

REPORTER'S PRIVILEGE: PENNSYLVANIA

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 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) 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

PENNSYLVANIA

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I. Introduction: History & Background

In Pennsylvania, the Pennsylvania Shield Law and the First Amendment reporter's privilege provide broad protection to reporters who are subpoenaed for their notes, documents and/or testimony. The Shield Law is an absolute privilege that precludes the compelled disclosure of confidential source information. The First Amendment reporter's privilege is a qualified privilege that applies to confidential source, unpublished and even published information and requires that the person serving the subpoena prove that the information sought is crucial to the claims at issue, that all alternative sources of the information have been exhausted and that the reporter is the only source of the information.

II. Authority for and source of the right

A. Shield law statute

The Pennsylvania Shield Law, 42 Pa. C.S.A. § 5942(a), provides:

No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

Pennsylvania enacted its Shield Law in 1937. *See* Act of June 25, 1937, No. 433, 1937 Pa. Laws 2123. The original statute protected people working on behalf of "any newspaper of general circulation" and "any press association for the purpose of gathering, procuring, compiling, editing or publishing news." *Id.* The Shield Law has been amended twice since then. In 1959, the Law was extended to protect radio and television stations, but only if they maintain copies or transcripts of their broadcasts for at least one year. *See* Act of Dec. 1, 1959, No. 612, 1959 Pa. Laws 1669-70. Nine years later, magazines were added to the list of protected entities. *See* Act of July 31, 1968, No. 255, 1968 Pa. Laws 858-59. (In 1976, the Law was recodified as part of the General Assembly's recodification of the entire Judicial Code. *See* Judiciary Act of 1976, No. 142, sec. 2, ch. 59, subch. A, § 5942, 1976 Pa. Laws 586, 725-26. The recodification did not change the substance of the Shield Law.)

By enacting the Shield Law, the Pennsylvania General Assembly plainly intended to protect the freedom of the press and the free flow of information. In the Assembly's deliberations preceding passage of the 1959 amendment, legislators expressed their concern that people would not share news with reporters if "they knew that the sources would be disclosed." 1959 *Legis. J.* 4197, 4198 (Oct. 15, 1959) (statement of Rep. Bell). The legislators therefore lauded the Shield Law for eliminating this concern by barring courts and government agencies from requiring reporters to "divulg[e] the information that comes to the hands of newspaper reporters." *Id.* (statement of Rep. Steckel).

Recently, the Pennsylvania Superior Court reaffirmed the policy bases for the Shield Law as well as First Amendment reporter's privilege, stating that these privileges are "deeply rooted in the public policy of this commonwealth and the public policy of the United States. It cannot be gainsaid that these privileges exist to preserve the free flow and exchange of ideas and information to the news media and that such intercourse is essential to the existence of a democratic republic." *Castellani v. The Scranton Times, L.P.*, — A.2d —, 2007 WL 10366 (Pa. Super.), 35 Media L. Rep. 1097, 2007 PA Super 2 (2007).

B. State constitutional provision

Pennsylvania's Constitution has no shield law provision. Although Pennsylvania's Constitution protects every citizen's right to "freely speak, write and print on any subject," Pa. Const. art. I, § 7, Pennsylvania courts have not held that it protects reporters from disclosing their sources. *See In re Taylor*, 193 A.2d 181, 184 (Pa. 1963).

C. Federal constitutional provision

Pennsylvania trial and intermediate appellate courts have uniformly applied a First Amendment reporter's privilege. *See Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997); *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991); *Commonwealth v. Farley*, 27 Med. L. Rptr. 1544 (C.P. Jefferson January 12, 1999). In so doing, these Pennsylvania courts have followed the numerous decisions from the United States Court of Appeals for the Third Circuit and the various district courts within the Third Circuit applying the First Amendment reporter's privilege. *See, e.g., United States v. Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981) (*Cuthbertson II*); *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (*Cuthbertson I*); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *In re Vmark Software, Inc.*, 1998 WL 42252 (E.D. Pa. Jan. 8, 1998); *Perry v. Keulian*, 1997 WL 117027 (E.D. Pa. March 11, 1997). The Pennsylvania Supreme Court has never addressed the issue. In 2003, the Pennsylvania Supreme Court "assume[d] without deciding" that Pennsylvania recognizes a First Amendment reporter's privilege. *See Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003). The Court implied that recognition of such a privilege was not assured: "[W]e need not reach the broader, thornier question of whether the Third Circuit properly interpreted *Branzburg* in recognizing a privilege."

