REPORTER'S PRIVILEGE: ILLINOIS

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

ILLINOIS

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I. Introduction: History & Background

In Illinois, reporters have a statutory qualified privilege protecting their sources, whether confidential or nonconfidential, from compelled disclosure. The Illinois Reporter's Privilege Statute, 735 ILCS 5/8-901 to 8-909, (the "Statute") provides that a court cannot order disclosure of the source of any information obtained by a reporter, except upon finding that "all other available sources of information have been exhausted" and either that "disclosure of the information sought is essential to the protection of the public interest involved" or in libel or slander cases, that the plaintiff's need for disclosure "outweighs the public interest in protecting the confidentiality of sources of information used by a reporter."

The statute is designed to preserve the autonomy of the press by allowing reporters to assure their sources of confidentiality, permitting the public to receive complete, unfettered information. *In re Arya*, 266 Ill. App. 3d 848, 852, 589 N.E.2d 832, 834 (1992). The Act incorporates the free press guarantees of the First Amendment and Art. I, § 4, of the Illinois Constitution (1970), and confers a *presumptive privilege* on the newsgathering functions of reporters and the media. "The reporter's privilege has evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's first amendment right to freely gather and disseminate information." *In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act*, 104 Ill. 2d 419, 428–29, 472 N.E.2d 450, 454 (1984). "[T]his Act reflects 'a paramount public interest in maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.'" *People ex rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039, 1043, 412 N.E.2d 692, 694-95 (1980), *rev'd on other grounds*, 87 Ill. 2d 167 (1981).

The Illinois Supreme Court and other Illinois courts have consistently upheld the principles behind the Statute. *See, e.g.*, *In Re Special Grand Jury Investigation*, 104 Ill. 2d 419, 472 N.E.2d 450 (1984) (reversing circuit court's order divesting reporter of privilege because the grand jury had not exhausted all other available sources of information); *Illinois v. Fort*, 15 Media L. Rep. 2251 (Ill. Cir. Ct. 1988) (quashing subpoena where criminal defendant could not show that documents were essential for a fair trial and that he had exhausted all other available sources); *Cukier v. American Medical Ass'n*, 259 Ill. App. 3d 159, 630 N.E.2d 1198 (1994)(refusing divestiture of privilege because the public has an interest in protecting confidentiality of sources, and because plaintiff failed to allege lack of other available sources); *U.S. v. Lopez*, 14 Media L. Rep. 2204 (N.D. Ill. 1987) (quashing criminal defendant's subpoena for outtakes because of defendant's failure to demonstrate outtakes contained information unavailable from other sources); *Neal v. City of Harvey*, 173 F.R.D. 231, 233, 25 Media L. Rep. 2403 (N.D. Ill. 1997) (quashing subpoena because qualified privilege protects reporter subpoenaed to testify about information available from other witnesses); *People v. Slover*, 323 Ill. App. 3d 620, 753 N.E.2d 554 (2001) (reversing jail conviction for reporter for refusing to produce unpublished crime scene photographs sought by a criminal defendant and applying the statutory reporter's privilege); *Dunn v. Hunt*, 31 Media L. Rep. 2245 (Ill. Cir. Ct., 2003) (civil plaintiff "has not met his burden to overcome the privilege and compel disclosure of the non-broadcast news materials"). *But see People v. Pawlaczyk*, 189 Ill. 2d 177, 724 N.E.2d 901 (2000) (upholding the principles behind the Statute with some favorable language for the media, but ultimately allowing disclosure and ordering the media to identify their sources to a grand jury on the grounds that disclosure was "essential to the public interest involved").

II. Authority for and source of the right

Illinois courts recognize that a reporter has a right not to disclose his/her sources of information under a statute called the reporter's privilege statute, set out in 735 ILCS 5/8-901 to 8-909. Courts typically base their opinions on the wording contained in the Statute, but they recognize that the Statute stems from the First Amendment to the United States Constitution and the standard set out by the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972) (upholding the freedom of state legislatures to fashion their own standards with respect to journalists' privilege).

A. Shield law statute

Effective July 1, 1982, the Illinois legislature enacted a reporter's privilege statute incorporating it into the state's Code of Civil Procedure, 735 ILCS 5/8-901 to 8-909. The Statute did not alter the then current protections afforded reporters. The Statute shields the anonymity of sources, whether confidential or nonconfidential. An order divesting the reporter of the privilege is granted only if the court finds that "all other available sources of information have been exhausted and disclosure of the information is essential to the protection of the public interest involved." 735 ILCS 5/8-907 (2001).

The Illinois legislature subsequently amended the reporter's privilege on September 16, 1985, by extending the application of the Statute to libel and slander cases, and by specifying requirements for seeking disclosure in such cases. The Statute does not apply, however, to libel actions in which the reporter is a defendant.

The Statute provides as follows:

Sec. 8-901. Source of Information. No court may compel any person to disclose the source of any information obtained by a reporter except as provided in Part 9 of Article VIII of this Act [735 ILCS 5/8-901 et seq.].

Sec. 8-902. Definitions. As used in this Act:

(a) "reporter" means any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained.

(b) "news medium" means any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing.

(c) "source" means the person or means from or through which the news or information was obtained.

Sec. 8-903. Application to court.

(a) In any case, except a libel or slander case, where a person claims the privilege conferred by Part 9 of Article VIII of this Act, the person or party, body or officer seeking the information so privileged may apply in writing to the circuit court serving the county where the hearing, action or proceeding in which the information is sought for an order divesting the person named therein of such privilege and ordering him or her to disclose his or her source of the information.

(b) In libel or slander cases where a person claims the privilege conferred by Part 9 of Article VIII of this Act, the plaintiff may apply in writing to the court for an order divesting the person named therein of such privilege and ordering him or her to disclose his or her source of information.

Sec. 8-904. Contents of application. The application provided in Section 8-903 of this Act shall allege: the name of the reporter and of the news medium with which he or she was connected at the time the information sought was obtained; the specific information sought and its relevancy to the proceedings; and, either, a specific public interest which would be adversely affected if the factual information sought were not disclosed, or, in libel or slander cases, the necessity of disclosure of the information sought to the proof of plaintiff's case. Additionally, in libel or slander cases, the plaintiff must include in the application provided in Section 8-903 a prima facie showing of falsity of the alleged defamation and actual harm or injury due to the alleged defamation.

Sec. 8-905. Civil Proceeding. All proceedings in connection with obtaining an adjudication upon the application not otherwise provided in Part 9 of Article VIII of this Act shall be as in other civil cases.

Sec. 8-906. Consideration by court. In granting or denying divestiture of the privilege provided in Part 9 of Article VIII of this Act the court shall have due regard to the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.

Sec. 8-907. Court's findings. An order granting divestiture of the privilege provided in Part 9 of Article VIII of this Act shall be granted only if the court, after hearing the parties, finds:

(1) that the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of this State or of the Federal government; and

(2) that all other available sources of information have been exhausted and, either, disclosure of the information sought is essential to the protection of the public interest involved or, in libel or slander cases, the plaintiff's need for disclosure of the information sought outweighs the public interest in protecting the confidentiality of sources of information used by a reporter as part of the news gathering process under the particular facts and circumstances of each particular case.

If the court enters an order divesting the person of the privilege granted in Part 9 of Article VIII of this Act it shall also order the person to disclose the information it has determined should be disclosed, subject to any protective conditions as the court may deem necessary or appropriate.

Sec. 8-908. Privilege continues during pendency of appeal. In case of an appeal the privilege conferred by Part 9 of Article VIII of this Act remains in full force and effect during the pendency of such appeal.

Sec. 8-909. Contempt. A person refusing to testify or otherwise comply with the order to disclose the source of the information as specified in such order, after such order becomes final, may be adjudged in contempt of court and punished accordingly.

B. State constitutional provision

Although the Illinois State Constitution does not contain express language establishing a reporter's privilege, it does guarantee freedom of the press in article 1, section 4. In drafting the Statute, the Illinois legislature incorporated these free press guarantees. *See People ex. rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039, 1042, 412 N.E.2d 692 (1980), *rev'd in part on other grounds*, 87 Ill. 2d 167, 429 N.E.2d 483 (1981), *Villeda v. Prairie Material Sales Inc.*, 17 Media L. Rep. 2289, 2293 (Ill. Cir. Ct. 1990).

