REPORTER'S PRIVILEGE: MONTANA

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

MONTANA

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I. Introduction: History & Background

Montana has had a shield law in some form since 1943. It has been amended four times up to the present, each time being broadened or strengthened. There have been only three Montana Supreme Court cases discussing this law, *State ex. rel. Adams v. District Court of the Third Judicial District*, 169 Mont. 336, 546 P.2d 988 (1976); *Sible v. Lee Enterprises, Inc.*, 224 Mont. 163, 729 P.2d 1271 (1986); *State v. Slavin*, 2004 MT 76, 320 Mont. 425.

The most noteworthy shield law case in Montana was never appealed to the Supreme Court. This was *Linda Tracy v. City of Missoula*, Missoula County Cause No. DV-00-849 (2001). A journalism student prepared and disseminated a video documentary of confrontations between police and citizens that occurred after a large scale police presence was brought into the city to deal with a *Hells Angels* gathering. The *Angels* themselves were a dud, but what many local people perceived as heavy handed police tactics led to two interesting days of protests, tear gas, and arrests. The city attempted to subpoena Linda Tracy's source material for use in criminal prosecutions, and she resisted on the basis of the shield law and the First Amendment. The District Court quashed the subpoena after a hearing.

II. Authority for and source of the right

A. Shield law statute

Montana's law is entitled the "Media Confidentiality Act" and presently reads as follows:

> *26-1-902. Extent of privilege.* (1) Without his or its consent no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business.
>
> (2) A person described in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to issue subpoenas for refusing to disclose or produce the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of his or its business.
>
> *26-1-903. Waiver of privilege.* (1) Except as provided in subsection (2), dissemination in whole or in part does not constitute a waiver of provisions of 26-1-902.
>
> (2) If the person claiming the privilege testifies, with or without having been subpoenaed or ordered to testify or produce the source, before a judicial, legislative, administrative, or other body having the power to issue subpoenas or judicially enforceable orders, he does not waive the provisions of 26-1-902 unless the person voluntarily agrees to waive the privilege or voluntarily discloses the source in the course of his testimony. Except as provided in this subsection, the provisions of 26-1-902 may not be waived.

The predecessor of this law was first enacted in 1943 as the "Reporters Confidence Act." It protected from disclosure only the sources of information. The privilege was granted to persons identified in a list of categories similar to that of the present law. In 1951 this list was expanded to include radio and television news.

In the *Adams* case, *supra*, a reporter was ordered to produce for *in camera* inspection by a judge a letter that had been written to him by a criminal defendant, and of which the reporter had published portions. Following that case, the law was amended to protect information as well as sources, and to make waiver more difficult. Organizations that appeared before the legislature to support those changes included the Montana Press Association, the Montana Broadcasters Association, and some newspapers.

In 1979 the law was broadened again by liberalizing when persons were protected by it. The waiver language was also adjusted.

In 1987 the Court decided the *Sible* case, *supra.* Part of its holding in this defamation action was that when the reporter testified, he waived his privilege to keep his notes confidential. The legislature then in 1989 amended the law to its present form, which prevents waiver by the journalism except as a voluntary choice.

B. State constitutional provision

In the *Adams* case the reporter raised state and federal constitutional issues. The Montana Supreme Court held that they could not be determined unless the district court first examined the subpoenaed material for relevancy and privilege. The Montana Constitution does provide for freedom of speech, expression and the press, in Article II, §7, and also contains a strong protection of the public's right to know, which is found at Article II, §9.

In the

Slavin case the shield law was attacked on constitutional bases. In that case the criminal defendant had subpoenaed a reporter and editor who had interviewed the complaining witness and written an article that contained statements from the complainant that were helpful to the defendant. The journalists moved to quash their subpoenas immediately before the trial, and the district court did so on the basis of the Media Confidentiality Act. The defendant was convicted and appealed on the grounds that his right to present witnesses in his defense had been violated, contrary to the Sixth Amendment and the Montana Constitution. The Montana Supreme Court denied the appeal. It held that if there were any error it was harmless, since the evidence was presented to the jury through other means, including the admissions of the complaining witness and the article itself.

