REPORTER'S PRIVILEGE: NEBRASKA

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

NEBRASKA

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I. Introduction: History & Background

Since the 1973 enactment of the "Free Flow of Information Act," Nebraska has had one of the broader, more absolute shield laws in the nation. Nebraska's shield law has generally been effective in limiting the number of subpoenas issued to reporters and, when such subpoenas have issued, has worked well at the trial court level to impose meaningful limits on the scope of testimony which can be compelled from reporters. The State's appellate courts have not addressed or dealt with shield law issues.

II. Authority for and source of the right

Shield law protection in Nebraska derives from the statutes. The Nebraska courts have not recognized any form of reporter's privilege under the State Constitution. No reported state appellate decisions have addressed either a First Amendment privilege or the *Branzburg* standard.

A. Shield law statute

Nebraska's shield law, *Neb. Rev. Stat.* §§ 20-144 through 147 (Reissue 1997), provides:

(d) FREE FLOW OF INFORMATION ACT

20-144. Finding by Legislature. The Legislature finds:

(1)That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere;

(2)That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed;

(3)That compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public;

(4)That there is an urgent need to provide effective measures to halt and prevent this inhibition;

(5)That the obstruction of the free flow of information through any medium of communication to the public affects interstate commerce; and

(6)That sections 20-144 to 20-147 are necessary to insure the free flow of information and to implement the first and fourteenth amendments and Article I, section 5, of the United States Constitution, and the Nebraska Constitution.

20-145. Terms, defined. For purposes of the Free Flow of Information Act, unless the context otherwise requires:

(1)Federal or state proceeding shall include any proceeding or investigation before or by any federal or state judicial, legislative, executive, or administrative body;

(2)Medium of communication shall include, but not be limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system;

(3)Information shall include any written, audio, oral, or pictorial news or other material;

(4)Published or broadcast information shall mean any information disseminated to the public by the person from whom disclosure is sought;

(5)Unpublished or nonbroadcast information shall include information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and shall include, but not be limited to, all notes, outtakes, photographs, film, tapes, or other date of whatever sort not itself disseminated to the public through a medium of communication, whether or not published or broadcast information based upon or related to such material has been disseminated.

(6)Processing shall include compiling, storing, transferring, handling, and editing of information; and

(7)Person shall mean any individual, partnership, limited liability company, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

20-146. Procuring, gathering, writing, editing, or disseminating news or other information; not required to disclose to courts or public. No person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public shall be required to disclose ain any federal or state proceeding:

(1)The source of any published or unpublished, broadcast or nonbroadcast information obtained in the gathering, receiving, or processing of information for any medium of communication to the public; or

(2)Any published or nonbroadcast information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.

20-147. Act, how cited. Sections 20-144 to 20-147 shall be known and may be cited as the Free Flow of Information Act.

B. State constitutional provision

The Nebraska Constitution has no express shield law provision, and none has been implied from the State Constitution by the courts.

C. Federal constitutional provision

No state court has applied or rejected a reporter's privilege based on the First Amendment.

D. Other sources

No reported Nebraska court decision has recognized a reporter's privilege from any source other than the statute.

III. Scope of protection

A. Generally

While a reporter may be compelled to disclose or testify about information actually broadcast or published, the statute otherwise provides an absolute privilege. It is certainly one of the broader, more absolute reporter's privilege statutes in the nation.

B. Absolute or qualified privilege

The privilege is absolute, although it does not protect information actually broadcast or published.

C. Type of case

1. Civil

The statute does not distinguish between civil and criminal proceedings; it applies by its terms to "any proceeding or investigation before or by any federal or state judicial, legislative, executive or administrative body." Section 20-145(1). While the Nebraska Legislature cannot bind federal courts or agencies to its statutory procedures, a federal district judge in Nebraska has indicated he will consider the statute in ruling on subpoenas issued to reporters as a matter of comity.

2. Criminal

It is possible that a criminal defendant's Sixth Amendment right to a fair trial could override the privilege in an appropriate case, but no reported decision has so held.

3. Grand jury

Grand jury subpoenas are treated the same as any other subpoena under the statute. See *Neb. Rev. Stat.* § 86-708(1) (Reissue 1999) noting that grand jury subpoenas shall not suspend or otherwise interfere with the shield law. Nebraska rarely utilizes grand juries. The authors are not aware of any grand jury subpoenas having been issued to reporters.

D. Information and/or identity of source

The statute specifically protects the identity of sources. Section 20-146(1). So long as the information has not been published or broadcast, the statute would also protect information that implicitly identifies the source of information.

E. Confidential and/or non-confidential information

The statute provides the same protection to non-confidential information as it does to information received by a reporter in confidence.