C. Federal constitutional provision

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court found "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards" with respect to a journalist's privilege, including the relations between law enforcement and the press. 408 U.S. at 706. The Court added, "[I]t goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Id.* Most Illinois courts have not based their decisions regarding reporters' privilege solely on the First Amendment of the U.S. Constitution. Instead, most Illinois courts rely on the Statute in determining whether to divest the reporter of the privilege. *See Reitz v. Gordon*, 26 Media L. Rep. 1447 (N.D. Ill. 1997) (stating that the scope of the Statute is "synonymous with the federal common law privilege arising from the First Amendment"); *see also People ex. rel. Scott v. Silverstein*, 89 Ill. App. 3d at 1043, 412 N.E.2d at 695 (holding that the Statute "reflects a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment"); *Cukier v. American Medical Ass'n*, 259 Ill. App. 3d 159, 163, 630 N.E.2d 1198, 1200 (1994) (the Statute "has evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's First Amendment right to freely gather and disseminate information"). *Cf. Gutierrez v. Shafer*, 9 Media L. Rep. 1054 (Ill. Cir. Ct. 1982) (quashing subpoena under the First Amendment instead of the Statute, holding that the privilege only protects against disclosure of sources and not the press).

D. Other sources

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

III. Scope of protection

A. Generally

Under the Privilege, reporters are not required to disclose the source of any information unless a court finds that "all other available sources of information have been exhausted" and that "disclosure of the information sought is essential to the protection of the public interest involved." 735 ILCS 5/8-907 (2001). The burden of proving these two elements is on the person or entity seeking access to the information.

B. Absolute or qualified privilege

Illinois reporters are entitled to a qualified privilege of confidentiality for any source of information utilized. *People v. Pawlaczyk*, 189 Ill. 2d 177, 724 N.E.2d 901 (2000). The Statute provides that "no court may compel any person to disclose the source of any information obtained by a reporter" except after application to the court for an order divesting the reporter of the qualified privilege. 735 ILCS 5/8-901 (2001). The court will not order access to the information unless all other sources for obtaining the information have been exhausted *and* disclosure of the information sought is essential to the protection of the public interest. 735 ILCS 5/8-907(2) (2001). Although the plain language of Section 8-907 reflects an intent to protect reporters, the Statute does not constitute an absolute or automatic ban on calling reporters to testify even if the trial court has complied with the divestment procedures set forth in 735 ILCS 5/8-904 and 735 ILCS 5/8-907. *People v. Palacio*, 240 Ill. App. 3d 1078, 607 N.E.2d 135 (1993). For example, a reporter cannot claim the benefits of the reporter's privilege if he was subpoenaed to testify in his own divorce case or in a civil case unconnected to his employment in which he was a party. *Id.*

In *Palacio*, the court rejected the argument that mere assertion of the privilege made the procedural aspects of the reporter's privilege statute applicable. 240 Ill. App. 3d 1078, 607 N.E.2d 135 (1993). The Statute "is not without its limits; it applies in circumstances in which someone seeks to compel a reporter to disclose the source of any information obtained by the reporter." *Id.* at 1093-94, 607 N.E.2d at 1384. The court noted the appropriate concern was "about harassment of the press and efforts to disrupt a reporter's relationship with its news sources." *Id.*, 607 N.E.2d at 1384.

C. Type of case

1. Civil

In civil cases, the reporter's privilege extends to all underlying unpublished material gathered in preparation for a news story or broadcast regardless of whether the source of the material is confidential. *Gulliver's Periodicals. Ltd. v. Chas. Levy Cir. Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978). *See also Reitz v. Gordon*, 26 Media L. Rep. 1447 (N.D. Ill. 1997) (quashing a subpoena to a non-party newspaper in a civil case). Indeed, in criminal proceedings, Illinois courts have looked to precedent of civil cases when determining whether the elements needed to divest the privilege have been satisfied. *See, e.g., In re Arya*, 226 Ill. App. 3d 848, 549 N.E.2d 832 (1992).

Section 8-905 of the Statute provides that "all proceedings in connection with obtaining an adjudication upon the application not otherwise provided in Part 9 of Article VIII of this Act shall be as in other civil cases." For example, the standard of proof used in proceedings pursuant to the Statute is a preponderance of evidence. This standard holds even if the underlying facts of the case involve a criminal investigation. *See, e.g., In re Arya*, 226 Ill. App. 3d at 862, 549 N.E.2d at 841.

2. Criminal

Illinois federal and state courts appear to treat criminal cases the same as civil cases. For example, in *United States v. Lopez*, the court held the defendant's argument—that a reporter's qualified privilege does not apply in criminal cases—without merit. 14 Media L. Rep. 2204 (N.D. Ill. 1987). The court looked to *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983), holding that "the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases, since reporters are to be encouraged to investigate and expose evidence of criminal wrongdoing." *Id.* at 1; *see also People v. Palacio*, 240 Ill. App. 3d 1078, 607 N.E.2d 1375 (1993) (upholding the privilege in a criminal case because defendant had failed to demonstrate that the information sought could not have been secured through alternative means); *People v. Childers*, 94 Ill. App. 3d 104, 41 N.E.2d 959 (1981), *cert. denied*, 455 U.S. 947 (1982), *reh'g denied*, 456 U.S. 939 (1982) (affirming trial court's denial of criminal defendant's application for the news reporter's disclosure); *Illinois v. Johnson*, 11 Media L. Rep. 1101 (Ill. Cir. Ct. 1984) (quashing a criminal defendant's subpoena for materials and information relating to a WBBM broadcast).

In criminal cases, like civil cases, the court is charged with balancing the social interest in the disclosure of the information against the public interest in the freedom of the press. In weighing these competing interests, one Illinois court considered the defendant's rights under the Fifth and Sixth Amendments as elements that counterbalance the reporter's First Amendment interest. *United States v. Bingham*, 765 F. Supp. 954 (N.D. Ill. 1991) (granting a broadcast company's motion to quash but ordering the company to turn over to defendant the transcripts of the outtakes in order to protect defendant's rights under the Fifth and Sixth Amendments). Some Illinois courts have looked to other jurisdictions that have quashed a subpoena based on the defendant's Sixth Amendment trial rights to ensure that they interpret the privilege correctly. *See, e.g.*, *People v. Pawlaczyk*, 189 Ill. 2d 177, 195, 724 N.E.2d 901, 912 (2000) *citing Brown v. Commonwealth*, 214 Va. 755, 758, 204 S.E.2d 429, 431 (1974).

In some instances, courts have declined to extend the Statute in criminal cases involving nonconfidential information. *See, e.g.*, *United States v. Jennings*, No. 97 CR 765, 1999 U.S. Dist. LEXIS 9534 at *1 (N.D. Ill. June 21, 1999) (finding that a qualified privilege did not protect a journalist's *nonconfidential* information in criminal cases). In *Jennings*, the writer argued that his materials were protected by the reporter's privilege under Illinois law and the First Amendment to the Constitution. The court rejected the writer's argument and denied his motion to quash, holding that the Statute does not apply to a subpoena issued in a federal criminal proceeding. The court further held that in criminal cases, "the First Amendment does not protect journalists from disclosure of non-confidential, relevant information that is sought in good faith." *Id.* at *1, *4 (*following United States v. Smith*, 135 F.3d 963 (5th Cir. 1998)). *See also Illinois v. Drazen*, 16 Media L. Rep. 2081 (Ill. Cir. Ct. 1989) (court allowed a subpoena of television interview outtakes, divesting CBS of the privilege against disclosure).

3. Grand jury

Although Illinois courts have not expressly set forth different standards for grand jury subpoenas relating to the Statute, some Illinois courts have found that grand jury proceedings implicate a compelling public interest that outweighs the public's interest in the privilege. *See People v. Pawlaczyk*, 189 Ill.2d 177; *see also United States v. Jennings*, No. 97 CR 765, 1999 U.S. Dist. LEXIS 9534 at *1 (N.D. Ill. June 21, 1999) (rejecting reporter's motion to quash by looking to the majority opinion in *Branzburg*, stating that there was "no reason to hold that…reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations"). In *Pawlaczyk*, the Illinois Supreme Court found that two reporters had properly been denied the benefits of the Statute when called to testify before a grand jury regarding potential perjury charges against their sources. 189 Ill. 2d 177, 724 N.E.2d 901 (2000). The reporters sought to quash the subpoena, arguing that their testimony was not relevant and that disclosure of their sources' identities did not serve a compelling public interest. *Id.* at 192, 724 N.E.2d at 910. The Illinois Supreme Court upheld the subpoenas, finding that the reporters' testimony was relevant to a fact of consequence in the perjury proceedings and that the grand jury proceedings implicated a compelling public interest that outweighed the public's interest in the reporter-source privilege. *Id.* at 199, 724 N.E.2d at 914. *But see In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill. 2d 419, 472 N.E. 2d 450 (1984) (holding that proof of exhaustion of alternative sources was insufficient to justify stripping the reporter of the statutory privilege when a grand jury requested that the state file an application to deny the privilege to the article's author).