D. Other sources

None.

III. Scope of protection

A. Generally

1. Shield Law

Unlike most other states' shield laws, the Pennsylvania Shield Law "creates an absolute privilege" that protects information "from disclosure without analysis of plaintiffs' need for the information." *Davis v. Glanton*, 705 A.2d 879, 883 (Pa. Super. 1997). The Shield Law "must be liberally construed in favor of the newspapers and news media." *In re Taylor*, 193 A.2d 181, 185 (Pa. 1963).

In *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003), the Pennsylvania Supreme Court held that the Shield Law protects only confidential source information, *i.e.*, only information and documents that "could breach the identity of a confidential source and thereby threaten the free flow of information from confidential informants to the media." *Id.* at 752. In declining to extend the privilege to non-confidential source information, the Court explained: "The obvious purpose of the Shield Law is to maintain a free flow of information to members of the news media. We fail to see how this purpose is promoted by protecting from discovery documentary information that was in the possession of a publisher of the defamatory statement where disclosure of this information would not reveal the identity of a confidential media-informant." *Id.* at 750.

Previously, Pennsylvania state and federal courts had held that the Shield Law applies to all unpublished information except in defamation cases. *In re Taylor*, 193 A.2d 181, 185 (Pa. 1963); *see also Sprague v. Walter*, 543 A.2d 1078, 1083, 1085 (Pa. 1988); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 279 (3d Cir. 1980) ("Inasmuch as Taylor protects all nonpublished portions of a source's statement, we hold that the outtakes of the Mills interview are protected even though the identity of the primary source of information is known."); *Altomose Const. v. Bldg. & Constr. Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977) (Pennsylvania Shield Law protects all sources "without reference to their confidentiality"). In *Bowden*, however, the Court adopted an "admittedly narrow reading" of *Taylor*, reasoning that the decision in *Taylor* protected non-confidential sources because their disclosure "had the potential to reveal sources of information which the [Shield Law] intended to protect," *i.e.*, confidential sources. *Id.* at 748.

2. First Amendment

In following the Third Circuit's reporter's privilege decisions, Pennsylvania trial and intermediate appellate courts have espoused a strong interpretation of the First Amendment reporters privilege. The privilege cannot be overcome unless a court concludes, in articulated findings, that the party seeking the information has established that

(1) the information sought is "necessary" and "crucial" to its case (*i.e.*, goes "to the heart of the claim"); (2) attempts to obtain the information from other sources have been exhausted; and (3) the only source of the information is the reporter. *See Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997); *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991). The First Amendment privilege has been applied even to published information, *see McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991); *but cf. Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997) (actual articles published not protected). The Pennsylvania Supreme Court has never addressed the issue. In 2003, the Pennsylvania Supreme Court "assume[d] without deciding" that Pennsylvania recognizes a First Amendment reporter's privilege. *See Commonwealth v Bowden*, 838 A.2d 740 (Pa. 2003).

B. Absolute or qualified privilege

1. Shield Law

Pennsylvania's Shield Law sets forth an absolute privilege against compelled disclosure of confidential source information. *See Commonwealth v Bowden*, 838 A.2d 740 (Pa. 2003); *Castellani v. The Scranton Times, L.P.*, — A.2d —, 2007 WL 10366 (Pa. Super.), 35 Media L. Rep. 1097, 2007 PA Super 2 (2007); *infra* § III.E.

2. First Amendment privilege

Pennsylvania's First Amendment reporters privilege is qualified and may be outweighed by the subpoenaing party's need for the information.

C. Type of case

1. Civil

a. Shield Law

Pennsylvania's Shield Law is applicable to civil cases.

b. First Amendment privilege

Although the First Amendment privilege is equally applicable to criminal and civil cases, Pennsylvania courts are likely to follow Third Circuit decisions holding that the privilege is slightly stronger in criminal cases, as the Supreme Court noted in the *Bowden* decision: "The Third Circuit has . . . stated that the privilege assumes a greater importance in civil than in criminal cases, as in criminal cases the public need to vindicate crime, or the defendant's constitutional right to a fair trial, can take precedence over a reporter's need to maintain confidentiality." *Bowden*, 838 A.2d at 744. There are very few Pennsylvania decisions, however, addressing the privilege in criminal cases. *See also Commonwealth v. Linderman*, 17 Pa. D. & C.4th 102 (C.P. Chester 1992).

