REPORTER'S PRIVILEGE: INDIANA

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

INDIANA

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I. Introduction: History & Background

Indiana has a strong shield law that provides an absolute and unqualified privilege protecting reporters from revealing sources of information obtained in the course of newsgathering, whether or not that information was published or broadcast. *See* Ind. Code §§ 34-46-4-1, 34-46-4-2. It is important to note, however, that this privilege applies only to state related matters. It does not apply to federal matters such as federal grand jury investigations, or cases in federal court involving federal issues. The shield law privilege belongs to the newsgatherer and is absolute. Indiana courts have not yet resolved whether the shield law protects nonconfidential source material.

As for other privilges, the Indiana Supreme Court has rejected the press's argument that a separate qualified newsgather's privilege exists under the free press provisions of the U.S. and state constitutions, to withhold raw materials such as video or other broadcast interviews of reporters subpoenaed in criminal matters. *In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998). The new standard as announced in WTHR-TV is that the First Amendment does not require a special showing of need and relevance beyond those imposed under normal discovery procedures when information in a criminal case is demanded from a reporter. Thus, in these situations, you need to look to the Indiana Rules of Trial Procedure. It is yet unclear, after *In re WTHR-TV*, whether a Court of Appeals opinion recognizing a First Amendment privilege in civil cases is still valid. *See In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986).

II. Authority for and source of the right

A. Shield law statute

Indiana's shield law provides an absolute privilege regarding state matters and reads as follows:

§34-46-4-1 Applicability of chapter:

Sec. 1. This chapter applies to the following persons:

(1) any person connected with, or any person who has been connected with or employed by:

(A) a newspaper or other periodical issued at regular intervals and having a general circulation; or

(B) a recognized press association or wire service;

as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news; and

(2) any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news.

§34-46-4-2 Privilege against disclosure of source of information:

Sec. 2. A person described in section 1 of this chapter shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of the person's employment or representation of a newspaper, periodical, press association, radio station, television station, or wire service, whether:

(1) published or not published:

(A) in the newspaper or periodical; or

(B) by the press association or wire service; or

(2) broadcast or not broadcast by the radio station or television station;

by which the person is employed.

Ind. Code §§ 34-46-4-1, 34-46-4-2. Indiana's shield law has been around since 1941. The law was originally codified as Indiana Code § 34-3-5-1. It was recodified into the two separate sections quoted above in 1998. The last significant change to the shield law was in 1973, when the legislature broadened its description of persons to whom the privilege applies.

In discussing the legislature's reasons for protecting the press through a shield law, the Indiana Court of Appeals has said that "the legislature, in balancing the conflicting interests of the alleged defamed public figure and the press, simply concluded that the journalist's privilege should prevail." *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243, 1247 (Ind. App. 1984).

B. State constitutional provision

Article I, section 9 of the Indiana Constitution provides: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."

The Indiana Constitution does not contain an express shield law provision, nor has one been read into any constitutional provision by a state court. In *In re WTHR-TV (State v. Cline)*, the Supreme Court of Indiana specifically declined to recognize a newsgatherer's privilege under Article I, section 9 in the context of a criminal case. 693 N.E.2d at 15-16.

C. Federal constitutional provision

In *In re WTHR-TV (State v. Cline)*, decided in 1998, the Supreme Court of Indiana declined to recognize a privilege under the First Amendment of the U.S. Constitution in the context of a criminal case. 693 N.E.2d at 10-16. In the *WTHR-TV* case, the murder defendant had been interviewed by a reporter while being held in jail. The media reporter was ordered to produce the videotapes of the interview, including outtakes. The court rejected the reporter's contention that *Branzburg v. Hayes*, the last major U.S. Supreme Court case on the topic of the reporter's privilege, required courts to recognize a constitutional privilege. *Id.* at 11-12. The court also dismissed all of the media's arguments in favor of such a privilege, including reasoning based on the chilling effect subpoenas have on the media and the enhanced burden imposed by subpoenas to the media. *Id.* at 13-15. *See also WTHR-TV (State v. Milam)*, 690 N.E. 2d 1174 (Ind. 1998). This case was decided on the same date as *WTHR-TV (State v. Cline)*. In *WTHR-TV (State v. Milam)*, the murder defendant filed a discovery request for "all news footage aired or unaired" regarding the murder. The discovery request was held to lack particularity and any showing of possible materiality because defendant failed to explain what the media party had or might have had that was specifically relevant to the defense or preparation for trial. *Id.*