D. Information and/or identity of source

The Statute specifically protects the identity of a source. *United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 2511 (1996); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 626 (N.D. Ill. 1998). It also protects information that implicitly identifies a source of information. For example, in *FMC Corp v. Capial Cities/ABC Inc.*, 915 F.2d 300 (7th Cir. 1990), ABC broadcast a story about the pricing policies of a Defense Department contractor, FMC Corp., displaying copies of documents from FMC's files. FMC asserted that the original documents were missing from its files and sued for conversion. ABC refused to return the documents or show them to the plaintiff, asserting that doing so would violate its First Amendment rights and the Statute. The Seventh Circuit held that ABC would have to return any originals that it possessed, and that it would have to provide FMC with copies of documents that FMC no longer possessed. The court held that under the Statute, ABC could furnish the information to FMC in a manner designed to protect any of ABC's sources.

E. Confidential and/or non-confidential information

Confidential information, generally, is any information obtained by a news gatherer under a promise of confidentiality. Non-confidential information, conversely, is any information obtained other than through a promise of confidentiality. The Statute does not differentiate between confidential and non-confidential information. The Statute extends to all sources *whether or not they are considered confidential*. *People v. Palacio*, 240 Ill. App.3d 1078, 1092, 607 N.E.2d 135, 138 (1993). "[T]he definition of 'source' makes no distinction between confidential and nonconfidential 'person or means from or through which the news or information was obtained.'" *People ex rel. Scott v. Silverstein*, 89 Ill. App. 3d at 1043, 412 N.E.2d at 695; *see also People v. Slover*, 323 Ill. App. 3d at 624, 753 N.E.2d at 558 (subpoenaed photographs were privileged because section 8-901 of the Statute protects even non-confidential sources); *United States v. Lopez*, 14 Media L. Rep. 2204 (N.D. Ill. 1987). (rejecting that defendant's contention that the reporter's qualified privilege protects only confidential sources); *McCabe v. Greager*, 27 Media L. Rep, 1702, 1703 (Ill. Cir. Ct. 1999) (finding that a videotape [outtake] was a "source" as defined by 735 ILCS 5/8-902(c), and cloaking it with the statutory privilege regardless of whether it was confidential). *Cf. Gulliver's Periodicals. Ltd. v. Chas. Levy Cir. Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978) (reporters are protected under a First Amendment balancing test from testifying as to either confidential or non-confidential source information); *but see Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 625-27 (N.D. Ill. 1999) (while citing 735 ILCS 5/8-901 in passing, court apparently applied federal constitutional reporter's privilege and not the Illinois statute, ordering NBC to produce videotape of "sex party," portions of which were aired on its *Dateline* show, finding that the videotape was not confidential, would not reveal the source's identity, and was relevant to the plaintiff's sexual harassment claims); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (in federal question case, court expressly *declined* to address Illinois reporter's privilege statute, and cast doubt on existence of federal privilege, finding it "difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure"); *United States v. Jennings*, No. 97 CR 765, 1999 U.S. Dist. LEXIS 9534 at *1, *4 (N.D. Ill. June 21, 1999) (holding that in federal criminal cases "the Illinois Reporter's Privilege Act provides no guidance" and "the First Amendment does not protect journalists from disclosure of non-confidential, relevant information that is sought in good faith").

F. Published and/or non-published material

On its face, the Statute does not distinguish between published and non-published material. In *People v. Slover*, the court interpreted the Statute as granting a qualified privilege against disclosure for even unpublished photographs taken by members of the media. 323 Ill. App. 3d 620, 624, 753 N.E.2d 554, 558 (2001). There, a murder defendant sought a subpoena to compel production of unpublished newspaper photographs that depicted search warrants being executed. *Id.* at 622, 753 N.E.2d at 556. The trial court held that the Statute did not apply to the photographs. *Id.* at 623, 753 N.E.2d at 556. The appellate court remanded for the trial court to allow the defendant to file an application seeking access to potentially privileged information. *Id.* at 625, 753 N.E.2d at 558. The court held that a photograph is a "source" of information under the plain meaning of the Statute even if the photo does not depict the identity of a person who is a news source. *See also People ex. rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039, 1043, 412 N.E.2d 695 (1980) ("The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants."); *Reitz v. Gordon*, 26 Media L. Rep. 1447 (quashing subpoena because unpublished photographs were not shown to be sufficiently necessary to the parties); *McCabe v. Greager*, 27 Media L. Rep. 1702 (video outtake was considered a source under the Statute regardless of whether it was confidential or that it was only an outtake).

G. Reporter's personal observations

The Northern District of Illinois has refused to apply the Statute when a reporter personally witnessed an occurrence. *Alexander v. Chicago Park District*, 548 F. Supp. 277 (N.D. Ill. 1982). In *Alexander*, plaintiffs served the Chicago Sun Times and five of its reporters with subpoenas. Ultimately, plaintiffs sought only the reporters' testimony as to their personal observations of the parks during their investigation for a series on the parks. The court denied the reporter's motion to quash, holding that the testimony as to the reporters' observations was not "source material" protected by the First Amendment. *Id.* at 278. "A reporter's observations of a public place or event are no different in kind than that of other individuals; and as to this, they are not entitled to constitutional protection." *Id.*

H. Media as a party

Although there have been very few Illinois cases analyzing the application of the Statute where the media is a party, the Seventh Circuit indirectly addressed this issue in *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300 (7th Cir. 1990). There, the court held that, while the Statute did not apply to ABC, ABC could furnish the information in a manner designed to protect ABC's sources).

I. Defamation actions

In Illinois, the test for divesting a reporter of the privilege under the Statute differs slightly when the request arises in the course of a lawsuit for libel or slander than when the request arises in other actions. For example, in libel or slander cases, only a plaintiff may apply to the court for an order seeking privileged information from a reporter. In contrast, any person or party, body or officer, may apply to the court in any other type of action. 735 ILCS 5/8-903(b) (2001). The chief difference lies in the proof the movant must adduce concerning any "public interest" at stake in the proceedings. In a libel or slander action, the movant must convince the court that the public's "need for disclosure of the information sought outweighs the public interest in protecting the confidentiality of sources of information used by a reporter." 735 ILCS 5/8-907(2). In all other actions, the movant must demonstrate that "disclosure of the information sought is essential only to the protection of the public interest involved." 735 ILCS 5/8-907(2).

For libel and slander actions involving an underlying claim of defamation, the Statute directs a party seeking access to privileged information to make a prima facie showing of defamation, and to demonstrate the necessity for disclosure of the privileged information. 735 ILCS 5/8-904. A libel or slander plaintiff must submit an application to the court that alleges falsity of the defamatory statements, and actual harm or injury due to the alleged defamation. The Seventh Circuit has stated in dicta that in cases where the plaintiff must prove actual malice, "ordinarily the reporter's privilege must give way to disclosure." *Desai v. Hersh*, 954 F.2d 1408 (7th Cir. 1992).

Another difference lies in the application of the "relevance" prong of the Statute. In all cases, Section 8-904 of the Statute requires the party seeking to divest the reporter of the privilege to demonstrate the relevancy of the privileged information to the "proceedings." 735 ILCS 5/8-904 (2001). Courts have interpreted the relevance standard more leniently in libel and slander cases because such privileged information is often the basis of the suit. For example, in *People v. Pawlaczyk*, 189 Ill. 2d 177, 194, 724 N.E.2d 901, 911 (2000), the court held that the identity of the defendants' source or sources was directly relevant to an element of the perjury charge against city officials: "If the privileged information will make any one the of the elements of perjury more or less probable, then it is relevant to the proceedings."