2. Criminal

a. Shield Law

Pennsylvania's Shield Law is applicable to criminal cases. *See Castellani v. The Scranton Times, L.P.*, — A.2d —, 2007 WL 10366 (Pa. Super.), 35 Media L. Rep. 1097, 2007 PA Super 2 (2007), discussed below.

b. First Amendment privilege

Although the First Amendment privilege is equally applicable to criminal and civil cases, Pennsylvania courts are likely to follow Third Circuit decisions holding that the privilege is slightly weaker in criminal cases, as the Supreme Court noted in the *Bowden* decision: "The Third Circuit has . . . stated that the privilege assumes a greater importance in civil than in criminal cases, as in criminal cases the public need to vindicate crime, or the defendant's constitutional right to a fair trial, can take precedence over a reporter's need to maintain confidentiality." *Bowden*, 838 A.2d at 744.

3. Grand jury

The applicability of the Shield Law and First Amendment privilege to grand jury proceedings was raised, but not explicitly decided, in *In re the Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (Pa. 2006). In that case, a newspaper's computer workstations was subpoenaed by the Attorney General' Office in the course of a

statewide grand jury investigating whether the coroner gave the newspaper's reporters his password to a part of the county's website restricted to law enforcement and other authorized persons. Denying the paper's motion to quash, the trial court permitted Attorney General to search the hard drives' Internet history and cached content, and imposed a sanction of \$1,000 per day when the paper refused to comply with the trial court's order. On appeal, the newspaper claimed (1) that the subpoena violated the First Amendment Privacy Protection Act, 40 U.S.C. §§ 2000aa-2000aa-12, (2) that the subpoena sought confidential source information on the hard drives that is absolutely protected from disclosure under the Pennsylvania Shield Law, (3) that the subpoena violated the First Amendment reporter's privilege because the hard drives contained confidential source information and the attorney general made no showing of a sufficient need for that information to overcome the privilege, and (4) that the subpoena would intrude on the newspaper's First Amendment right to newsgathering set forth in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Without specifically addressing any of these arguments, the Supreme Court reversed the trial court's order. Noting the "potential chilling effect" of the trial court's order, the Court held that it was overbroad and that "measures were available to obtain the information subject to the investigation short of outright surrender of the hard drives to the Commonwealth." The Court said that "[w]e do not foreclose ... the utilization by the supervising judge of a neutral, court-appointed expert to accomplish the forensic analysis and report specific, relevant results." The dissent, observing that the Court's decision did not "specifically identify" the legal basis for its decision, found that none of the subpoenaed information "is protected by any of the privileges claimed by the newspapers."

a. Shield Law

Pennsylvania's Shield Law applies equally to grand jury proceedings. *See In re Taylor*, 193 A.2d 181 (Pa. 1963). In *Castellani v. The Scranton Times, L.P.*, — A.2d —, 2007 WL 10366 (Pa. Super.), 35 Media L. Rep. 1097, 2007 PA Super 2 (2007), the Pennsylvania Superior Court ruled that the Shield Law remained an absolute privilege even though at issue in the underlying defamation case was whether the newspaper's confidential source violated grand jury secrecy. A concurring opinion stated that it would "not foreclose the possibility, as does the majority, that in a future case – for example where, in a criminal prosecution of a grand jury leak, a reporter's evidence about the source of that leak is sought – the Shield Law may have to yield." In that case, and "only in such case, where the interest of the state and the public in disclosure is at its zenith, can we consider creating an exception to what is, on its face, an unambiguous Shield Law." Although the concurring opinion implied that this would be consistent with the panel's decision, that is far from clear, as the panel decision expressly stated that the possible commission of a crime does not permit a court to create an exception to the Shield Law.

b. First Amendment privilege

There is no Pennsylvania case law holding whether the First Amendment privilege currently applies in a grand jury matter. Prior to recognition of a First Amendment reporter's privilege by the Pennsylvania Superior Court in *Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997), the Pennsylvania Supreme Court noted, in *dicta*, that no constitutional privilege protected journalists against disclosure of information to an investigating grand jury, citing *In re Taylor*, 193 A.2d 181 (Pa. 1963), a case that preceded the *Branzburg* decision. The Superior Court in the *Castellani* decision did not address the First Amendment privilege, relying solely on the Shield Law.

