

# REPORTER'S PRIVILEGE: NORTH DAKOTA

**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](http://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 and 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 dis-

sent 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 constitu-

tional 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](http://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 sup-

porting 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

# NORTH DAKOTA

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## I. Introduction: History & Background

The North Dakota statute governing the reporter's privilege is codified in N.D.C.C. § 31-01-06.2:

No person shall be required in any proceeding or hearing to disclose any information or the source of any information or hearing to disclose any information or the source of any information procured or obtained while the person was engaged in gathering, writing, photographing, or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news, unless directed by an order of a district court of this state which, after hearing, finds that the failure of disclosure of such evidence will cause a miscarriage of justice.

The reporter's privilege has not been extensively litigated in North Dakota. The most recently reported case that invoked the statute was decided in 1982. In *Grand Forks Herald v. District Court ex rel. Grand Forks County*, the North Dakota Supreme Court ruled that the North Dakota statute governing the reporter's privilege did not require that the news source be confidential in order for the court to determine that the privilege applied. In dicta, the court speculated that the confidentiality of the information is one of the factors that district courts should consider in determining whether the disclosure of the evidence will result in a miscarriage of justice. Additional factors in determining whether disclosure would result in a miscarriage of justice were whether alternative sources of information were available to the party seeking the information and whether disclosure would create a chilling effect on First Amendment rights.

Generally, application of the reporter's privilege is subject to the discretion of the district court. In its 1982 opinion, the court emphasized that the key factor in determining protected information is whether failure to disclose the information would result in a miscarriage of justice.

## II. Authority for and source of the right

North Dakota has codified the reporter's privilege in N.D.C.C. § 31-01-06.2. The most recently reported case was in 1982, *Grand Forks Herald v. District Court ex rel. Grand Forks County*, 322 N.W.2d 850 (N.D. 1982). The court recognized that other jurisdictions have recognized the Branzburg rule as conferring a First Amendment privilege on news gatherers. As a response to the Branzburg decision, the North Dakota legislature adopted section 31-01-06.2.

### A. Shield law statute

North Dakota adopted the shield law statute in 1973, in apparent response to the Branzburg decision. The statute is codified in N.D.C.C. § 31-01-06.2:

*Disclosure of new sources and information required only on court order.* No person shall be required in any proceeding or hearing to disclose any information or the source of any information procured or obtained while the person was engaged in gathering, writing, photographing, or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news, unless directed by an order of a district court of this state which, after hearing, finds that the failure of disclosure of such evidence will cause a miscarriage of justice.

The legislative history behind the statute is unavailable. However, the case law on the statute discusses the legislative history. The purpose behind the statute was to protect confidential sources, although the plain language of the text does not make that distinction.

### B. State constitutional provision

The North Dakota state constitution does not have an express shield law provision. The shield law is codified in N.D.C.C. section 31-01-06.2. There is no case law discussing reporter's privilege prior to the adoption of the current shield law. Since there is no constitutional provision on shield laws, there is no case law interpretation.

### **C. Federal constitutional provision**

The North Dakota Supreme Court has not applied or rejected a reporter's privilege based on the First Amendment to the U.S. constitution. There is no case law discussing federal constitutional rights prior to the legislature adopting the shield law in 1973.

### **D. Other sources**

There are no additional sources of a reporter's privilege, such as court rules, state bar guidelines, or administrative procedures. The only source for a reporter's privilege is the applicable North Dakota statute.

## **III. Scope of protection**

### **A. Generally**

The plain language of the applicable statute appears to offer broad protection under the reporter's privilege. However, dicta in the ruling case on this issue indicates that the privilege is a qualified one. The privilege is limited by whether the court would find that a "miscarriage of justice" would occur if the information was not disclosed. Factors considered in whether nondisclosure would result in a miscarriage of justice include:

- (1) whether the information is available from some other source and the party seeking disclosure has exhausted all other resources of information;
- (2) whether the information came from a confidential source, although this is not dispositive, it is only a factor to consider;
- (3) relevancy of the information sought to the litigation;
- (4) whether disclosure of the information would cause a "chilling effect".

The court did not rule on the application of the reporter's privilege in criminal situations, although the court speculated that the nature of the action is something that a lower court should consider when determining whether nondisclosure would result in a miscarriage of justice.