Both WTHR cases involved criminal matters. In an earlier case decided by the Indiana Court of Appeals, it can arguably be said that a qualified First Amendment privilege was recognized, in the context of a civil case. *See In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146, 150-51. There, the court held that a journalist's photographs could not be compelled by subpoena unless (1) they were material and relevant to the action, (2) they were critical to a fair determination of the cause, and (3) the subpoenaing party had exhausted all other sources for the same information. *Id.* at 151. It is unclear whether this decision is invalidated by *In re WTHR-TV* or whether a First Amendment privilege is still cognizable in civil cases.

D. Other sources

There are no other sources of the reporter's privilege in Indiana.

III. Scope of protection

A. Generally

Indiana's shield law provides absolute protection of the identity of a newsgatherer's confidential source. However, the shield law does not explicitly protect information obtained from confidential sources, nor does it protect non-confidential source materials. The shield law is the only source of privilege in criminal cases and may be the only

source in civil cases as well. Thus, under current caselaw, those materials that are not covered by the shield law are subject to disclosure if subpoenaed.

In sum, the reporter's privilege in Indiana is good for reporters trying to protect the identities of confidential sources but does not provide protection for other newsgathering materials.

B. Absolute or qualified privilege

Indiana's shield law provides absolute protection for the identity of a newsgatherer's confidential source, Ind. Code § 34-46-4-2, with regard to state matters or lawsuits.

C. Type of case

1. Civil

Indiana's shield law applies in "any legal proceedings or elsewhere." Ind. Code § 34-46-4-2.

The Indiana Supreme Court has rejected the press's argument that a separate newsgatherer's privilege exists, under the free press provisions of the U.S. and state constitutions, for reporters subpoenaed in criminal matters. *In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998). It is unclear, after *In re WTHR-TV*, whether a Court of Appeals opinion recognizing a qualified First Amendment privilege in civil cases is still valid. *See In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986). *(See the above discussion at III.C.)* If it is, such a privilege might cover those materials that are not protected under the shield law. In order to overcome the qualified privilege, the subpoenaing party in a civil case would need to prove: (1) the materials sought are material and relevant to the action, (2) they are critical to a fair determination of the cause, and (3) the subpoenaing party had exhausted all other sources for obtaining the same information. *Id.* at 151.

2. Criminal

Indiana's shield law applies in "any legal proceedings or elsewhere." Ind. Code § 34-46-4-2. It is important to note, however, that the shield law applies only to state matters and that in a conflict of law scenario between federal and state law, the federal will apply, which means that there is no shield available in such a case.

There is no other source of privilege in a criminal case. The Indiana Supreme Court has rejected the notion that a qualified privilege exists under either the U.S. or state constitution in criminal cases. *See In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998).

Thus, under current caselaw, only the identity of a reporter's confidential source is protected in a criminal case involving state matters.

3. Grand jury

Indiana's shield law applies in "any legal proceedings or elsewhere." Ind. Code § 34-46-4-2. As stated above, the shield law applies to state matters only. Such limitation means that the shield law does not apply when a reporter is called before a federal grand jury.

There is no other source of privilege in a criminal case. The Indiana Supreme Court has rejected the notion that a qualified privilege exists under either the U.S. or state constitution in criminal cases. *See In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998).

Thus, under current caselaw, only the identity of a reporter's confidential source is protected in a grand jury.

D. Information and/or identity of source

Indiana's shield law specifically protects the identity of a reporter's source. Ind. Code § 34-46-4-2. It does not protect the information itself. Such information might be protected under a separate First Amendment privilege in civil cases, if such privilege is still considered viable after the Supreme Court of Indiana rejected such a privilege for criminal cases in *In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998). *See In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986).