IV. Who is covered

Three key terms are defined in the Statute: "reporter," "news medium," and "source." 735 ILCS 5/8-902 (2001). Because the statutory definitions are rather broad, courts have considerable leeway in deciding what actually falls within such definitions. For example, in *People v. Slover*, an Illinois appellate court concluded that a photojournalist was within the definition of "reporter" and a photograph fell within the statutory definition of a "source" of information. The court stated "[p]hotojournalism is not a word crafted to artificially enhance the capacity to tell a story and gather or report the news by means of an image. A photojournalist is a reporter. When a reporter obtains news or information by means of photography, the photograph is a 'source' of information within the plain meaning of section 8-901 as defined in section 8-902(c)." 323 Ill. App. 3d at 624, 753 N.E.2d at 557.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The Statute defines "reporter" as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes an person who was a reporter at the time the information sought was procured or obtained." 735 ILCS 5/8-902(a) (2001). The Statute covers all "reporters" regardless of whether they work full-time or part-time, as the statutory definition is not contingent upon a minimum number of working hours.

b. Editor

Although the Statute does not explicitly define "editor," an "editor" appears to be covered in the definition of "reporter" in Section 8-902(a) of the Statute because a reporter is defined as "any person . . . writing *or editing* news for publication . . ." 735 ILCS 5/8-902(a) (2001) (emphasis added).

c. News

Although the Statute does not define "news," it does state that a reporter is one who is "writing or editing *news* for publication through a *news* medium . . ." 735 ILCS 5/8-902(a) (2001) (emphasis added).

d. Photo journalist

Although the Statute does not define "photo journalist," Illinois courts have held that photographers are considered "reporters" under Section 8-902(a). *See, e.g., People v. Slover*, 323 Ill. App. 3d at 624, 753 N.E.2d at 557 (concluding that the Herald's photographers unquestionably were engaged in the business of collecting news for publication in a news medium and were considered "reporters" under the Statute).

e. News organization / medium

The Statute defines "news medium" as "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a new service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing." 735 ILCS 5/8-902(b) (2001).

2. Others, including non-traditional news gatherers

It does not appear that Illinois courts have directly addressed the issue of whether the Statute applies to non-traditional news gatherers. Nonetheless, courts have interpreted the definition of "researcher" rather broadly. *See, e.g., People v. Slover*, 323 Ill. App. 3d 620, 753 N.E.2d 554 (2001). It appears that anyone can assert the privilege and the court can reject or accept it. For example in *Slover,* a murder defendant issued a subpoena to numerous persons employed at eight media organizations, including a librarian at a newspaper, to produce published and unpublished photographs related to the death of the victim. *Id.* at 622, 753 N.E.2d at 556. The librarian refused to produce the photographs and asserted the reporter's privilege. *Id.* The trial court found that the unpublished photographs were not privileged. The trial court also held that the librarian could not assert the reporter's privilege, and found her in civil contempt. The trial court held a sentencing hearing in which they allowed the editor of the paper to be substituted as the subject of its order. The appellate court reversed the order, holding that the photographs were privileged and overturning the contempt charge against the librarian.

Similarly, in *Cukier v. American Medical Ass'n*, 259 Ill. App. 3d 159, 630 N.E.2d 1198 (1994), *appeal denied*, 156 Ill. 2d 556, 638 N.E.2d 1114, the appellate court applied the Statute to a medical journal and its editor, holding that the journal and its editor met the definitions of "news medium" and "reporter," respectively, under the Statute. In refusing to grant access to the information, the court held that the journal and its editor could have learned the information from an undisclosed source during the "news gathering" process. *Id.* at 164, 630 N.E.2d at 1201.

Also, in an unpublished order, the Circuit Court of Cook County held that a government watchdog group, the Better Government Association, could assert the reporter's privilege in response to defendants' subpoena in the capital murder case. Defendants, on trial for the infamous "Brown's Chicken Massacre," sought the BGA's notes and other work product it compiled for an article it had produced concerning the case and how the police bungled their investigation. The court observed that the BGA "need not fit into any pre-conceived category of journalism in order to qualify under the Illinois Reporter's Privilege Act's definition of reporter." Mem. Op. and Order, *Illinois v. Degorski and Luna*, 02 CR 15430 (Ill. Cir Ct., May 20, 2005), at p. 13.

B. Whose privilege is it?

The privilege belongs to the reporter. In most Illinois cases, it is the reporter or publisher who seeks protection under the Statute. *See, e.g., People v. Slover*, 323 Ill. App. 3d 620, 753 N.E.2d 554; *People v. Pawlaczyk*, 189 Ill.

2d 177, 724 N.E.2d 901; *Cukier v. American Medical Ass'n*, 259 Ill. App. 3d 159, 630 N.E.2d 1198 (holding that the editor and authors of a medical journal were "reporters" able to assert the privilege). In addition, Illinois case law states that the "privilege [is] granted to *reporters*." *People v. Pawlaczyk*, 189 Ill. 2d at 181, 724 N.E.2d at 905 (emphasis added). Although the statute itself remains ambiguous as to whether the reporter is the only one allowed to assert the statutory privilege, Section 8-901 provides that "no court may compel any *person* to disclose the source of any information obtained by a reporter . . . ." (emphasis added).

Although the privilege belongs to the reporter, it is the source itself that is the subject of the Statute's protection. Furthermore, Illinois courts have recognized that the legislature intended to protect more than simply the name and identities of sources. *See People v. Slover*, 323 Ill. App. at 624; 753 N.E.2d at 558 (holding that "[t]he legislature did not limit the scope of section 8-901 of the Statute by inserting either 'the name of' or 'the identity of' before 'the source of any information'").

V. Procedures for issuing and contesting subpoenas

Absent the provisions within the Shield Law itself, the Illinois Code of Civil Procedure governs the issuance of subpoenas in civil cases. *See, e.g.*, 735 ILCS 5/2-1101, 5/10-109 (2002); *see also* Reporter's Privilege, 735 ILCS 5/8-904. Subpoenas issued in criminal cases are governed by the criminal rules set forth for each judicial district. *See e.g.*, IL R COOK CTY CIR Rule 15.3 (setting for the rule for issuing subpoenas in criminal cases Cook County); IL R 4 CIR Rule 7-4 (setting for the rule for issuing in criminal cases in the Fourth Judicial Circuit); IL R 19 CIR Rule 10.11 (setting forth the rule for issuing in criminal cases in the Nineteenth Judicial Circuit). In addition, Illinois Supreme Court Rules govern compelling appearances of witnesses at trial and the subpoena power in civil cases. *See* Ill. Sup. Ct. R. 204, 237 (2002).

A. What subpoena server must do

1. Service of subpoena, time

A subpoena to depose a witness in a civil proceeding may be served by certified or registered mail, so long as the return receipt shows that the deponent or his agent received the subpoena at least seven days before the date on which his appearance is sought. The party seeking to depose the witness must submit an affidavit showing that the mailing was prepaid and was addressed to the deponent, restricted delivery, return receipt requested, showing to whom, date and address of delivery, with a check or money order for the fee and mileage enclosed. *See* Ill. Sup. Ct. R. 204. Illinois Supreme Court Rule 237 provides the time frame for service of subpoenas on civil trial witnesses in Illinois. The rule states that subpoena by mail must be delivered to the witness by certified or registered mail at least seven days before the date on which appearance is required. Ill. Sup. Ct. R. 237. Subpoenas for witnesses in criminal proceedings are governed by the local rules of each Illinois Judicial District, and vary from district to district.

2. Deposit of security

Although there is no Illinois statutory or case law addressing the issue of deposit of security to procure the testimony or materials of the reporter, the Illinois Code of Civil Procedure provides that the court, in a case of subpoena duces tecum, may condition the denial of the motion upon payment in advance of the reasonable expense of producing any item therein specified by the person in whose behalf the subpoena is issued. 735 ILCS 5/2-1101 (2002).

3. Filing of affidavit

Although there is no Illinois statutory or case law specifically addressing whether an affidavit must accompany a subpoena to the news media, the Statute does require that the application to the court requesting divestiture of the privilege allege the following facts: 1) the name of the reporter and of the news medium with which he or she was connected at the time the information sought was obtained; 2) the specific information sought and its relevancy to the proceedings; and 3) a specific public interest which would be adversely affected by non-disclosure of the information. In a libel or slander case, the movant must allege, in place of element #3 above, that the disclosure of information is necessary to the proof of the movant's case. 735 ILCS 5/8-904. The Statute also requires the mo-

vant in a libel or slander case to make a prima facie showing of defamation, including falsity of the statements and actual harm or injury due to the alleged defamation. *Id.*

4. Judicial approval

The Illinois Code of Civil Procedure, 735 ILCS 5/2-1101, states that "[a]n order of court is not required to obtain the issuance by the clerk of a subpoena duces tecum." Other than the Sheild Law, there is no Illinois statutory or case law specifically addressing judicial approval for a subpoena to a member of the news media.

5. Service of police or other administrative subpoenas

The Illinois Code of Civil Procedure governs administrative review. 735 ILCS 5/3-101 *et seq*. The Illinois Administrative Code addresses subpoenas with regard to the various administrative agencies and committees. Each administrative agency or committee has its own rule relating to the issuance of subpoenas.