D. Information and/or identity of source

1. Shield Law

The Pennsylvania Shield Law specifically protects the identity of a confidential "source of information," which includes sources such as "documents as well as personal informants." *In re Taylor*, 193 A.2d 181 (Pa. 1963). It also protects information that might "reasonably lead to the discovery of the identity" of the source of information. *See Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003); *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346, 350-51 (Pa. 1987).

2. First Amendment privilege

The First Amendment privilege applies to the identity of a source as well as information that may reasonably lead to the discovery of the identity of a source of information. *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997).

E. Confidential and/or non-confidential information

1. *Shield Law*

The Shield Law applies only to confidential source information. *Commonwealth v Bowden*, 838 A.2d 740 (Pa. 2003).

Hatchard, *Glanton*, *Bowden* and *Castellani* are the leading Pennsylvania cases regarding the scope of the Shield Law. *Hatchard* arose out of two libel actions against a local television station for news broadcasts that allegedly defamed the plaintiff. In one case, the plaintiff attempted to discover "out-takes" (unbroadcast videos), and in the other, the plaintiff sought documents available to the station at the time it broadcast the report. 532 A.2d at 347. The Pennsylvania Supreme Court reasoned that a libel plaintiff's constitutional right of reputation would be compromised if a defendant reporter was permitted to assert the Shield Law with respect to all unpublished information such that it prevented him from proving his defamation case. *See id.* at 349, 351. Accordingly, the Supreme Court held that the plaintiff could subpoena the outtakes, but could not obtain any outtakes that disclosed, or reasonably could lead to the disclosure of, confidential sources. *See id.* at 351.

In *Glanton*, plaintiffs filed a defamation suit against defendants based on comments made by the defendants that were published in a newspaper article. *See* 705 A.2d at 881. During the course of discovery, plaintiffs subpoenaed the notes of non-party reporter who wrote the article, as well as other unpublished material he collected in preparing the article. *See id.* at 883. Following the Supreme Court's reasoning and holding in *Hatchard*, the Pennsylvania Superior Court ruled that the Shield Law did not protect the subpoenaed notes and unpublished material to the extent they could not "reasonably lead to the discovery of the identity of a confidential media-informant." *Id.* at 885.

In *Bowden*, the trial court ordered two reporters to disclose to the Philadelphia District Attorney's Office verbatim, post-indictment statements made by a homicide defendant about the incident at issue in pre-trial interviews with the reporters. The two reporters argued that *Hatchard* limited the Shield Law's absolute protections to confidential source information *only* to defamation cases; in all other cases, they argued, the Shield Law protected all unpublished information regardless of its confidentiality. The Pennsylvania Supreme Court in *Bowden* categorically rejected that position, holding that the Shield Law protects only confidential source information in *all* cases. The Court reasoned that it saw "no principled reason" why the rule espoused in *Hatchard*, a defamation case, "should not apply in other settings." *Id.* at 751. Significantly, the Court in *Bowden* did not require the production of the reporters' notes; it only affirmed the trial court's order requiring the reporters to provide, either orally or in writing, the statements made by the defendant.

In *Castellani*, the Pennsylvania Superior Court ruled that the Shield Law remained an absolute privilege even though at issue in the underlying defamation case was whether the newspaper's confidential source violated grand jury secrecy. A concurring opinion stated that it would "not foreclose the possibility, as does the majority, that in a future case – for example where, in a criminal prosecution of a grand jury leak, a reporter's evidence about the source of that leak is sought – the Shield Law may have to yield." In that case, and "only in such case, where the interest of the state and the public in disclosure is at its zenith, can we consider creating an exception to what is, on its face, an unambiguous Shield Law." Although the concurring opinion implied that this would be consistent with the panel's decision, that is far from clear, as the panel decision expressly stated that the possible commission of a crime does not permit a court to create an exception to the Shield Law.