E. Confidential and/or non-confidential information

Indiana's shield law protects the identity of a reporter's confidential source. Nonconfidential source materials are not explicitly covered under the statute. *See Slone v. State*, 496 N.E.2d 401,405 (Ind. 1986) (declining to decide whether the shield law covers nonconfidential source materials). Such materials might be protected under a qualified First Amendment privilege in civil cases, assuming that privilege was not eliminated by the Supreme Court's rejection of a constitutional privilege in criminal cases in *In re WTHR-TV*, 693 N.E.2d 1 (Ind. 1998). *See In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986).

F. Published and/or non-published material

The Indiana shield law protects "the source of any information ... whether (1) published or not published ... or broadcast or not broadcast." Ind. Code § 34-46-4-2.

G. Reporter's personal observations

There is no statutory or case law addressing this issue.

H. Media as a party

The Indiana shield law does not differentiate between cases where the media is a party and where it is not. The shield law applies "in any legal proceedings or elsewhere." Ind. Code § 34-46-4-2. *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. App. 1984), is the only reported opinion about the reporter's privilege in which the media was a party. There, the court rejected a libel plaintiff's argument that the shield law violated Article I, section 12 of the Indiana Constitution, which guarantees a remedy for injury to reputation. *Id.* at 1249-50. The court concluded that the constitutional provision did not prevent the legislature from modifying or restricting the right to sue for libel, by allowing the shield law to prevent some discovery in libel cases. *Id.*

I. Defamation actions

The Indiana shield law does not make any special provisions for libel actions. The shield law applies "in any legal proceedings or elsewhere." Ind. Code § 34-46-4-2. *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. App. 1984), is the only reported opinion about the shield law in which the media was sued for libel. There, the court rejected the plaintiff's argument that the shield law violated Article I, section 12 of the Indiana Constitution, which guarantees a remedy for injury to reputation. *Id.* at 1249-50.

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Indiana's shield law applies to:

> (1) any person connected with, or any person who has been connected with or employed by:
>
> (A) a newspaper or other periodical issued at regular intervals and having a general circulation; or
>
> (B) a recognized press association or wire service;
>
> as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news; and
>
> (2) any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news.

Ind. Code § 34-46-4-1. The statute does not further define the terms in this section.

The privilege can only be invoked if the person subpoenaed was acting in her capacity as a newsgatherer when she obtained the information sought. *See Northside Sanitary Landfill, Inc. v. Bradley*, 462 N.E.2d 1321 (Ind. App.

1984) (freelancer who gave document to television station with whom she had no employment arrangement was precluded from using the shield law); *Shindler v. State*, 335 N.E.2d 638 (Ind. App. 1975) (reporter would have lost protection of the privilege if she had been acting as an agent for the state in investigating a crime).

b. Editor

Indiana's shield law applies to:

> (1) any person connected with, or any person who has been connected with or employed by:
>
> (A) a newspaper or other periodical issued at regular intervals and having a general circulation; or
>
> (B) a recognized press association or wire service;
>
> as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news; and
>
> (2) any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news.

Ind. Code § 34-46-4-1. The statute does not further define the terms in this section.

The privilege can only be invoked if the person subpoenaed was acting in her capacity as a newsgatherer when she obtained the information sought. *See Northside Sanitary Landfill, Inc. v. Bradley*, 462 N.E.2d 1321 (Ind. App. 1984) (freelancer who gave document to television station with whom she had no employment arrangement was precluded from using the shield law); *Shindler v. State*, 335 N.E.2d 638 (Ind. App. 1975) (reporter would have lost protection of the privilege if she had been acting as an agent for the state in investigating a crime).

c. News

The Indiana shield law does not define "news," nor is the term defined in caselaw discussing the statute.

d. Photo journalist

The Indiana shield law does not define "photojournalist," but a photojournalist would probably be considered a "reportorial employee" under Ind. Code § 34-46-4-1.

e. News organization / medium

Indiana's shield law applies to newspapers; other periodicals issued at regular intervals and having a general circulation; recognized press associations or wire services; and licensed radio or television stations. Ind. Code § 34-46-4-1.