F. Published and/or non-published material

While the protection for non-published material is absolute, a reporter can be compelled to testify regarding material which has been published or broadcast. See Sections 20-146(2) and 20-145(5).

G. Reporter's personal observations

So long as the observation has not been published or broadcast, it is protected. An unreported county court decision has so held.

H. Media as a party

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

I. Defamation actions

The statute does not contain a "libel exception," and does not differentiate between libel cases and any other litigation. The express terms of the statute, however, do not address jury instructions or presumptions that no source exists, or presumptions of actual malice. The authors believe the stated policies of the statute should prohibit adverse instructions or presumptions, but the issue has not been addressed by any Nebraska court. The authors are aware of instances in which media defendants in libel cases have intentionally waived privilege protection in order to more vigorously defend against libel claims.

IV. Who is covered

Coverage of Nebraska's shield law statute is defined by function, not title. Thus, any person "engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public" is entitled to protection under the statute. Section 20-146.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The statute does not define reporter, and the scope of protection is based on function, not title. See IV above.

b. Editor

See Section IV(A)(1)(a) above.

c. News

The statute covers persons engaged in disseminating "news or other information to the public." Section 20-146. The term "news" is not defined, but the concept of disseminating "news or other information to the public" is very broad. No reported decisions.

d. Photo journalist

The statute does not define photojournalist, but clearly provides coverage to photojournalists. See Section 20-145(5), which includes within the definition of unpublished or nonbroadcast information (which need not be disclosed) "outtakes, photographs, film, tapes or other data of whatever sort."

In a recent unpublished opinion, a trial court expressly held the shield law privilege to be applicable to be applicable to video outtakes which had not been broadcast. *Frolio v. Pinkelman*, Doc. 1057, Page 721 (Dist. Ct. Douglas County, NE, 1-10-07).

e. News organization / medium

The privilege is applicable to those engaged in "gathering, receiving, or processing of information for any medium of communication to the public." Section 20-146(1) and (2). "Medium of communication *shall include, but not be limited to*, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." Section 20-145(2).

2. Others, including non-traditional news gatherers

Nebraska's shield law applies to all news gatherers, whether "traditional" ones or not. So long as a person is "engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public," the statute provides coverage. Section 20-146. The statute also covers others involved in "processing" such information, and defines processing as including "compiling, storing, transferring, handling and editing of information." Section 20-145(6).

B. Whose privilege is it?

The privilege belongs to the media and its constituent parts, not the source.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

a.To compel testimony at trial — Not less that six (6) days before the trial day of the cause upon which witness' attendance required. See *Neb. Rev. Stat.* § 25-1226.

b.To depose non-party — See Nebraska Discovery Rules for all Civil Cases, Rules 26 and 30. Reasonable notice to adverse party required. Reasonable notice to the deponent required.

c.To compel production by non-party or inspection without a deposition — See Nebraska Discovery Rules for all Civil Cases, Rule 34A. Not less than ten (10) days notice to adverse parties prior to issuance of subpoena. If adverse party objects then a hearing can be held to resolve the disputes. Person served with the subpoena has ten (10) days to object.

2. Deposit of security

Not applicable.

3. Filing of affidavit

Neither the shield law nor subpoena statutes require the person issuing the subpoena to make any sworn statement in order to procure testimony. Proof of service by affidavit is required unless subpoena is served by sheriff, constable, or coroner. See *Neb. Rev. Stat.* § 25-1223.

4. Judicial approval

Judicial approval is not required before a subpoena is served.

However, to subpoena a witness in the context of grand jury proceedings, the Attorney General or County Attorney must file an application directly to the court. A statute specifies that grand jury subpoenas do not suspend the shield law privilege. See Neb. Rev. Stat. § 86-708 (Reissue 1999).

5. Service of police or other administrative subpoenas

No different procedures, except that a subpoena issuing from a state administrative agency must generally include with the subpoena a statement prepared by the agency outlining the rate of travel pay and fees the witness will be paid for attending.

B. How to Quash

Since Nebraska's shield law does not provide a privilege for information actually published or broadcast, it may not be possible to wholly quash a given subpoena, depending on the information sought.

1. Contact other party first

No prohibition from contacting issuing party and asking them to withdraw or rescind subpoena, however, a party need not contact the issuing party before they file a motion to quash or seek a protective order. Any communications should be conducted through counsel. A party resisting a subpoena may also have their attorney contact the other party(ies) to the lawsuit to determine whether they have already filed a motion to quash the subpoena or will file one on the reporter's behalf.