### **B. Absolute or qualified privilege**

The privilege is a qualified one. The only qualifying factor is whether nondisclosure of the protected information would result in a miscarriage of justice. Factors such as confidentiality, civil or criminal matter, etc., are to be weighed in order to determine whether disclosure is appropriate.

### **C. Type of case**

#### **1. Civil**

The language of the North Dakota shield law does not make a distinction between civil and criminal cases. Presumably, the same standard would apply to both types of cases. The North Dakota Supreme Court has not yet had the opportunity to rule on whether the nature of the action would alter the conditions of the privilege. In the *Herald* case the North Dakota Supreme Court speculated that the type of case would be one of the factors considered in determining whether nondisclosure would result in a miscarriage of justice.

#### **2. Criminal**

The North Dakota Supreme Court has not yet ruled on whether subpoenas should be treated differently in criminal versus civil cases, although it has stated that the nature of the action is something that the trial court may consider in determining whether disclosure is appropriate. In *Moore v. State*, 711 N.W.2d 606 (N.D. 2006), the North Dakota Supreme Court affirmed a trial court's decision to quash a criminal defendant's subpoena of a TV reporter that was present during the defendant's sentencing hearing. The defendant subpoenaed the TV reporter in support of his assertion that the trial court had falsified the transcript of his sentencing hearing. The trial court quashed the subpoena, finding that the information sought was procured or obtained while the reporter was employed by and

acting for an organization engaged in broadcasting news, and the failure to disclose such evidence will not cause a miscarriage of justice.

### **3. Grand jury**

The North Dakota Supreme Court has stated that the nature of the action is something that the trial court may consider in determining whether disclosure is appropriate. The statute does not make a distinction between grand jury subpoenas and those issued during discovery. Accordingly, the privilege should not be more difficult to defend at this level.

#### **D. Information and/or identity of source**

Confidentiality is one factor that the court may consider in determining whether to allow disclosure. The plain language of the statute does not prohibit revealing a source.

#### **E. Confidential and/or non-confidential information**

The plain language of the statute does not distinguish between confidential and non-confidential information. The North Dakota Supreme Court speculated in the *Grand Forks Herald* case that confidentiality is one factor to consider when determining whether nondisclosure would result in a "miscarriage of justice". The confidential nature of a source is not dispositive in determining whether the information is protected.

#### **F. Published and/or non-published material**

The plain language of the statute does not make a distinction between published and non-published material. However, in *Grand Forks Herald*, the North Dakota Supreme Court stated that because the plaintiff sought discovery on a group of photographs of which one had already been published, then it was unlikely that disclosure would cause a chilling effect on First Amendment rights. Publication is another likely factor in the determining whether nondisclosure would result in a miscarriage of justice.

#### **G. Reporter's personal observations**

The plain language of the statute does not address whether the privilege would protect an eye witness. The statute does not specifically account for situations where the reporter has personally observed the matter on which he/she reported and then was subpoenaed. This issue was not addressed by the North Dakota Supreme Court in its summary affirmation of a trial court's order quashing a criminal defendant's subpoena of a TV reporter in *Moore*. 711 N.W.2d 606. The TV reporter was present during the defendant's sentencing hearing.

#### **H. Media as a party**

The plain language of the statute does not differentiate between situations where the media is a party. However, in the *Herald* case, the North Dakota Supreme Court stated that if the media is a party to the litigation, then the trial court should take that into consideration in determining whether nondisclosure would result in a miscarriage of justice.

#### **I. Defamation actions**

North Dakota does not have a libel exception to the reporter's privilege. Accordingly, the court would probably consider the nature of the action when deciding whether nondisclosure would constitute a miscarriage of justice.

The governing statute on damages for libel seriously limits the amount that a plaintiff can recover for defamation. In 1995, North Dakota passed the Uniform Correction or Clarification of Defamation Act, codified at N.D.C.C. Chapter 32-43. The legislation requires that a plaintiff make a timely and adequate request for correction and clarification from a defendant in order for the plaintiff to be able to claim damages other than pure economic loss. The request for clarification must be made within 90 days if the plaintiff wants to seek non-economic damages.

North Dakota does not have any penalties for noncompliance in a libel case, although the court could presumably assess them against a party if the party failed to comply with discovery rulings.

## IV. Who is covered

The applicable North Dakota statute does not define who qualifies as a 'reporter' or what constitutes 'news'. The plain language of the statute states that any person who is engaged in news gathering for the purpose of reporting is protected by the statute. North Dakota does not have any case law that delineates an exclusive or inclusive definition of who is a 'reporter'.