2. Others, including non-traditional news gatherers

Indiana's shield law applies to freelancers who have an employment relationship with a particular news medium. *Northside Sanitary Landfill, Inc. v. Bradley*, 462 N.E.2d 1321 (Ind. App. 1984). The shield law has not be applied to other non-traditional newsgatherers in reported caselaw.

B. Whose privilege is it?

The privilege belongs to the reporter and cannot be claimed by the source. *See Hestand v. State*, 273 N.E.2d 282 (Ind. 1971); *Lipps v. State*, 258 N.E.2d 622 (Ind. 1970).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special rules for service of subpoenas to the news media. In general, "[s]ervice of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person." Ind. R. Trial P. 45(C). For gen-

eral rules on subpoenas, *see* Ind. R. Trial P. 34 ("Production of documents and things and entry upon land for inspection and other purposes"); Ind. R. Trial P. 45 ("Subpoena"); Ind. R. Crim. P. 2 ("Subpoena duces tecum"); Ind. Code § 35-37-5-2 (subpoenas to witnesses out of state); Ind. Code § 35-34-2-5 (grand jury subpoenas). Generally, on criminal subpoena, you are required to also follow the Indiana Rules of Trial Procedure.

2. Deposit of security

Special Procedures and Defenses Available to a Reporter When Production of Tapes or Documents are Required in State Courts (Subpoena Duces Tecum):

When a subpoena duces tecum or other discovery request for documents is issued, both Ind. R. Trial P. 34 and 45 must be complied with.

Ind. R. Trial P. 34 entitles the subpoenaed party to security in the form of prepayment of damages that are to be incurred and a variety of other alternative securities from the party issuing the subpoena. Examples of alternative securities include "an adequate surety bond or other indemnity conditioned against such damages." *Id.*

Ind. R. Trial P. 45 allows a court to order payment "of the reasonable cost of producing the books, papers, documents, or tangible things." *Id.*

3. Filing of affidavit

Upon agreement of the parties to the litigation, an affidavit may be produced by the subpoenaed party in lieu of direct testimony.

4. Judicial approval

An attorney can issue a subpoena as an officer of the court in most situations or can have the court clerk issue a subpoena. *See* Ind. R. Trial P. 34, 45; Ind. R. Crim. P. 2; Ind. Code § 35-37-5-2; Ind. Code § 35-34-2-5.

5. Service of police or other administrative subpoenas

Various administrative bodies have the power to issue subpoenas. For instance, in connection with the investigation of a fire, the fire department may issue subpoenas, under Ind. Code §§ 22-14-2-08 and 36-8-17-7.

B. How to Quash

1. Contact other party first

The law does not require that the subpoenaing party be contacted prior to moving to quash, but such contact is generally recommended. Parties may agree to limit or withdraw subpoenas once they are made aware of the contours of the reporter's privilege or other basis for objection such as lack of following the terms of Ind. Tr. Rule 34(c).

2. Filing an objection or a notice of intent

Indiana courts do not require that a notice of intent to quash be filed before the motion to quash. A motion to quash must be made "promptly" and in any event within the time specified for compliance with the subpoena, unless it is a subpoena duces tecum. To be safe, any motion to quash should be filed within three days of receipt. However, if the subpoena calls for the production of tapes or documents, then the provisions of Ind. R. Trial P. 34(c) apply, and the subpoenaed party has thirty days to make a written resonse and assert a request for security or to offer different terms of compliance.

A motion to quash a subpoena duces tecum in a grand jury proceeding must include a statement of facts and grounds in support of the objection to the subpoena. Ind. Code § 35-34-2-6. The court must conduct a hearing on the motion to quash. *Id.* Also, as mentioned above, Rule 34(c) of the Indiana rule of Trial Procedure does apply.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the same court as the court that is hearing the case at issue.

b. Motion to compel

The media party need not wait for the subpoenaing party to file a motion to compel before filing a motion to quash.

