of a particular case will determine how exhaustive a search must be performed. For instance, in *State v. Rogers* the Superior Court found that sufficient efforts had been performed in a criminal case where the State had only found out about the existence of the information six days prior to trial and had tracked down another witness to the information. *State v. Rogers*, 820 A.2d 1171, 1181-82 (Del. Super. 2003). The Court noted, however, that under different circumstances this search might not have been sufficient. *Id.* at 1181. By contrast, in *Fuester v. Conrail* the Superior Court found the party's efforts to be insufficient where the party had access to the information from another source. *Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376 (Del. Super. 1994).

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

Not litigated.

c. Source is an eyewitness to a crime

Although this precise issue has not been litigated in Delaware, the Delaware Reporters' Privilege Act excludes the privilege from applying to "any situation in which the reporter is an eyewitness to or participant in an act involving physical violence or property damage." 10 *Del. C.* § 4320(7).

3. Balancing of interests

Prior to balancing interests, the Court must find that disclosing the content would not reveal the source of the information. The judge then uses a balancing test to determine whether that the public interest in disclosure outweighs the public interest in confidentiality. 10 *Del. C.* § 4323 (a).

In cases where a criminal defendant is seeking testimony or documents, the balance weighs more heavily on the side of disclosure. *See supra*, Parts III.C.2.; VI.B.1.

4. Subpoena not overbroad or unduly burdensome

In addition to the first three grounds that are found within the Reporters' Privilege Act, the Rules of Civil Procedure also provide general guidance on dealing with subpoenas. Specifically, Rule 45 dictates that overbroad and unduly burdensome subpoenas will be quashed or modified. Super. Ct. Civ. R. 45 (c)(3). If the materials are both unduly burdensome and "necessary," the party seeking the information must compensate the other party, or the Court may specify the conditions of production or appearance. *Id.*

5. Threat to human life

Although not a part of the Reporters' Privilege Act, the Rules of Civil Procedure enable the court to consider a person's safety as part of its decision making process on whether the quash the subpoena. Super. Ct. Civ. R. 45 (c)(3)(B)(ii).

6. Material is not cumulative

If the material or testimony will be cumulative of other materials or testimony, it does not meet the "necessary" or "critical" standard in a civil case or a criminal case where the state seeks the information, and the privilege will be maintained. *See supra*, Part VI.B.2. *See also Fuester v. Conrail*, 22 Media L. Rep. (BNA) 2376, 2378 (Del. Super. 1994).

Likewise, cumulative materials in criminal cases where the defendant seeks materials have been disallowed. *See State v. Hall*, 16 Med. L. Rptr. 1414 (Mun. Ct., M-88-10-1948, Fraczkowski, C.J.) (March 8, 1989) (quashing subpoena for testimony when reporters attended a rally in their official capacities and personally witnessed the disorderly conduct in question, when other witnesses were available); *State v. Cordrey*, Del. Super., C.A. No. 88-07-0000A, Barbiarz, J. (September 28, 1988) (Transcript) (quashing subpoena where reporter was not the only one present who witnessed procedural events in courtroom that may have created jeopardy).

7. Civil/criminal rules of procedure

The Rules of Civil Procedure dictate that overbroad and unduly burdensome subpoenas will be quashed or modified. Super. Ct. Civ. R. 45 (c)(3). If the materials are both unduly burdensome and "necessary," the party seeking the information must compensate the other party, or the Court may specify the conditions of production or appearance. *Id.*

8. Other elements

No additional elements have been required to overcome the privilege.

C. Waiver or limits to testimony

10 *Del. C.* § 4325 acknowledges that a reporter may waive the privilege.

1. Is the privilege waivable at all?

Because the privilege belongs to the reporter, she may waive it. However, a reporter's decision to waive with respect to certain facts does not waive the privilege with respect to other facts for which she continues to claim the privilege. Likewise, third party disclosure does not constitute waiver. 10 *Del. C.* § 4325.

2. Elements of waiver

a. Disclosure of confidential source's name

Third party disclosure does not constitute waiver. 10 *Del. C.* § 4325.

b. Disclosure of non-confidential source's name

Third party disclosure does not constitute waiver. 10 *Del. C.* § 4325.

c. Partial disclosure of information

By waiving her privilege with respect to certain facts a reporter does not waive the privilege with regard to other facts for which she continues to claim the privilege. 10 *Del. C.* § 4325.

d. Other elements

Not litigated.