2. *First Amendment privilege*

The First Amendment reporter's privilege has been applied in Pennsylvania to confidential, non-confidential and even published information. *See, e.g., Commonwealth v. Bowden*, 800 A.2d 327 (Pa. Super. 2002), *aff'd*, 838 A.2d 740 (Pa. 2003); *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997) (applying privilege where defendant was known source of information) (citing *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (privilege applies to information regardless of its confidentiality)); *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991) (privilege applies to published statements). In *Bowden*, the Supreme Court noted that the Third Circuit "has stated that it is important for courts faced with privilege questions to consider whether a reporter's source is confidential, because the lack of a confidential source is a factor that favors production." *Id.* At 754 (citing *Cuthbertson I* and *Criden*).

Glanton, *McMenamin* and *Bowden* are the leading Pennsylvania cases regarding the scope of the First Amendment reporter's privilege.

In *Glanton*, the plaintiffs were township commissioners who subpoenaed *The Philadelphia Inquirer* for testimony and documents primarily relating to an *Inquirer* article that quoted a defendant as accusing the plaintiffs of, among other things, "thinly disguised racism." *Glanton*, 705 A.2d at 881-82. During discovery, plaintiffs subpoenaed the notes and other unpublished materials of the reporter who wrote the article, as well as the notes of any of the interviews of the newspaper's reporters with the defendants and any materials received by the newspaper in preparing any article about the defendants in the five years before the article at issue was published. *See* 705 A.2d at 883. On appeal, the Pennsylvania Superior Court held that (1) the reporter's notes were necessary to determine whether the potentially defamatory statements, which the defendant denied making, referred to the plaintiffs (or to someone else); (2) the reporter's notes were the only memorialization of the interview; and (3) the reporter and one of the defendants were the only parties to the interview. *See id.* at 885. Accordingly, the Superior Court ordered the reporter to testify and produce the notes and materials used in preparing the article in question. *See id.* The Superior Court held, however, that the First Amendment reporter's privilege barred the plaintiff from obtaining the other information it sought from the newspaper — that is, the notes from any of the interviews of the newspaper's reporters with the defendant and any materials received by the newspaper in preparing any article about the defendants in the five years before the article was published. *See id.* at 886. The Superior Court reasoned that such materials were not crucial to the plaintiffs' case. *See id.*

In *McMenamin*, the plaintiff sought to call a reporter to testify to the accuracy of certain statements recorded by videotape at a press conference and later used as part of a news report. 590 A.2d at 811. The court held that the First Amendment privilege protected the reporter against testifying because there was no evidence that the same information could not have been obtained from others present at the press conference. *Id.*

In *Bowden*, the trial court ordered two reporters to disclose to the Philadelphia District Attorney's Office verbatim, post-indictment statements made by a homicide defendant about the shooting at issue in pre-trial interviews with the reporters. The Supreme Court, assuming without deciding that there is a First Amendment privilege in Pennsylvania, held that, even if there were, the District Attorney's Office had satisfied the three part test required to pierce the privilege and ordered the reporters to testify about the statements. The Court reasoned that the reporters were the only source of the precise statements made to the reporters by the criminal defendant years before. Citing *Cuthbertson*, the Court stated: "By their very nature, these [verbatim and substantially verbatim] statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time." The Court also found that the statements were "crucial" — meaning "relevant" and "important" — to the criminal prosecution of the defendant, whose "defense at trial rested entirely on his claim" that he acted in "self-defense." The Court concluded that any of the defendant's statements about the shooting were highly relevant and important to his "mental state" and self-defense claim, either as direct evidence or impeachment evidence. Significantly, the Court in *Bowden* did not require the production of the reporters' notes; it only affirmed the trial court's order requiring the reporters to provide, either orally or in writing, the statements made by the defendant. *See Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003).

F. Published and/or non-published material

1. Shield Law

The Pennsylvania Shield Law does not protect published material. The privilege is waived for information that is "actually published or publicly disclosed" *See In re Taylor*, 193 A.2d 181 (Pa. 1963). And the Pennsylvania Supreme Court recently made it clear that the Shield Law does not protect unpublished, non-confidential source information. Rather, the Shield Law protects only confidential source information unless waived by publication. *See Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003); *see supra* § II E.1.

2. First Amendment privilege

The First Amendment privilege presumptively applies to all information, including published information, and may protect reporters from having to verify the accuracy of published material. *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.) (where, based on First Amendment, court refused to compel reporter's testimony to verify that candidate made statements at press conference which were part of a television news report), *aff'd*

without op., 590 A.2d 753 (Pa. 1991); *see also Commonwealth v. Farley*, 27 Med. L. Rptr. 1544 (C.P. Jefferson January 12, 1999) (quashing subpoena and holding that First Amendment reporters' privilege applies to published material sought by the Commonwealth). *But cf. Davis v. Glanton*, 705 A.2d 879, 887 (Pa. Super. 1997) (actual published articles not protected by First Amendment privilege).