### A. Statutory and case law definitions

#### 1. Traditional news gatherers

##### a. Reporter

North Dakota law does not define the term 'reporter'. The statute protects persons engaged in news gathering while acting on behalf of a publishing or news agency. There are no conditions placed on the reporter's employment status with the agency. In *Moore*, a TV reporter for a local television station that attended a criminal defendant's sentencing hearing was found to be acting on behalf of and employed by an organization engaged in broadcasting news. 711 N.W.2d 606.

##### b. Editor

The North Dakota statute does not define 'editor', although the language of the statute implicitly includes employers of the newsgatherer.

##### c. News

The term "news" is not defined in the statute, although the it protects additional methods of news gathering such as wiring, photographing, and editing.

##### d. Photo journalist

The statute does not define photojournalist.

##### e. News organization / medium

The statute does not define news media or other types of newsgathering, such as broadcasting, or newspapers.

#### 2. Others, including non-traditional news gatherers

North Dakota does not have any case law that discusses the application of the privilege to any untraditional news gatherers. The statute is unclear as to whether it would apply to news librarians or others involved in the storage of news.

### B. Whose privilege is it?

North Dakota has not yet ruled on who can claim the privilege. However, statutory language and case law appears to indicated that the privilege belongs to the reporter and the employer.

## V. Procedures for issuing and contesting subpoenas

### A. What subpoena server must do

#### 1. Service of subpoena, time

There are no special rules for serving a subpoena on a member of the news media. Rule 45 of the North Dakota Rules of Civil Procedure requires that the subpoena be personally served, along with payment for one day's attendance, mileage and travel expense, as set by law.

#### 2. Deposit of security

A deposit of security is not required. However, a witness fee for one day's attendance, mileage and travel expenses must be paid at the time of service of the subpoena.

### **3. Filing of affidavit**

A subpoena can be signed by an attorney for a party to an action or proceeding or by the clerk of court. The North Dakota shield law does not require that the party serving the subpoena make any special sworn statement in order to procure the reporter's testimony or materials.

### **4. Judicial approval**

A judge or magistrate does not need to approve a subpoena under any particular circumstances before a party can serve it.

### **5. Service of police or other administrative subpoenas**

North Dakota does not have any special rules regarding the use and service of other administrative subpoenas, such as police or fire investigation subpoenas.

## **B. How to Quash**

### **1. Contact other party first**

North Dakota law does not require that the party serving the subpoena be contacted prior to moving to quash. An objection to a subpoena must be submitted within ten days of receiving the subpoena or twenty-four hours prior to the time specified in the subpoena.

### **2. Filing an objection or a notice of intent**

North Dakota law does not require that a party serve a notice of intent to quash before the motion to quash is submitted. The service of an objection is sufficient.

### **3. File a motion to quash**

Motions to quash are not required. A party served with a subpoena merely has to serve the party designated in the subpoena with an objection within 10 days after receipt of the subpoena or, if the time specified in the subpoena for compliance is less than 10 days, then at least 24 hours before the time specified for compliance. If an objection is made, the party serving the subpoena is not entitled to compliance except by order of the court. The party serving the subpoena must file a motion to require compliance, with notice given to the party served with the subpoena.

#### **a. Which court?**

All proceedings will take place in the court designated by the subpoena.

#### **b. Motion to compel**

The media party should not wait for the party serving the subpoena to file a motion to compel before it files an objection to a subpoena. Any objection to a subpoena must be served on the party designated in the subpoena within 10 days or, at the time specified for compliance is less than 10 days, at least 24 hours before the time specified for compliance.

#### **c. Timing**

An objection should be served on the party designated in the subpoena within 10 days or, at the time specified for compliance is less than 10 days, at least 24 hours before the time specified for compliance.

#### **d. Language**

North Dakota law does not require any stock language or preferred text that should be included in an objection to a subpoena. It is recommended, however, that the basis of the objection be stated.

#### **e. Additional material**

There are no required materials that should be attached to motions and memoranda in opposition to a motion to compel with a subpoena. However, courts are generally receptive to any relevant attachments.

#### **4. In camera review**

##### **a. Necessity**

The statute does not require an in camera review, but the courts will normally conduct such a review.

##### **b. Consequences of consent**

There is not an automatic stay if the reporter consents to an in camera review.