B. How to Quash

A reporter faced with a subpoena may file a motion with the court to quash that subpoena. The burden to defeat a motion to quash lies with the party seeking to divest the reporter of the privilege. If the party seeking divestiture cannot establish 1) the relevance of the information to the proceeding, 2) the public interest supported by disclosing the information, and 3) exhaustion of all other available sources of the information, the court may quash the subpoena. Illinois v. Fort, 15 Media L. Rep. 2251, 2253-54 (Ill. Cir. Ct. 1988). Conversely, the court may deny the reporter's motion to quash if the party seeking divestiture meets the three requirements above. See, e.g., *People v. Pawlaczyk*, 189 Ill. 2d 177, 196, 724 N.E.2d 901, 913 (denying reporter's motion to quash and upholding an order divsting the reporter of the privilege when the reporter's testimony was relevant to a fact of consequence in the proceedings and the public interest favored disclosure).

Illinois courts review the propriety of quashing a subpoena under the abuse of discretion standard. *United States v. Lloyd*, 71 F.3d 1256, 1268 (7th Cir. 1995); *United States v. McCollom*, 815 F.2d 1087, 1089 (7th Cir. 1987). As a general rule, appellate courts afford the trial judge "great deference" with respect to evidentiary rulings because of his "first-hand exposure to the witnesses and evidence as a whole, and because of his familiarity with the case and ability to gauge the likely impact of the evidence in the context of the entire proceeding." *United States v. Torres*, 977 F.2d 321, 329 (7th Cir. 1992). For example, in *Lloyd*, the trial court quashed a subpoena issued by a criminal defendant to a *Chicago Tribune* reporter. The *Tribune* argued that the subpoena violated the reporter's privilege under the Statute and the reporter's First Amendment rights. The trial court agreed, holding that the information would be "collateral impeachment at best," because it was not relevant to whether the defendant, as charged, possessed a firearm. *Id.* at 1262. The Seventh Circuit held that the trial court did not abuse its discretion in quashing the subpoena "because the substance of her proposed testimony was of speculative value at best, and was only being offered for the possible purpose of attempting to impeach witnesses as to matters collateral to [the defendant's] possession of the firearm." *Id.* at 1269.

1. Contact other party first

There is no Illinois statutory or case law addressing this issue. However, Illinois Supreme Court Rule 201(k) provides that, during discovery in a civil proceeding, the parties shall "facilitate discovery under these rules and shall make reasonable attempts to resolve differences" during the discovery period. Ill. Sup. Ct. R. 204(k).

2. Filing an objection or a notice of intent

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

3. File a motion to quash

a. Which court?

Although the Illinois Code of Civil Procedure does not specifically address this issue, Illinois case law indicates that motions to quash a subpoena should be filed in the court adjudicating the proceeding that led to the subpoena of the reporter. *See People ex. rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039, 412 N.E.2d 695 (1980); *People v. Palacio*, 240 Ill. App. 3d 1078, 607 N.E.2d 1375.

b. Motion to compel

Illinois Supreme Court Rule 219 sets forth the consequences for refusing to comply with court orders, including subpoenas.

c. Timing

Illinois case law, together with Illinois Supreme Court Rule 219 indicate that a motion to quash a subpoena should be filed before the subject of the subpoena is in contempt of the court's order(s).

d. Language

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

e. Additional material

There is no additional material.

4. In camera review

a. Necessity

Although there does not appear to be a mandatory law in Illinois directing a court to conduct an in camera review of materials prior to ruling on a motion to quash, some courts have stated that an in camera review of the material in question may be appropriate if an issue arises as to the appropriate scope of the disclosure order. *See*, *e.g.*, *In re Arya*, 266 Ill. App. 3d 848, 862, 589 N.E.2d 832, 841. In such instances, the trial court should scrutinize the material in camera to ensure that its production does not abridge the protections the legislature afforded source information through the Statute. *Id.*, 589 N.E.2d at 841. For example, in *United States v. Bingham*, the court discovered, during an in camera review, that numerous statements in the witness's interview outtakes contradicted the witness's direct examination testimony. 765 F. Supp. 954, 956 (N.D. Ill. 1991). The court held that the defendants were seeking highly relevant prior inconsistent statements by the witness when trying to divest the reporter of the privilege. *Id.* at 957.

b. Consequences of consent

Illinois courts have not directly addressed the consequences of consent to in camera review on the appeal process. The court in *United States v. Bingham* indirectly addressed the issue when the news media party consented to an in camera review in order for the court to make an accurate determination on the motion to quash the subpoena and did not appeal the order. 765 F. Supp. 954, 956 (N.D. Ill. 1991).

c. Consequences of refusing

The Statute provides a contempt provision stating that "[a] person refusing to testify or otherwise comply with the order to disclose the source of the information as specified in such order, after such order becomes final, may be adjudged in contempt of court and punished accordingly." 735 ILCS 5/8-909. There is no instructive case law on this point.

5. Briefing schedule

The court in which the proceeding is initiated may set a briefing schedule.

6. Amicus briefs

Amicus briefs may be filed *only* by leave of the court, or at the courts request. Ill. Sup. Ct. R. 345(a). Illinois Supreme Court Rules 341-344 set forth the rules for the format and appearance of amicus briefs. Amicus curiae are not allowed time for oral argument. Ill. Sup. Ct. R. 345(c).

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Although the Statute does not explicitly state a standard of proof, section 8-905 states that "all proceedings in connection with obtaining an adjudication upon the application not otherwise provided in Part 9 of Article VIII of this [Statute] shall be as in other civil cases." A petitioner seeking disclosure must prove compliance with the statutory requirements by a preponderance of the evidence; with regard to the issue of exhaustion, this burden amounts to requiring the petitioner to prove a negative. *In re Arya*, 226 Ill. App. 3d 848, 589 N.E.2d 832.

B. Elements

A reporter may be deprived of the statutory privilege once the party seeking disclosure meets the requirements set forth in Section 8-904. *People v. Pawlaczyk*, 189 Ill.2d 177, 188, 724 N.E.2d 901, 908 (2000). The party seeking disclosure must identify the specific information's "relevancy to the proceedings" by alleging: 1) that a specific public interest would be adversely affected if the information sought was not disclosed; 2) that the information sought does not concern matters or details required to be kept secret under the laws of this State or the Federal Government; 3) that all other available sources of information have been exhausted; and 4) that disclosure of the information sought is essential to the protection of the public interest involved. 735 ILCS 5/8-904, 8-907 (2001); *People v. Pawlaczyk*, 189 Ill.2d at 188, 724 N.E.2d at 908.

In libel or slander cases, the plaintiff seeking access to potentially privileged information must prove the prima facie case, showing falsity of the alleged defamation and actual harm or injury due to the alleged defamation. In addition, the plaintiff must show that that the need for disclosure outweighs the public interest in protecting the confidentiality of sources of information and the overall freedom of the press. 735 ILCS 5/8-904, 8-907 (2001).

The Statute states that a court, when granting or denying disclosure, shall consider the nature of the proceedings, the merits of the claims or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove. 735 ILCS 5/8-906 (2001); *People v. Pawlaczyk*, 189 Ill.2d at 188, 724 N.E.2d at 908.

1. Relevance of material to case at bar

The Statute specifically states that the party seeking disclosure shall allege that the specific information sought is relevant to the proceedings. 735 ILCS 5/8-904 (2001). The court in *People v. Pawlaczyk* addressed the issue of relevancy, holding that "section 8-904 requires only a showing that the information requested is 'relevant to the proceedings' . . . in which the information is sought. 189 Ill.2d at 193, 724 N.E.2d at 911. The court defines "relevant" as a fact that "tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

Privileged information is relevant to the proceeding, therefore, if it makes another fact more or less probable. *Id*. *Pawlaczyk*, for example, involved a grand jury proceeding on a potential charge of perjury against city officials. The subpoenaed reporters attempted to invoke the statutory privilege. The defendants claimed that since the information sought was not relevant to the libel proceeding in which the defendants allegedly made the perjurious remarks, the privileged information was not relevant. *Id.* at 192-93. The court concluded that the information must be relevant to the proceeding in which the information is sought, the perjury proceeding in this case, regardless of its relevance to the proceeding in which the perjurious statements were made. *Id.* at 193-94. Lastly, the court rejected any assertion that the privileged information must be "critically relevant" to the proceedings at issue. *Id.* at 195. The court applied the statute according to the plain and ordinary meaning of its terms. *Id. Compare Illinois v. Johnson*, 11 Media L. Rep. 1101, 1102 (Ill. Cir. Ct. 1984) (quashing a criminal defendant's subpoena for materials relating to a WBBM broadcast where relevance and admissibility of reporter's evidence was questionable).