c. Timing

As discussed above, a motion to quash must be made "promptly" and in any event within the time specified for compliance with the subpoena, unless it is a subpoena duces tecum. To be safe, any motion to quash should be filed within three days of receipt. However, if the subpoena calls for the production of tapes or documents, then the provisions of Ind. R. Trial P. 34(c) apply, and the subpoenaed party has thirty days to make a written resonse and assert a request for security or to offer different terms of compliance.

d. Language

You will need to cite the applicable provisions of Ind. T. Rule P. 45 and/or Ind. T. Rule P. 34(c) and explain how these provisions apply to your situation.

e. Additional material

The Reporters Committee for Freedom of the Press often recommends that a copy of "Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media," its biennial survey of the incidence of news media subpoenas, be attached to a motion to quash based on the reporter's privilege.

4. In camera review

a. Necessity

The Indiana shield law does not require a court to conduct an in camera review of materials or prior to deciding a motion to quash.

In *In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998), the court said, with respect to in camera review:

> In camera review to determine materiality of the validity of any objections to production is generally within the trial court's discretion. [M]ateriality need not be shown prior to disclosure where the relevance of the item is self-evident or the precise nature of the information is unknown. However, in that circumstance, the discovery rules' prohibition on fishing expeditions and burdensome requests would effectively be lost if in camera review could be obtained without a showing of at least possible relevance ... Accordingly, where materiality is challenged or is unknown, a showing of at least "potential materiality" is generally required to obtain in camera review of disputed items.

Id. at 8 (internal citations omitted). *See also WTHR-TV v. Milam*, 690 N.E.2d (Ind. 1998).

b. Consequences of consent

There is no statutory or case law on this issue.

c. Consequences of refusing

There is no case law on this issue, but courts have broad powers to hold people in contempt for failing to obey a court order. In *In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998), the media party moved for a stay of the trial court's order for in camera review. The order was stayed pending the appeal.

5. Briefing schedule

There are no Indiana rules on this issue. Generally, courts may set briefing schedules. You should also check local rules.

6. Amicus briefs

Amicus briefs are accepted at the appellate level. For rules relating to amicus participation, *see* Ind. R. App. P. 16, 41, 43, 44, 46, 53.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Generally, the burden is on the party moving to quash a subpoena for documents to show why the documents should not be produced. *Newton v. Yates*, 353 N.E.2d 485 (Ind. App. 1976).

It is unclear who has the burden under the First Amendment reporter's privilege recognized for civil cases in *In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986), and whether or not that privilege is even still valid.

B. Elements

To make use of the shield law statute which protects reporters from revealing their sources, a reporter must show that he or she is a person covered under § 34-46-4-1 and that the identity of a news source is being sought.

As for other video or documents such as interviews of persons relevant to a civil criminal case, the elements that must be shown to overcome the First Amendment reporter's privilege recognized in *In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986), are: (1) the materials sought are material and relevant to the action, (2) they are critical to a fair determination of the cause, and (3) the subpoenaing party has exhausted all other sources for the same information. *Id.* However, it is unclear whether this constitutional privilege is still valid in Indiana. *See In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998), discussed earlier in this article.

1. Relevance of material to case at bar

The material or testimony subpoenaed must be relevant to the case, under normal discovery rules. *See WTHR-TV v. Milam*, 690 N.E.2d 1174, 1176 (Ind. 1998) ("[D]iscovery rights do not entitle a criminal defendant to commandeer the efforts of third parties as a substitute for independent [] investigation. Nor do the Trial Rules allow the defendant to rummage through the files of third parties, particularly the press, for information whose materiality is only a matter of pure supposition."); *see also In re Wireman*, 367 N.E.2d 1368, 1371 (Ind. 1977) (refusing to confront issue of applicability of shield law, because newsperson's testimony was irrelevant)

2. Material unavailable from other sources

In *In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998), the court addressed the need for a showing of unavailibity from other sources as it relates to a criminal case when it stated "[w]here a media organization is subpoenaed, the Trial Rules require sensitivity to any possible impediments to press freedom. A showing that the information is unique and likely not available from another source should normally be required." *Id.* at 9.

As for civil cases, the subpoenaing party under *In Re Stearns* must show that all other sources for this information have been exhausted.

a. How exhaustive must search be?