##### **c. Consequences of refusing**

If the reporter or publisher does not consent to an in camera review the court can still order an in camera review.

#### **5. Briefing schedule**

If a motion to compel is filed as the result of an objection to a subpoena, the party filing the motion must file a brief with the motion. Any party opposing the motion has 10 days to file a reply brief and supporting papers, and request oral argument on the motion.

#### **6. Amicus briefs**

Amicus briefs are routinely accepted, but are rarely filed.

### **VI. Substantive law on contesting subpoenas**

#### **A. Burden, standard of proof**

There is no standard of proof expressly stated in the case law. Generally, however, courts require the party serving the subpoena to demonstrate that failure to disclose will cause a miscarriage of justice.

#### **B. Elements**

The plain language of the North Dakota statute does not require that any particular test be met. However, the dicta in the leading case on the subject indicates that the court should consider a conglomerate of different factors in order to determine whether nondisclosure is appropriate. The threshold is met when nondisclosure would result in a miscarriage of justice.

##### **1. Relevance of material to case at bar**

The North Dakota Supreme Court has indicated that relevancy is one of the factors that should be considered when the court is determining whether disclosure is appropriate.

##### **2. Material unavailable from other sources**

The North Dakota Supreme Court has stated that availability of the information from other sources is one factor to consider in determining whether the court should order disclosure. In the *Grand Forks Herald* case the Court appeared especially concerned with this factor. The final ruling in the case was based on the fact that the plaintiff in a car accident had no other access to photographs of the accident scene. Additionally, the court said that the fact that the plaintiff did not have other evidentiary options available, and because the Herald published one of the photographs of the accident scene, then the media would not suffer from a chilling effect, and failure to disclose the photographs would result in a miscarriage of justice.

##### **a. How exhaustive must search be?**

The North Dakota Supreme Court has not determined whether the search must be exhaustive, nor has it applied any standards by which one can measure "exhaustion".

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

The plain language of the statute does not require that the subpoenaing party conduct an exhaustive search. However, North Dakota case law indicates that it is one of the factors to consider in determining whether the court should order disclosure.

### **c. Source is an eyewitness to a crime**

The fact that a source witnessed a crime and how it would affect the shield law has not been litigated in North Dakota. The statutory language does not distinguish between whether the information was gathered from a source that was either an eye witness or a participant in a crime.

### **3. Balancing of interests**

The judicial balancing test promulgated by the North Dakota Supreme Court requires that the court look at several factors including, but not limited to:

- (1) whether the information is available from some other source and the party seeking disclosure has exhausted all other resources of information;
- (2) whether the information came from a confidential source, although this is not dispositive, it is only a factor to consider;
- (3) relevancy of the information sought to the litigation;
- (4) whether disclosure of the information would cause a "chilling effect."

The court should consider these factors in determining whether disclosure of the relevant information would result in the a miscarriage of justice.

### **4. Subpoena not overbroad or unduly burdensome**

A media party served with a subpoena can object based on the subpoena being overbroad or unduly burdensome. Compliance is thereafter not required unless the party serving the subpoena files a motion to compel and a judge makes a determination that the subpoena is not overly broad or unduly burdensome.

### **5. Threat to human life**

The court is not required to weigh whether matter subpoenaed involved a threat to human life. However, this factor should be included by the court in determining whether nondisclosure would result in a miscarriage of justice.

### **6. Material is not cumulative**

Whether the expected testimony or material would be cumulative is probably relevant, since one factor to be considered is whether the information is available from another source.

### **7. Civil/criminal rules of procedure**

The rules of procedure allow a party to object to a subpoena. Therefore, compliance is not required except upon court order. There are no special rules in order to object to a frivolous or unduly burdensome subpoena.

### **8. Other elements**

There are no other elements to consider.

## **C. Waiver or limits to testimony**

### **1. Is the privilege waivable at all?**

There is no North Dakota case law addressing whether a reporter waives the privilege through publication. Publication is one of the factors to consider in determining whether nondisclosure would result in a miscarriage of justice.

### **2. Elements of waiver**

#### **a. Disclosure of confidential source's name**

North Dakota has not yet determined whether the disclosure of a confidential source's name would constitute a waiver of the privilege.

#### **b. Disclosure of non-confidential source's name**

North Dakota has not yet determined whether the disclosure of a non-confidential source's name would constitute a waiver of the privilege.