However, some courts have found speculation that a reporter's testimony "may" "potentially" be relevant is insufficient to abrogate the privilege; a "showing of potential relevance will not suffice." *Neal v. City of Harvey, Illinois*, 173 F.R.D. 231, 234, 25 Media L. Rep. 2403 (N.D. Ill. 1997); *see also United States v. Lloyd*, 71 F. 3d 1256, 1268 (7th Cir. 1995) (affirming lower court's decision to quash a speculative subpoena); *Illinois v. Fort*, 15 Media L. Rep. 2251, 2253-54 (Ill. Cir. Ct. 1988) (quashing subpoena served on reporter and news station seeking information defendants believed "may be useful in the cross-examination of anticipated witnesses," because *potential* prior inconsistent statements of such witnesses and were not "relevant to the ultimate issues" in the case, nor "essential to protect the public interest implicated").

2. Material unavailable from other sources

In Illinois, in order for a court to issue an order granting disclosure, the material or information sought must be unavailable from other sources. Section 8-907 of the Statute provides that "[a]n order granting divestiture of the privilege . . . shall be granted only if the court, after hearing the parties, finds . . . that all other available sources of information have been exhausted . . . ." 735 ILCS 5/8-907 (2001). Illinois courts have strictly applied this component of the test. *See, e.g., In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act*, 104 Ill. 2d at 428–29, 472 N.E.2d at 454 (even where a compelling public interest found, and information sought was directly relevant to the grand jury's inquiry of who leaked information to the reporter, court found reporter's privilege barred grand jury subpoena to reporter because other sources of the information were potentially available and had not yet been exhausted); *In re Arya*, 226 Ill. App. 3d at 862, 589 N.E.2d at 841 (quashing subpoena for failure to exhaust all other available sources of information despite finding public interest in videotapes and notes containing interviews relating to a murder investigation, including a confession by an unindicted suspect; "legislature intended divestiture of a reporter's privilege to be the last resort to get the sought-after information"); *Neal v. City of Harvey, Ill.*, 173 F.R.D. 231, 233, 25 Media L. Rep. 2403 (N.D. Ill. 1997) (quashing subpoena because information available from witnesses other than reporter); *United States v. Lopez*, 14 Media L. Rep. 2204 (N.D. Ill. 1987) (quashing criminal defendant's subpoena for outtakes because of defendant's failure to demonstrate outtakes contained information unavailable from other sources).

Illinois courts have not adopted a legal standard for determining exhaustion. *In Re Arya*, 226 Ill. App. 3d at 855, 589 N.E.2d at 836. Instead, the Illinois Supreme Court wrote that "the extent to which an investigation must be carried before the reporter's privilege should be divested . . . depend[s] on the facts and circumstances of the particular case." *People ex rel. Donahue v. Warden*, 104 Ill. 2d 419, 427, 472 N.E.2d 450, 453-54 (1984) (holding that to prove it has exhausted all its available sources, the State must call other witnesses with the information before divesting a reporter of his privilege).

a. How exhaustive must search be?

In order to gain access to potentially privileged information, the Statute requires a petitioner to prove that it has exhausted all other available sources. 735 ILCS 8-907(2) (2001). Illinois courts have held that "available sources" as stated in the Statute means those sources that are identified or known, or those sources that are likely to become identified or known as a result of a thorough and comprehensive investigation. *See, e.g., In re Arya*, 266 Ill. App. 3d 848, 589 N.E.2d 832.

In *In re Arya*, the defendant argued on appeal that the State failed to prove that it had exhausted all other available sources for obtaining the information it sought from the defendant. In particular, the defendant argued that in order for the State to show that it has exhausted all other available sources, it must show that it has unsuccessfully used specific, alternative methods of investigation, such as undercover agents, informants, or other surreptitious forms of investigation, to obtain the sought-after information. *Id.* at 859, 589 N.E.2d at 839. The court disagreed, stating that "while courts require exhaustion of sources, none have required (as defendant suggests) the State in a criminal investigation to prove exhaustion of 'alternative sources' of information by either conducting an undercover investigation or using informants in order to obtain evidence from witnesses who do not wish to speak to the police." *Id.* The court found that the "legislature did not intend to compel reporters to become investigators for the State or anyone else. "Accordingly, in order to satisfy the 'exhaust all other available sources' requirement of section 8-907(2) of the [Statute], a petitioner must satisfy the court that its investigation has been sufficiently thorough and comprehensive that further efforts to obtain the sought-after information would not likely be successful." *Id.*, at 861, 589 N.E.2d at 841; *see generally Warden*, 104 Ill. 2d 419, 472 N.E.2d 450 (1984) (holding that more than a showing of inconvenience to the investigator is required before a reporter can be compelled to disclose his sources).

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

The legislature intended to allow access to privileged information only as a last resort. As such, the subpoenaing party has to prove that it exhausted all alternative sources. *See, e.g., Warden*, 104 Ill. 2d 419, 472 N.E.2d 450 (1984) (proof of exhaustion of alternative sources was insufficient to justify disclosure).

c. Source is an eyewitness to a crime

The Illinois reporter's privilege has been found to be inapplicable when a reporter personally witnessed an occurrence. *See generally Alexander v. Chicago Park District*, 548 F. Supp. 277 (N.D. Ill. 1982).

3. Balancing of interests

The Statute requires a judicial balancing of interests in determining whether to quash a subpoena. In *United States v. Bingham*, for example, the court balanced the defendant's need for the material against the reporter's interest in protecting his source. 765 F. Supp. 954, 959 (N.D. Ill. 1991). The court held that the public has an interest in "the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment . . . . Reporters should be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing." *Id.* at 957 (internal citation omitted). The public's interest in preserving a defendant's constitutional rights to a fair trial should be balanced against the public's interest in a free press. *Id.* at 959; *see also Warden*, 104 Ill. 2d 419, 472 N.E.2d 450 (recognizing a clear legislative intent to create a standard which balances the reporter's First Amendment rights against the public interest in the information sought and the practical difficulties in obtaining the information elsewhere).

4. Subpoena not overbroad or unduly burdensome

The Illinois Code of Civil Procedure provides that "[f]or good cause shown, the court on motion may quash or modify any subpoena or, in the case of a subpoena duces tecum, condition the denial of the motion upon payment in advance by the person in whose behalf the subpoena is issued of the reasonable expense of producing any item therein specified." 735 ILCS 5/2-1101.

Under Rule 45(c)(3)(A)(iv), the Court "shall" quash or modify a subpoena that "subjects a person to undue burden." Whether a subpoena subjects a witness to an undue burden requires the court to balance the subpoena's benefits and burdens by considering "<u>whether the information is necessary and unavailable from any other source</u>." Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 2463 at 72 (West 1995) (emphasis added).

While casting doubt on the existence of a federal reporter's privilege, the Seventh Circuit in *McKevitt, supra*, opined that an appropriate application of Rule 45(c) to subpoenas upon the press would pay due regard to the First Amendment concerns underlying the federal common law reporter's privilege. 339 F.3d at 533. "Nothing in *McKevitt* suggests that a reporter's notes are discoverable in civil litigation simply because the reporter interviewed a party to that litigation." *Hobley v. Burge*, 223 F.R.D. 499, 505 (N.D. Ill. 2004) (quashing subpoena pursuant to Fed. R. Civ. P. 45(c)). Quashing a subpoena under Rule 45, the district court in *Patterson v. Burge*, 33 Med. L. Rptr. 1200 (N.D. Ill. 2005), relied upon many of the same policy underpinnings that support the statutory and constitutional reporter's privileges: "Since the press is involved in collecting information about all manner of things and circumstances that frequently end up in litigation, if there is no standard higher than mere relevance which civil lawyers must satisfy to help themselves to reporters' records, news organizations will be very busy responding to civil subpoenas. Similarly, the news organizations' efforts to maintain their independence and gain the trust of sources is an interest that will be severely impaired if mere relevance, meaning as it does here a mere relationship to the subject matter of a civil suit, makes their non-public records available on request." *Id.* at 1203; *see also Hobley*, 223 F.R.D. at 505 ("Given the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private discovery agents.").

5. Threat to human life

Rule 45 of the Federal Rules of Civil Procedure indirectly addresses this point by addressing the undue hardship a person subject to the subpoena may encounter. Fed. R. Civ. P. 45(c)(3)(B) (2001).

6. Material is not cumulative

Illinois Courts have refused to divest the privilege where the requested information relates to a collateral issue, would be used solely for impeachment, or is cumulative evidence. *See, e.g., People ex rel. Scott v. Silverstein*, 89 Ill. App. 3d at 1045, 412 N.E.2d at 696 (defendants were not prejudiced "in the least" by the lack of an opportunity to depose a reporter because any information obtained from the reporter would be duplicative of existing

testimony); *Illinois Racing Board v. Segal*, 16 Media L. Rptr. 1138, 1139 (Ill. Cir. Ct. 1988) (where charges against defendant were based on over 13 incidents, proving "one more instance" through information from reporter "would be cumulative, not critical").