There is no statutory or case law on this issue.

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

For a criminal case, most likely the party need only assert that the information is unique and not likely available from another source. *See In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1, 9 (Ind. 1998). For a civil case, see above comments.

c. Source is an eyewitness to a crime

The Indiana shield law protects a reporter from disclosing the identity of any source.

3. Balancing of interests

The Indiana shield law is absolute and, therefore, does not require a judicial balancing of interests in determining whether to quash a subpoena, if the purpose of the subpoena is to learn the identity of a source.

The constitutional newsgatherer's privilege, arguably still recognized for civil cases in *In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986), involves the balancing of First Amendment considerations against "a

paramount public interest in the fair administration of justice." *Id.* at 150. The court, faced with a claim of privilege, must consider the following factors: (1) whether the materials sought are material and relevant to the action, (2) whether they are critical to a fair determination of the cause, and (3) whether the subpoenaing party had exhausted all other sources for the same information. *Id.* at 151. It is unclear, however, whether this constitutional privilege still exists after the Indiana Supreme Court rejected such an approach for criminal cases. *See In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998).

In criminal cases, *In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998), applies and the test is not one of privilege but resolution consistent with Indiana's Trial Rules that pertain to discovery. More specifically, the *WTHR* court stated that when a media organization is subpoenaed "a showing that the information is unique and likely not available from another source should normally be required." *Id.* at 9.

4. Subpoena not overbroad or unduly burdensome

A subpoena may be quashed for being overbroad or unduly burdensome. Ind. R. Trial P. 45(B); Ind. R. Crim. P. 2; Ind. Code § 35-37-5-2(c)(1). *See also In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998).

5. Threat to human life

There is no statutory or case law on this issue.

6. Material is not cumulative

A subpoena may be quashed for being overbroad or unduly burdensome. Ind. R. Trial P. 45(B); Ind. R. Crim. P. 2; Ind. Code § 35-37-5-2(c)(1). *See also In re WTHR-TV (State v. Cline)*, 693 N.E.2d 1 (Ind. 1998). However, "[i]nformation is not necessarily oppressive or unreasonable because similar evidence can be gleaned from another source." *Hueck v. State*, 590 N.E.2d 581, 586 (Ind. App. 1992). *See* 536 N.E.2d 534, 537 (Ind. App. 1989) (relevant evidence will not be rejected simply because it is cumulative unless it creates undue prejudice, such as a parade of witnesses offering consistent testimony).

7. Civil/criminal rules of procedure

A subpoenaed person may ask the court to modify or quash an overbroad or unduly burdensome subpoena. Ind. R. Crim. P. 2; Ind. Code § 35-37-5-2; Ind. R. Trial P. 34, 45(B). A person subpoenaed for the production of documents pursuant to Indiana Trial Procedure Rule 34 may also request a security deposit; propose different terms; or object specifically or generally to the request by written objection within 30 days of receipt of the subpoena. Ind. R. Trial P. 34(C).

8. Other elements

There are no other elements.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Indiana courts have recognized that the privilege is waivable. *See In re Wireman*, 367 N.E.2d 1368, 1371 (Ind. 1977); *Northside Sanitary Landfill, Inc. v. Bradley*, 462 N.E.2d 1321, 1325 (Ind. App. 1984). In *Northside Sanitary Landfill*, the court said a credible argument could be made that a reporter waived her privilege by failing to claim it at her deposition. *Northside Sanitary Landfill*, at 1325. However, that case was decided on grounds other than waiver.

2. Elements of waiver

There is no statutory or case law on this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law on this issue.

VII. What constitutes compliance?

A. Newspaper articles

Newspapers are self-authenticating. Ind. R. Evid. 902.

B. Broadcast materials

Broadcast materials must be authenticated in court. Methods of authentication are listed in Ind. R. Evid. 901 and include testimony of a witness with knowledge that a matter is what it is claimed to be. Generally, the parties may stipulate as to the authenticity of a tape or document. However, all parties must so consent before such authentication is permitted.