2. Filing an objection or a notice of intent

Resist the subpoena by filing a motion to quash the subpoena in the court it was issued from. Alternatively, a protective order can be sought pursuant to Nebraska Discovery Rules for all Civil Cases, Rule 26.

3. File a motion to quash

a. Which court?

File in the court issuing the subpoena

b. Motion to compel

If party issuing the subpoena files a motion to compel, file a motion to quash and alternatively seek a protective order.

c. Timing

File the motion to quash before default on the subpoena has occurred (file objections before the time scheduled for the deposition or testimony). A court has inherent authority to sanction parties for disobeying court orders, regardless of whether he or she will ultimately be directed to testify.

d. Language

In resisting the subpoena cite to the Free Flow of information Act and Rule 26 of the Nebraska Discovery Rules for all Civil Cases.

e. Additional material

Not specified.

4. In camera review

a. Necessity

Not required before issuance. Can be requested by party resisting subpoena by filing for a protective order.

b. Consequences of consent

No reported decisions.

c. Consequences of refusing

No reported decisions.

5. Briefing schedule

Briefing schedule is at the discretion of the court.

6. Amicus briefs

Whether to allow for the filing of amicus briefs and the time for submitting such briefs is within the discretion of the court.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The statutory privilege applies to all unpublished or nonbroadcast information. Once the reporter establishes that he or she is entitled to the privilege (i.e., that he or she was engaged in procuring, etc., news or other information for dissemination to the public), no statutory exceptions allow the subpoenaing party to overcome the privilege. It is possible that a criminal defendant may overcome the privilege by demonstrating violation of his or her Sixth Amendment right to a fair trial. While no Nebraska cases address this issue, courts in other jurisdictions have required the defendant to establish that the information sought is admissible in evidence, central or crucial to the defense, and not otherwise available or obtainable.

B. Elements

See Section VI(A) above.

1. Relevance of material to case at bar

See Section VI(A) above.

2. Material unavailable from other sources

See Section VI(A) above.

a. How exhaustive must search be?

See Section VI(A) above.

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

See Section VI(A) above.

c. Source is an eyewitness to a crime

See Section VI(A) above. The statute makes no distinction between eyewitnesses and other sources, and no case law addresses this issue.

3. Balancing of interests

See Section VI(A) above.

4. Subpoena not overbroad or unduly burdensome

Overbreadth and burden are grounds for quashing any subpoena under general procedural rules.

5. Threat to human life

See Section VI(A) above. No cases address whether courts should consider threat to human life in addressing shield law privilege.

6. Material is not cumulative

See Section VI(A) above.

7. Civil/criminal rules of procedure

A subpoena may be quashed or modified, or a protective order may be granted, if the subpoena fails to allow a reasonable amount of time for compliance; if it requires disclosure of privileged matters; or if it is unduly burdensome or designed to harass.

8. Other elements

None.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

No published case law. Certainly, publishing or broadcasting information "waives" the privilege for such information. A recent unpublished trial court decision holds that the shield law privilege was not waived by providing non-broadcast video footage to law enforcement authorities. *Frolio v. Pinkelman*, Doc. 1057, page 721 (Dist. Ct. Douglas County, NE , 1-10-07).

2. Elements of waiver

a. Disclosure of confidential source's name

Publication or broadcast of the name clearly waives privilege. While there is no case law on the point, disclosure of a source's name outside the media organization might be deemed a waiver. No waiver should result from disclosure within the media organization (e.g., to an editor or news director), nor should waiver result from disclosure to the reporter's or organization's lawyer.

b. Disclosure of non-confidential source's name

The statute does not distinguish between confidential and non-confidential sources. See Section VI (C)(2)(a) above.

c. Partial disclosure of information

Statute protects against disclosure of unpublished or nonbroadcast "data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published or broadcast information based upon or related to such material has been disseminated." Section 20-145(5).

d. Other elements

No case law.

3. Agreement to partially testify act as waiver?

Since information actually published or broadcast is not protected, testimony to confirm publication of information and its accuracy will not waive privilege as to other, unpublished or non-broadcast information.

VII. What constitutes compliance?

A. Newspaper articles

Absent agreement among the parties to the litigation, the article must be authenticated by a live witness. That can be the reporter who wrote the story, an editor with appropriate knowledge, or a librarian or archivist. If all parties agree (which often happens), foundation for the article can be presented via affidavit (the affidavit itself is hearsay, thus requiring the agreement of the parties to waive objection).

B. Broadcast materials

Same rules as are applicable to newspaper articles. See Section VII(A) above.

C. Testimony vs. affidavits

See Section VII(A) above.