7. Civil/criminal rules of procedure

The Illinois Code of Civil Procedure, 735 ILCS et seq. contains the rules of procedure in civil cases. The Reporters Privilege Statute is set forth at 735 ILCS 5/8-901 et seq. Each Illinois Judicial District maintains its own rules with respect to criminal procedure.

8. Other elements

There are no additional elements to be met before the privilege can be overcome.

C. Waiver or limits to testimony

Although the Statute does not contain a waiver provision, courts have generally held that publication of otherwise privileged source material waives the privilege only as to the specified information that has been published or broadcast. *See, e.g., People ex. rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039, 1044, 412 N.E.2d 695 (1980) (fact that reporter had revealed some sources did not constitute waiver of privilege); *Illinois v. Fort*, 15 Media L. Rep. 2251, 2254 (Ill. Cir. Ct. 1988).

1. Is the privilege waivable at all?

Despite the lack of a waiver provision in the Statute, one Illinois appellate court addressed the issue of waiver in *People ex. rel. Scott v. Silverstein*, 89 Ill. App.3d 1039, 412 N.E.2d 692. In *Scott*, the court held that a reporter's "regular contacts" with an Assistant Attorney General were within the role of a newspaper reporter. 89 Ill. App.3d at 1045. In addition, the court stated that any information given to the Assistant Attorney General by the newspaper reporter did not constitute a waiver of the reporter's privilege. *Id.* Although no Illinois case law exists creating a bright line rule on waiver of the privilege, *Scott* contains some guidance as to when a reporter may be said to have waived the privilege. The court stated that "[i]f '[the reporter] abandoned the role of newspaper reporter and assumed the duties of an investigator,' then arguably he waived his reporter's privilege." *Id.* The court also stated that the disclosure of general information and sources in affidavits, on television, and to two law enforcement officials did not constitute a waiver. *Id.* at 1044. This language suggests that waiver of the privilege depends on the degree of specificity of the information disclosed and the size of the audience to which the reporter disclosed the information. *See id.* (*quoting Altemose Construction Co. v. Building & Construction Trades Council of Philadelphia*, 443 F.Supp. 489, 491 (E.D.Pa. 1977), which states that "[t]he submission of the affidavits to two law enforcement functionaries by the affiants is a far cry from thousands of occupants opening the windows of their respective apartments and shouting a message or the world to hear"). The *Scott* court did not commit to a bright line rule regarding waiver; rather, the court confined its determination to the particular facts of that case.

Because of a dearth in case law defining waiver of the privilege, the *Scott* court looked to other evidentiary privileges, such as attorney-client, psychiatrist-patient, and informer's privileges, which have more defined waiver provisions. *People ex. rel. Scott v. Silverstein*, 89 Ill. App.3d 1039, 1043, 412 N.E.2d 692. The court found that these privileges and their waivers are not analogous to the reporter's privilege because they refer to confidential information only. In contrast, the reporter's privilege extends non-confidential information as well. *Id.* In addition, the reporter's privilege is unique in that it plays an important role in the exchange of information between the press and the public, whereas the other privileges only involve the exchange of information between individuals. *Id.*

2. Elements of waiver

Although the Statute does not contain elements constituting waiver of the privilege, Illinois courts have held that publication of otherwise privileged source material waives the privilege only as to the specified information that has been published or broadcast. *See Illinois v. Fort*, 15 Media L. Rep. 2251, 2254 (stating that publication of a given source material will not be construed as a waiver of the privilege as to other sources in possession of the reporter).

a. Disclosure of confidential source's name

There is no Illinois statutory or case law specifically addressing waiver of the privilege by disclosure of a confidential source's name. The Statute protects both confidential and non-confidential material.

b. Disclosure of non-confidential source's name

There is no Illinois statutory or case law specifically addressing waiver of the privilege by disclosure of a non-confidential source's name. The Statute protects both confidential and non-confidential material.

c. Partial disclosure of information

Illinois courts have held that publication of otherwise privileged source material waives the privilege only as to the *specified information* that has been published or broadcast. *See Illinois v. Fort*, 15 Media L. Rep. at 2254 (emphasis added).

d. Other elements

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

3. Agreement to partially testify act as waiver?

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

VII. What constitutes compliance?

A. Newspaper articles

There are no Illinois cases that discuss authenticating the materials.

B. Broadcast materials

The Northern District of Illinois addressed the issue of material that was both broadcast and not broadcast. *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991). The interview that was broadcast was turned over to the court in response to a subpoena duces tecum, but NBC refused to turn over the un-broadcast outtakes from the interview. Although the court did not address the specific procedure of turning over material that was aired, the court did require that the outtakes portion not aired be subject to an in camera review in order to rule accurately on the motion to quash the subpoena. *Id.* The court held that because the party impeaching a witness under Federal Rule of Evidence 613 must know the substance of the prior inconsistent statement, the defense counsel must have access to the outtakes. *Id.* at 957. Instead of allowing the entire video to be presented at trial, however, the court ordered the video to be transcribed and turned over to the parties. *Id.* at 959.

C. Testimony vs. affidavits

No Illinois statutory or case law specifically states a procedure for replacing in-court testimony for sworn affidavits, but *People v. Pawlaczyk* contains some guidance. In *Pawlaczyk*, the reporter filed an affidavit for another proceeding confirming her conversation with the source but refusing to reveal the name of the source pursuant to the Statute. *People v. Pawlaczyk*, 189 Ill. 2d 177, 180, 724 N.E.2d 901 (2000). In a prior proceeding, the circuit court divested the reporter of her statutory privilege and ordered her to divulge the source's name. *Id.* at 182. Instead of testifying at trial, the reporter filed an affidavit confirming the source's name. *Id.; see also Maple Lanes, Inc. v. News Media Corp.*, 322 Ill. App. 3d 842, 843 (2001) (allowing a reporter to file an affidavit confirming that she wrote the article and accurately quoted her sources).

D. Non-compliance remedies

1. Civil contempt

Section 8-909 of the Statute states that "[a] person refusing to testify or otherwise comply with the order to disclose the source of the information as specified in such order, after such order becomes final, may be adjudged in contempt of court and punished accordingly." 735 ILCS 5/8-909 (2001). For example, in *People v. Slover*, the trial court found that unpublished photographs were not privileged and found the reporter "in direct civil contempt for refusing to deliver all unpublished photographs concerning the murder investigation." 323 Ill. App. 3d 620,

622, 753 N.E.2d 554, 556 (Ill. App. Ct. 2001). The reporter refused to produce the photos and was sentenced to jail pending compliance. *Id.* at 623, 753 N.E.2d at 556. The reporter appealed, and the appellate court reversed the judgment ordering the production of the photographs and the contempt finding, remanding the case to the trial court. *Id.* at 625, 753 N.E.2d at 558. In *In re Arya*, the trial court found the reporter in contempt when he refused to obey an order to produce videotapes and notes and ordered him jailed until he complied with the order. 226 Ill. App. 3d 848, 850, 589 N.E.2d 832, 833 (Ill. App. Ct. 1992). As in *Slover*, the reporter appealed, and the order was vacated and remanded. *Id.*

a. Fines

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

b. Jail

In Illinois, reporters have been jailed when found in contempt for not complying with an order to disclose or hand over information the reporters deemed privileged. *See People v. Slover*, 323 Ill. App. 3d 620, 753 N.E.2d 554; *In re Arya*, 226 Ill. App. 3d 848, 589 N.E.2d 832. In both of these cases, however, the findings of contempt and the jail sentences were vacated or reversed by an Illinois appellate court.

2. Criminal contempt

Although the Statute provides a contempt provision, there are no Illinois cases addressing criminal contempt. The Statute allows the person refusing to comply with an order to disclose the source of the information to be held in contempt of court and punished accordingly. 735 ILCS 5/8-909.

3. Other remedies

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

VIII. Appealing

A. Timing

1. Interlocutory appeals

The Illinois Supreme Court has held that a trial court's order, made as a preliminary discovery order in a pending suit, is interlocutory in nature and not subject to review under Illinois Supreme Court Rule 301 (73 Ill. 2d Rule 301). *People ex. rel. Scott v. Silverstein*, 87 Ill. 2d 167, 429 N.E.2d 483 (1981). In *Scott*, the Court further held that such discovery orders are not made appealable under the provisions of Illinois Supreme Court Rules 306, 307, or 308 (73 Ill. 2d Rules 306-308). One of the defendants subpoenaed a newspaper reporter for his deposition and for the production of certain documents. The reporter moved to quash, contending that enforcement of the subpoena would violate the Statute. The reporter's motion was denied, and the reporter appealed. On appeal, the court found that the order was final and appealable under Illinois Supreme Court Rule 301 (73 Ill. 2d R. 301). The Illinois Supreme Court reversed. *People ex. rel. Scott v. Silverstein*, 87 Ill. 2d 167, 429 N.E.2d 483 (1981).