C. Federal constitutional provision

Other than the rather cursory treatment of the issue in *Adams*, discussed above, this writer is unaware of any Montana case in which a state court applied or rejected a reporter's privilege based on the First Amendment to the U.S. Constitution.

Concerning the shield law and the Sixth Amendment, see the

Slavin case discussed in the preceding paragraph.

D. Other sources

There are no other sources of a reporter's privilege in Montana other than the statutes and constitutional provisions described above.

III. Scope of protection

A. Generally

Montana's privilege is very strong. It is absolute for covered individuals and information, without the weighing of other factors. Nor can it be waived except by intention.

B. Absolute or qualified privilege

The law does not make any distinction among different types of information, but gives an absolute privilege for all newsgathering.

C. Type of case

1. Civil

The law makes no distinction between civil and criminal cases.

2. Criminal

On its face, the law does not treat subpoenas differently depending on whether they are for civil or criminal cases. In practice, many criminal case subpoenas are likely to be issues under § 46-4-301, MCA, which gives authority to prosecutors to request investigative subpoenas. Such a subpoena must be quashed under § 46-4-303, MCA.

3. Grand jury

There are no different standards in the law for grand jury subpoenas. Grand juries are seldom used in Montana, where prosecutors can file cases by information.

D. Information and/or identity of source

E. Confidential and/or non-confidential information

The law now protects both sources and information, and makes no distinction between "confidential" and "non-confidential" information.

F. Published and/or non-published material

Montana's law does not differentiate between published material and material that has not been published. In the *Tracy* case, *supra*, the court denied the prosecutor's access to Linda Tracy's film outtakes.

G. Reporter's personal observations

There is no Montana case law discussing whether there should be a distinction when the reporter has personally observed the matter on which he reported and was then subpoenaed. The statute however, protects "any information obtained or prepared . . . if the information was gathered, received, or processed in the course of his employment or its business." That language does not appear to treat eyewitness testimony any differently.

H. Media as a party

The privilege does not differentiate between cases where the media is a party and where it is not.

I. Defamation actions

Montana's law does not contain any "libel exception." The *Sible* case was a defamation action against a newspaper and its reporter. The Court held that the reporter waived the privilege as to his notes when he testified. The legislature subsequently changed the law to avoid that result.

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Montana does not give the privilege to "reporters" as such, but to "any person connected with or employed by (certain named organizations) for the purpose of gathering, writing, editing or disseminating news." There is no requirement that such a person work a minimum number of hours.

b. Editor

The definition that covers reporters is the same one that covers editors.

c. News

There is no further definition of what "news" is. If the information was gathered or processed in the course of the business of the defined organizations, then it is presumed to be news.

d. Photo journalist

Photojournalists are not separately mentioned in the law. Linda Tracy was a videographer and the privilege applied to her. Whether or not a photojournalist in another case would receive the protection of the law, would depend on that person's relationship with the named organizations.

e. News organization / medium

The Montana law only gives its protection to certain defined media and those employed by or connected with that media for the purpose of gathering or disseminating news.

2. Others, including non-traditional news gatherers

The area where the Montana law can be the most limited concerns who is covered by the privilege. Non-traditional news gatherers will not have coverage unless they also have a connection with the media that are listed in the law. For example Linda Tracy, a student who made a video documentary, received the protection of the privilege because she had connections with the University of Montana, which operates a public radio and television station, with television stations that broadcast some of her work, and with a non-profit organization, Cold Mountain, Cold Rivers, Inc., that provided Ms. Tracy with videotape footage and equipment for producing the documentary. By virtue of its history and stated purpose of producing video documentaries as well as news footage to television networks, the district court found CMCR to be a "news agency" as that term is used in the statute.

A person who might have trouble obtaining the protection of the Montana shield law would be a true freelancer, *e.g.* an author doing research for a book, who had no connection with the listed media.