### **c. Partial disclosure of information**

North Dakota has not yet determined whether partial disclosure constitutes a waiver. Partial disclosure is one of the factors to consider in the judicial balancing test to determine if nondisclosure would result in a miscarriage of justice.

### **d. Other elements**

There is no North Dakota case law addressing other factors that should be considered in determining whether a reporter has waived the privilege. However, the North Dakota Supreme Court ruled in *Grand Forks Herald* that one of the factors to consider on the disclosure issue is whether the media source has already published a photograph that is a part of a group of photographs that are sought in discovery.

## **3. Agreement to partially testify act as waiver?**

There is no applicable case law on this question.

## **VII. What constitutes compliance?**

### **A. Newspaper articles**

Printed materials purporting to be newspapers or periodicals are self-authenticating. N.D.R.Ev. 902

### **B. Broadcast materials**

The North Dakota Rules of Evidence do not address what is required when turning over broadcast material.

### **C. Testimony vs. affidavits**

The North Dakota Rules of Evidence do not address the issue of whether a sworn affidavit can take the place of in-court testimony to confirm that an article was true and accurate as published.

### **D. Non-compliance remedies**

North Dakota does not have any special laws to force a journalist to comply with a valid, upheld subpoena. General rules apply.

#### **1. Civil contempt**

##### **a. Fines**

Applicable fines for non-compliance are not capped for journalists. Any fines levied against reporters are comparable to general rules of court.

##### **b. Jail**

Applicable jail sentences for failing to comply with a subpoena are general sentences and there are no exceptions for journalists protected under the shield law. North Dakota has never sent a reporter to jail for failing to disclose the names of confidential sources of information.

#### **2. Criminal contempt**

North Dakota has never issued a fixed criminal contempt sentence, because no reporter has ever challenged the application of the North Dakota test for determining disclosure.

#### **3. Other remedies**

All remedies against a non-complying reporter would be a general application of the rules. No reporter in North Dakota has challenged the application of criminal sanctions for non-compliance.

## **VIII. Appealing**

### **A. Timing**

#### **1. Interlocutory appeals**

Orders dealing with subpoena compliance are considered discovery orders. Generally, such orders are interlocutory and not appealable. Accordingly, a party appealing such an order must file a petition for supervisory writ requesting the North Dakota Supreme Court to exercise its rights of original jurisdiction.

#### **2. Expedited appeals**

### **B. Procedure**

#### **1. To whom is the appeal made?**

Appeals are made to the North Dakota Supreme Court under a supervisory writ which falls within the original jurisdiction of the Court.

#### **2. Stays pending appeal**

A request for a stay must initially be sought in the trial court. The motion must set forth the reasons for the requested stay and the facts relied upon. The general rules apply equally to both regular and expedited appeals. The fact that a reporter is addressing a violation of the shield law does not affect the standard.

#### **3. Nature of appeal**

The legal nature of the appeal is review of a supervisory writ.

#### **4. Standard of review**

The standard of review applied by the North Dakota Supreme Court on a supervisory writ is abuse of discretion. The fact that the reporter is addressing a constitutional right does not affect the standard of review.

#### **5. Addressing mootness questions**

The North Dakota Supreme Court has not addressed the mootness issue when the trial or grand jury session for which the reporter was subpoenaed has concluded.

#### **6. Relief**

A defendant reporter can seek any relief deemed appropriate. Typically, a reporter will seek an order reversing the trial court's order requiring compliance with the subpoena. The Supreme Court can issue such an order or send the case back to the trial court to reconsider the issue in light of the appellate decision.

## **IX. Other issues**

### **A. Newsroom searches**

The federal Privacy Protection Act (42 U.S.C. 2000aa) has not been used to limit searches of newsrooms in North Dakota. There are no similar provisions under state law to limit newsroom searches.

### **B. Separation orders**

North Dakota has no statute or case law that offers additional protection limiting the scope of separation orders who are both trying to cover a trial and are also on the witness list. The issue has not been litigated in North Dakota.

### **C. Third-party subpoenas**

The courts in North Dakota have not considered whether a plaintiff can issue third party subpoenas in order to discover a reporter's sources. If a subpoena was served on a third party, no special notice to the reporter would be required.

#### **D. The source's rights and interests**

The issue of whether sources have the right to intervene anonymously in order to halt the disclosure of their identities has not been litigated in North Dakota. Additionally, the issue of whether sources would be able to sue over disclosure after the fact has not been litigated.