C. Testimony vs. affidavits

The Indiana Rules of Evidence do not specify whether a sworn affidavit may take the place of in-court testimony to confirm the authenticity of evidence, but such an affidavit is often used when all parties so concur.

D. Non-compliance remedies

1. Civil contempt

There are no known instances where a reporter has been held in civil contempt, with the proverbial keys to the cell in his own pocket, for disobeying a subpoena. For rules relating to contempt, *see* Ind. Code 34-47.

a. Fines

Fines for civil contempt are not capped. *See Moore v. Ferguson*, 680 N.E.2d 862 (Ind. App. 1997).

b. Jail

Jail sentences for civil contempt are not limited. *See Moore v. Ferguson*, 680 N.E.2d 862 (Ind. App. 1997).

2. Criminal contempt

There are no known instances where a reporter has been prosecuted for criminal contempt for disobeying a subpoena. For rules relating to contempt, *see* Ind. Code 34-47.

3. Other remedies

Courts generally have discretion to order remedies for contempt, such as default judgments against the media or presumptions of malice in libel cases.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Rule 14 of the Indiana Rules of Appellate Procedure governs interlocutory appeals. With respect to timing, the rule provides: "A motion requesting certification of an interlocutory order must be filed in the trial court within thirty (30) days of the date of the interlocutory order unless the trial court, for good cause, permits a belated motion," and "[t]he motion requesting that the Court of Appeals accept jurisdiction over an interlocutory appeal shall be filed within thirty (30) days of the date of the trial court's certification."

A denial of a motion to quash may be appealed. *See, e.g., In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d 146 (Ind. App. 1986).

2. Expedited appeals

"The Court of Appeals, upon motion by a party and for good cause, may shorten any time period. A motion to shorten time shall be filed within ten (10) days of the filing of either the Notice of Appeal with the trial court clerk or the motion to the Court of Appeals requesting permission to file an interlocutory appeal." Ind. R. App. P. 14(F).

B. Procedure

1. To whom is the appeal made?

The media party must request certification of the interlocutory order from the trial court. Then, the media must request that the appeals court take jurisdiction over the appeal. Ind. R. App. P. 14.

2. Stays pending appeal

"An interlocutory appeal shall not stay proceedings in the trial court unless the trial court or a judge of the Court of Appeals so orders." Ind R. App. P. 14(G). *See* Ind. R. App. P. 39 for rules relating to motions to stay.

3. Nature of appeal

The appeal is discretionary. Ind. R. App. P. 14.

4. Standard of review

In *In re Stearns*, the court, in reviewing an interlocutory appeal of a motion to quash a subpoena to a news organization, said: "When reviewing a general judgment this Court will presume the judgment to be based on findings which are supported by the evidence and we must affirm if the decision of the trial court can be sustained on any legal grounds." *In re Stearns (Vollmer v. Zulka)*, 489 N.E.2d at 149.

5. Addressing mootness questions

Indiana courts have not addressed the mootness issue when the trial or grand jury session for which a reporter was subpoenaed has concluded. Indiana does recognize an exception to the mootness doctrine when an issue is "capable of repetition but evading review." *See, e.g., Ray v. State Election Bd.*, 422 N.E.2d 714 (Ind. App. 1981).

6. Relief

A reporter's attorney should ask that the subpoena be quashed under the shield law and/or that any contempt citation be dissolved.

IX. Other issues

A. Newsroom searches

The federal Privacy Protection Act (42 U.S.C. 2000aa), which drastically limits searches of newsrooms, has not been used in Indiana. There are no similar provisions under state law.

B. Separation orders

In *Shindler v. State*, 335 N.E.2d 638 (Ind. App. 1975), the court considered a breach of a separation of witnesses order. The trial court had ordered that witnesses not discuss testimony among themselves. One witness remained in the courtroom and wrote newspaper articles about the trial. The defendant argued that because the other witnesses read the news articles, there had been a violation of the order. The court did not decide whether a violation of the order had occurred, because it found that any such error was harmless. *Id.* at 267-68.

C. Third-party subpoenas

There is no statutory or case law on this issue.

D. The source's rights and interests

There is no statutory or case law on this issue.