B. Whose privilege is it?

The privilege belongs to the reporter and the news media that the reporter is employed by or connected with. The privilege does not belong to the source.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special requirements for service on a member of the news media. In general, subpoenas are served by showing the original and presenting a copy, along with the statutory witness fee (currently $10) and a fee for mileage if the person subpoenaed lives out of the town and requests mileage. Subpoenas must be served sufficiently ahead of time to give the person subpoenaed a reasonable amount of time to comply or object.

2. Deposit of security

No security is required as a deposit for a subpoena.

3. Filing of affidavit

An affidavit is required for an investigative subpoena on behalf of law enforcement. Otherwise, an affidavit is not required.

4. Judicial approval

A judge or magistrate must approve a criminal investigative subpoena, but need not approve a subpoena in a civil case.

5. Service of police or other administrative subpoenas

Some administrative bodies can serve subpoenas, but these must be enforced through the courts.

B. How to Quash

A subpoena must be quashed by applying to the court. In the case of administrative subpoenas, redress through the administrative body should first be sought. In the case of criminal investigative subpoenas, the applicable statutes are §§ 46-4-301 through 46-4-303, MCA.

1. Contact other party first

The law does not require that the subpoenaing party first be contacted before moving to quash a subpoena. As a matter of effective practice in this state, it may however be a good idea to do so.

2. Filing an objection or a notice of intent

In a civil case a party can make an objection and wait for a motion to quash, Rule 45(c), M.R.Civ.P. Overall however, an objecting party probably puts itself in a better position with a motion to quash.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the court that issued the subpoena.

b. Motion to compel

A motion to quash may be a better way to go rather than waiting for a motion to compel, though in a civil case an objection made within fourteen days of the subpoena is also an option.

c. Timing

In a civil case the objection or motion to quash should be made within fourteen days, or prior to the time specified for compliance if that time is less than fourteen days. Otherwise, there is no set deadline for filing a motion to quash, but it probably should be done as soon as possible after receipt of the subpoena.

d. Language

There is no stock language for a motion to quash.

e. Additional material

A motion to quash should be supported by a brief or memorandum filed with the motion or within five days of it. How a court may react to particular attachments to such a memorandum will depend on the particular judge and case.

4. In camera review

a. Necessity

Should the reporter establish that the subpoena is barred under the Montana Media Confidentiality Act, the privilege is absolute and any weighing of factors in an *in camera* review is unnecessary. In the case of a constitutional challenge to the subpoena, there will be a weighing of factors and likely such an *in camera* review.

b. Consequences of consent

In the case of an adverse ruling a stay is not automatic, but there would be good grounds for getting one on request.

c. Consequences of refusing

If a district court order is not obeyed, the alternatives are obtaining a stay pending appeal, or risking sanctions for contempt of court.

5. Briefing schedule

Usually a brief must be filed with the motion or within five days. The other party then has ten days to respond, and there is given an additional ten days for a reply by the moving party.

6. Amicus briefs

Courts often accept *amicus* briefs. In Montana a reporter may wish to contact the *FOI Hotline* c/o the Associated Press Bureau in Helena, Montana.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

If a reporter demonstrates that he is covered under the state shield law, the privilege is absolute.

B. Elements

The elements that must be shown are those described in the statute quoted above.

1. Relevance of material to case at bar

In theory, the relevance of the material does not matter if it is privileged.

2. Material unavailable from other sources

Under Montana's shield law, it does not matter whether or not the material is available from other sources.

a. How exhaustive must search be?

If the statutory privilege applies, exhaustion of other sources is not an issue.

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

If the statutory privilege applies, exhaustion of other sources is not an issue.

c. Source is an eyewitness to a crime

No distinction is made under Montana's law if the source is an eyewitness to a crime. If the source is a criminal participant, then the law might not apply if the court found that the source had not been engaged in his or her employment of gathering news.

3. Balancing of interests

While there would be a judicial balancing of interests under constitutional considerations, under the statutory shield law there is no such requirement.

4. Subpoena not overbroad or unduly burdensome

Supboenas can be quashed or modified if overbroad.