D. Non-compliance remedies

1. Civil contempt

Civil contempt sanctions may be used to coerce compliance with a valid subpoena.

a. Fines

Fines may be levied to coerce compliance with a subpoena. There are no known instances of fines being levied against reporters for failing to comply with a subpoena.

b. Jail

Indeterminate jail sentences may be used to coerce compliance with a subpoena. There are no known instances of jail confinement imposed on reporters for failing to comply with a subpoena.

2. Criminal contempt

Criminal contempt sanctions are rarely imposed (and even more rarely upheld on appeal) in Nebraska. It is conceivable that a criminal contempt conviction could be imposed after dissolution of a civil contempt sanction following the end of a trial, when testimony would no longer be relevant. That has not happened in Nebraska.

3. Other remedies

It is conceivable that other remedies such as adverse presumptions or jury instructions, or perhaps even default judgment, could be utilized where the media is a party. The authors do not believe that any such remedies have been utilized in Nebraska.

VIII. Appealing

A. Timing

1. Interlocutory appeals

An order denying a motion to quash or motion for a protective order is not immediately appealable. However, where the lower court had a clear duty to quash the subpoena or issue a protective order, the denial can be challenged in an original action for mandamus in the Nebraska Supreme Court. *State ex rel. Acme Rug Cleaner, Inc. v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999). A final judgment of criminal contempt is appealable. An order holding a witness in civil contempt is not appealable, and must be challenged via an original habeas corpus action in the Nebraska Supreme Court.

2. Expedited appeals

While the Nebraska Supreme Court can and has expedited appeals (or employed procedures to hasten mandamus proceedings), its rules do not specify legal standards governing such expedition, nor does the case law.

B. Procedure

1. To whom is the appeal made?

Appeals from orders entered by a county court (the lowest trial level court) are to the district court (a superior trial level court). Appeals from orders entered by a district court are to the Court of Appeals. Review of decisions by the Court of Appeals may be sought in the Nebraska Supreme Court, but such review is discretionary and not regularly exercised. Where a motion to quash or for protective order is denied, the mode of review is by mandamus, which must be filed as an original action in the Supreme Court.

2. Stays pending appeal

Appeals from final orders entered by trial level courts may be stayed (the official term is superseded) by discretionary order entered by the court rendering judgment. Either the Court of Appeals or the Supreme Court can stay

final orders of trial level courts on appeal, although neither the rules nor decisions specify legal standards for such stays. When the Nebraska Supreme Court agrees to consider an original mandamus action, it typically issues an alternative writ of mandamus and stays the lower court proceedings. See *State ex rel. Acme Rug Cleaner, Inc., supra*.

3. Nature of appeal

In an appeal from a final order, the court generally reviews for clear error and/or abuse of discretion. In an original mandamus action, the relator must establish that he has a clear legal right to the relief sought, there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and there is no other plain and adequate remedy available in the ordinary course of the law.

4. Standard of review

In practical terms. both appeals and mandamus actions are reviewed for abuse of discretion. While the language the court uses in mandamus cases sounds like a more deferential review, it amounts to abuse of discretion review as applied by the Supreme Court. See *State ex rel. Acme Rug Cleaner, Inc., supra*.

5. Addressing mootness questions

The Nebraska courts have not addressed mootness issues in the context of subpoenas. In other contexts, the Nebraska Supreme Court has sometimes refused to moot appeals on the ground that the issue is capable of repetition but evading review.

6. Relief

In an original mandamus action (the method of review most likely available to challenge the failure to quash a subpoena or issue a protective order), the Supreme Court provides relief in the form of a mandatory writ of mandamus, which directs the lower court to act in accordance with its terms. In the usual appeal from a final order, the appellate court generally remands the matter for action consistent with the appellate opinion.

IX. Other issues

A. Newsroom searches

No Nebraska opinion has addressed the federal Privacy Protection Act. A Nebraska statute, *Neb. Rev. Stat.* §29-813(2) (Reissue 1995) prohibits issuance of a warrant to search a newsroom or other place where the news is prepared or processed, unless probable cause is shown that a person on such premises has committed or is committing a crime.

B. Separation orders

No statutes or case law address the scope or propriety of separation orders issued against reporters who are both trying to cover the trial and are on a witness list.

C. Third-party subpoenas

The courts have not addressed a media interest in fighting subpoenas issued to third parties in an attempt to discover a reporter's source.

D. The source's rights and interests

The courts have not addressed whether sources can intervene to halt disclosure of their identities. Since the statutory privilege belongs to the media, not the source, it seems unlikely that they would allow such intervention. The courts have also not addressed the viability of a source's cause of action against a reporter who has disclosed the source notwithstanding a promise of confidentiality.