The Illinois Constitution provides that the Illinois Supreme Court may create rules allowing appeals from other than final judgments of the trial courts. *People ex. rel. Scott v. Silverstein*, 87 Ill. 2d at 171, 429 N.E.2d at 485. Illinois Supreme Court Rule 301 provides that "[e]very final judgment of a circuit court in a civil case is appealable as of right." (73 Ill. 2d R. 301). Illinois Supreme Court Rules 306, 307, and 308 provide for appeals from specific interlocutory orders.Rules are in place to provide for appeals from certain specified interlocutory orders. (73 Ill. 2d R. 306, 307, 308). "A judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment." *People ex. rel. Scott v. Silverstein*, 87 Ill. 2d 167, 429 N.E.2d 483 (1981). A preliminary discovery order denying assertion of the statutory privilege is not appealable because it is reviewable on appeal from the final order. *Id.* "[A]n order cast in terms of a contempt proceeding imposing sanctions is a final and appealable order and has been held to be an appropriate method for testing pretrial discovery orders." *Id.* at 171-72, 429 N.E.2d at 486. Although a sanction for contempt occurs within the context of another proceeding and seems interlocutory, it is an independent hearing, collateral to the case in which it arises. *Id.* The Illinois Supreme Court has held that an interlocutory order requiring a reporter to

disclose information as a preliminary discovery order is unappealable until it results in a judgment of contempt, including a fine or imprisonment. *Id.* at 174, 429 N.E.2d at 487.

Orders divesting reporters of the privilege are final and appealable when divestiture was the sole purpose of the proceeding. *People v. Pawlaczyk*, 189 Ill. 2d 177, 187, 724 N.E.2d 901, 908 (2000). When "nothing remains to be done in the proceedings except to execute the judgment of the trial court . . . [t]his court possesses the necessary jurisdiction to decide defendants' appeal." *Id.*

See Ill. Sup. Ct. R. 306, 307, and 308 (73 Ill. 2d Rules 306, 307, 308).

2. Expedited appeals

After the docketing statement is filed with the reviewing court, the court on its own motion or on the motion of a party may place the case on accelerated docket for good cause shown. This motion shall contain an affidavit stating the reasons for the expedited appeal. Ill. Sup. Ct. R. 311 (73 Ill. 2d Rule 311). There are no special considerations that affect news media subpoenas.

B. Procedure

1. To whom is the appeal made?

Illinois Supreme Court Rule 301 (73 Ill. 2d Rule 301) states that "[e]very final judgment of a circuit court in a civil case is appealable as of right" and "initiated by filing a notice of appeal." Ill. Sup. Ct R. 301 (2002). The rule also goes on to state that "[n]o other step is jurisdictional." *Id.* Illinois Supreme Court Rule 306 governs appeals from orders of the circuit court by petition for leave to appeal to the Appellate Court. Leave to appeal from the Appellate Court to the Illinois Supreme Court is governed by Illinois Supreme Court Rule 315 (73 Ill. 2d Rule 315).

An appeal from a municipal, public, governmental, or quasi-municipal corporation, or by a public officer proceeds to the trial court, reviewing court, or reviewing judge pursuant to Illinois Supreme Court Rule 305(h) (73 Ill. 2d Rule 305(h)).

2. Stays pending appeal

The Statute states that the "Privilege continues during pendency of appeal." 735 ILCS 5/8-908 (2001). The court may stay the enforcement of judgment or an judicial order upon just terms. The application of stay must be made to the trial court, or in the alternative, the motion for a stay is made to the reviewing court or judge when application to the trial court is not practical pursuant to Illinois Supreme Court Rule 305(a), (d) (73 Ill. 2d Rule 305(a), (d)).

3. Nature of appeal

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

4. Standard of review

Illinois courts review the propriety of quashing a subpoena under the abuse of discretion standard. *United States v. Lloyd*, 71 F.3d 1256, 1268 (7th Cir. 1995); *United States v. McCollom*, 815 F.2d 1087, 1089 (7th Cir. 1987). This is because the courts afford the trial judge "great deference" on appeal with respect to evidentiary rulings because of his "first-hand exposure to the witnesses and evidence as a whole, and because of his familiarity with the case and ability to gauge the likely impact of the evidence in the context of the entire proceeding." *United States v. Torres*, 977 F.2d 321, 329 (7th Cir. 1992). The Illinois Supreme Court held that the Court will only "disturb the lower court's findings under the statute only if they are against the manifest weight of the evidence." *People v. Pawlaczyk*, 189 Ill. 2d at 188, 724 N.E.2d at 908.

5. Addressing mootness questions

Illinois courts have held that an appeal is not moot even when the trial or grand jury session for which a reporter was subpoenaed has concluded. For example, in *People v. Palacio*, a reporter appealed the trial court's denial of his motion to quash the subpoena requiring him to testify at the hearing on defendant's post-trial motion. 240 Ill. App. 3d 1078, 1091, 607 N.E.2d 1375, 1382 (1993). The defendant filed a motion to dismiss the reporter's appeal

as moot, arguing that because the reporter answered the questions put to him after the trial court denied his motion to quash, the court could grant the reporter no relief even if the trial court's order was incorrect. *Id.* The court denied defendant's motion to dismiss the reporter's appeal as moot, holding that the great public interest exception to the mootness doctrine applies. *Id.*; *see also In re A Minor*, 127 Ill. 2d at 257, 537 N.E.2d at 296) (holding that the great public interest exception to the mootness doctrine applied in the case and that "the interest in the publication of newsworthy information— [is] of surpassing public concern").

Similarly, a case can still be appealed as a controversy "capable of repetition but evading review" even when the trial or grand jury session for which a reporter was subpoenaed has concluded. To receive the benefit of this exception, the complaining party must demonstrate that: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *People v. Bailey*, 116 Ill. App. 3d 259, 261-62, 452 N.E.2d 28, 30-31 (1983) *citing Gannett Co. v. Depasquale*, 443 U.S. 368, 377, 99 S. Ct. 2898, 2904 (1979). In cases involving court-ordered restrictions on the reporting of judicial proceedings, Illinois courts follow the United States Supreme Court which has regularly found the restrictions to be "capable of repetition, yet evading review." *See, e.g., Gannett Co. v. Depasquale*, 433 U.S. at 377-78, 99 S.Ct. at 2904 (lifting of order closing pretrial hearing to the press does not deprive Court of jurisdiction since underlying criminal proceeding will not normally last long enough to permit full appellate review); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613 (1982) (order excluding press and public during testimony of minor victim in a rape trial capable of repetition, yet evading review because criminal trials are typically of short duration).

For example, in *Palacio*, the issue before the court was one that involved an event of short duration, capable of repetition yet evading review. The court held that "given the important stakes involved, we decline to require a news media representative to subject himself or herself to the penalties of contempt when challenging an order like the one before us in the blind hope that an appellate court will conclude the underlying order was erroneous and vacate those penalties." *People v. Palacio*, 240 Ill. App. 3d 1078, 1091, 607 N.E.2d 135, 138 (Ill. App. Ct. 1993).

6. Relief

Illinois Appellate Courts have vacated and reversed contempt citations with remand to the trial court to reconsider the issues of the appellate decisions. *See People v. Slover*, 323 Ill. App. 3d at 624, 753 N.E.2d at 556-57; *In re Arya*, 226 Ill. App. 3d at 850, 589 N.E.2d at 833. In addition, the courts have reversed decisions denying a motion to quash the subpoena or upheld the motion to quash the subpoena when the subpoenaing party has not met its burden. *See, e.g., In Re Special Grand Jury Investigation*, 104 Ill. 2d 419, 472 N.E.2d 450; *Cukier v. American Medical Ass'n*, 259 Ill. App. 3d 159, 630 N.E.2d 1198; *United States v. Lloyd*, 71 F.3d 1256.

IX. Other issues

A. Newsroom searches

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

B. Separation orders

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

C. Third-party subpoenas

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

D. The source's rights and interests

In Illinois, no source has asserted the statutory privilege provided by the Illinois statute, resulting in no Illinois statutory or case law addressing this issue.