5. Threat to human life

There is nothing in the statutes, nor any case law, on the issue of threat to human life.

6. Material is not cumulative

Under the shield law, it does not matter if the subpoenaed testimony or material would be cumulative. However, see the discussion of the *Slavin* case above.

7. Civil/criminal rules of procedure

All subpoenas should be contested before the court or body that issues them.

8. Other elements

If the statutory criteria are met, the privilege is absolute.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

The Montana statute specifically states that the privilege is waived only on the voluntary choice of the reporter, § 26-1-903, MCA.

2. Elements of waiver

a. Disclosure of confidential source's name

Disclosure to some, *e.g.* an editor or lawyer, does not waive the privilege.

b. Disclosure of non-confidential source's name

Disclosure of the source's name is not waiver except of course as to the identity of the source.

c. Partial disclosure of information

Partial disclosure is not waiver.

d. Other elements

The Montana statute specifically states that the privilege is waived only on the voluntary choice of the reporter, § 26-1-903, MCA.

3. Agreement to partially testify act as waiver?

Partial dissemination is not waiver unless the reporter intends it to be so.

VII. What constitutes compliance?

Compliance with a subpoena means the production of the subpoenaed material or testimony.

A. Newspaper articles

Montana allows fairly easy authentication of evidence such as newspaper articles.

B. Broadcast materials

There is no particular requirement as to who the representative of a subpoenaed broadcaster must be.

C. Testimony vs. affidavits

An affidavit can take the place of in-court testimony only upon the agreement of all the parties.

D. Non-compliance remedies

Pursuant to § 3-1-501, MCA, non-compliance with a valid, upheld subpoena can result in either civil contempt, § 3-1-520, MCA or criminal contempt, § 45-7-309, MCA.

1. Civil contempt

a. Fines

The fine for civil contempt is capped at $500.

b. Jail

Jail sentences for civil contempt are not limited by the statute. This author is aware of no recent instances in which a reporter went to jail rather than disclose.

2. Criminal contempt

This author is aware of no recent instances of criminal contempt being used against a reporter for failure to disclose.

3. Other remedies

In a civil case in which the person refusing to obey the lawful subpoena is a party, they may be assessed costs, including attorney fees, or be limited in the evidence they can present in the case, Rule 37, M.R.Civ.P.

VIII. Appealing

A. Timing

1. Interlocutory appeals

With a few exceptions, only final judgments and orders can be appealed. Interlocutory orders can be appealed either on stipulation or with the consent of the district court after a motion.

2. Expedited appeals

There are no procedures for the expedited appeals of these issues, which decision would lie completely in the discretion of the Montana Supreme Court.

B. Procedure

1. To whom is the appeal made?

Appeals from courts of limited jurisdiction, *e.g.* justice or municipal courts, or from administrative agencies, are to district court. All appeals from district courts must be to the Montana Supreme Court.

2. Stays pending appeal

Requests for stay should be addressed to the court that issued the order being appealed. If a constitutional right is alleged, that argument should be made.

3. Nature of appeal

Extraordinary writs such as mandamus require that there is no adequate remedy through an ordinary appeal under law.

4. Standard of review

Appellate courts give great deference to findings of fact, only overturning them if they are not supported by substantial evidence. Concerning legal conclusions the standard of review is *de novo.*

5. Addressing mootness questions

Montana recognizes the doctrine of "capable of repetition but evading review" in allowing appeals.

6. Relief

An appellate court could either dissolve the contempt citation, or order the trial court to reconsider it. A reporter should ask for the maximum relief.

IX. Other issues

A. Newsroom searches

Montana has no statutory equivalent to the federal Privacy Protection Act, though it has strong privacy protections in its constitution at Article II, § 10. There has not been litigation on this precise issue.

B. Separation orders

The author is unaware of any cases where separation orders have been an issue.

C. Third-party subpoenas

Montana courts have not addressed a media interest in fighting third party subpoenas.

D. The source's rights and interests

The author is unaware of any interventions or lawsuits by sources.