3. Agreement to partially testify act as waiver?

This has not been litigated. But, by waiving her privilege with respect to certain facts a reporter does not waive the privilege with regard to other facts for which she continues to claim the privilege. 10 *Del. C.* § 4325.

VII. What constitutes compliance?

A. Newspaper articles

Newspapers and periodicals are self-authenticating. D.R.E. 902(6).

B. Broadcast materials

Not litigated.

C. Testimony vs. affidavits

Although this issue has not been extensively litigated, at least one Delaware Court has found that an affidavit by the reporter is sufficient and indicated that "an affidavit from the reporter will, in most cases, be sufficient." *State v. Rogers*, 820 A.2d 1171, 1179 (Del. Super. 2003).

D. Non-compliance remedies

1. Civil contempt

a. Fines

The statute does not specify a cap on the amount a reporter may be fined for refusing to comply with the court's order to testify or produce documents.

Courts are authorized, at their discretion, to issue fines for civil contempt. *See, e.g.*, 10 *Del. C.* § 9506 (enabling Justices of the Peace to impose fines of up to $100 for civil contempt). In addition to fines and possible incarceration, parties who fail to comply may also be liable for damages to the aggrieved party. 10 *Del. C.* § 4301.

b. Jail

The statute does not specify a cap on the amount of jail time a judge may impose upon a reporter for refusing to testify or produce documents.

Courts are authorized to order incarceration for civil contempt at their discretion. *See, e.g.*, 10 *Del. C.* § 9506 (enabling Justices of the Peace to impose jail time of up to 170 days for civil contempt).

2. Criminal contempt

Criminal contempt may apply for refusing to testify. 11 *Del. C.* § 1271. It is punishable by incarceration for a maximum of one year, or a fine not to exceed $2,300. 11 *Del. C.* § 4206.

3. Other remedies

There is no statutory or case law addressing this issue.

VIII. Appealing

A. Timing

Appeals must be made within 30 days of the order. Supr. Ct. R. 6; 10 *Del. C.* §§ 143, 145, 147, 148, 1051, 1326.

As a practical matter, appeals do not typically occur because of timing concerns.

1. Interlocutory appeals

A denial of a motion to quash is an interlocutory order, and is subject to the appropriate court's appellate rules. The trial court must certify that the issue is substantial, affects a legal right, and meets additional criteria. The party requesting the appeal bears the burden of proof. *See generally* Supr. Ct. R. 42.

A party subject to an interlocutory order that does not appeal that order immediately does not waive its ability to appeal the issue after final judgment has been entered. 10 *Del. C.* § 144.

2. Expedited appeals

Not specified.

B. Procedure

1. To whom is the appeal made?

Appeals are made to the appropriate appellate court.

2. Stays pending appeal

There is no stay unless ordered by the trial court, and the determination is discretionary, though reviewable. *See* Super. Ct. Civ. R. 3, 62(c); Supr. Ct. R. 32.

3. Nature of appeal

The statute does not address any differences between forms of appeal.

4. Standard of review

It is unclear whether the determination of whether the privilege applies is a finding of fact or law. As such, the standard of review upon appeal is also unclear.

5. Addressing mootness questions

Courts have not addressed whether mootness prevents an appeal when the trial or grand jury session for which a reporter was subpoenaed has concluded.

6. Relief

The statute is unclear whether an appellate court would dissolve a contempt citation or whether it would remand the matter to the trial judge to reconsider. No cases have addressed this issue.

IX. Other issues

A. Newsroom searches

No newsroom search or seizure cases have been litigated in Delaware. Although there is no express provision under state law limiting the searches of newsrooms, the federal Privacy Protection Act would likely be invoked in the event a state agency attempted to pursue such activity.

B. Separation orders

There is no statutory or case law addressing separation orders. To the extent that circumstances that could implicate separation orders might arise, attorneys should point to the chilling effects such an order could have on the state's freedom of the press.

C. Third-party subpoenas

There is no statutory or case law addressing a media interest in fighting subpoenas issued to third parties in an attempt to discover a reporter's source.

D. The source's rights and interests

There is no statutory or case law addressing sources intervening anonymously to halt disclosure of their identities, or suing over disclosure after the fact. It is unclear whether journalists have a First Amendment or other defense to such suits.