G. Reporter's personal observations

There are no Pennsylvania appellate court decisions addressing whether the Shield Law or the First Amendment privilege applies where the information sought is a reporter's personal observations of an event at issue in the case. Two trial court decisions have touched on this issue. In *Commonwealth v. Linderman*, 1992 WL 563407, *1, 17 Pa. D. & C.4th 102, 104 (C.P. Chester Sept. 4, 1992), the trial court found that the Shield Law does not apply to unpublished photographs taken by a media photographer where the photographs were taken in public of a scene in plain view and thus served only as a factual record of an event. *Id.* at *2, 17 Pa. D. & C.4th at 106. Another trial court, however, found that the First Amendment test applies to such photographs and suggested that both the Shield Law and the First Amendment privilege could protect against disclosure if the photographs are sources of information rather than records of an event taken in public. *Shetler v. Zeger*, 1989 WL 234087, *5-6, 4 Pa. D. & C.4th 564, 573 (C.P. Franklin June 1, 1989).

In light of the decision in *Bowden*, however, it would appear that a reporter's personal observations, insofar as they would not reveal a confidential source, would not be protected by the Shield Law.

H. Media as a party

1. Shield Law

The Shield Law applies without regard to whether the media is a party in the case.

2. First Amendment privilege

Pennsylvania courts apply the First Amendment reporter's privilege regardless of whether the media is a party. *Cf. Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997) (holding that the balancing test for the First Amendment reporter's privilege must be applied on a case-by-case basis regardless of whether media is a party); *Melvin v. Doe*, 49 Pa. D. & C.4th 449, 477 (C.P. Allegheny 2000) (Wettick, J.) (suggesting that when a media entity is a party Pennsylvania courts apply the same First Amendment privilege analysis as in other cases).

I. Defamation actions

In general, there is no "libel exception" in Pennsylvania under either the Shield Law or First Amendment privilege. However, the First Amendment privilege may have different levels of protection depending on whether the case is a defamation case.

1. Shield Law

The leading Pennsylvania cases discerning the scope of the Shield Law in defamation cases are *Hatchard*, *Glanton* and *Castellani*. *Hatchard* arose out of two libel actions against a local television station for news broadcasts that allegedly defamed the plaintiff. In one case, the plaintiff attempted to discover "out-takes" (unbroadcast videos), and in the other, the plaintiff sought documents available to the station at the time it broadcast the report. *See* 532 A.2d at 347. The Pennsylvania Supreme Court reasoned that a libel plaintiff's constitutional right of reputation would be compromised if a reporter was permitted to assert the Shield Law with respect to all unpublished information such that it prevented him from proving his defamation case. *See id.* at 349, 351. Accordingly, the Supreme Court held that the plaintiff could subpoena the outtakes, but could not obtain any outtakes that disclosed, or reasonably could lead to the disclosure of, confidential sources. *See id.* at 351.

In *Glanton*, the plaintiffs were township commissioners who subpoenaed *The Philadelphia Inquirer* for testimony and documents primarily relating to an *Inquirer* article that quoted a defendant as accusing the plaintiffs of, among other things, "thinly disguised racism." *Glanton*, 705 A.2d at 881-82. During discovery, plaintiffs subpoenaed the notes and other unpublished materials of the reporter who wrote the article, as well as the notes of any of the interviews of the newspaper's reporters with the defendants and any materials received by the newspaper in preparing any article about the defendants in the five years before the article at issue was published. *See* 705 A.2d

at 883. On appeal from the trial court's ruling enforcing much of the subpoena, *The Inquirer* argued, citing *Taylor*, that the Pennsylvania Shield precludes the compelled disclosure of all unpublished information. The Superior Court explained that *Hatchard* required a different rule in light of "the effects of the U.S. Supreme Court's 'constitutionalization' of defamation law" in *New York Times v. Sullivan* and held that the Shield Law did not protect the subpoenaed notes and unpublished material to the extent they could not "reasonably lead to the discovery of the identity of a confidential media-informant." *Id.* at 885. Recognizing that in defamation cases involving a plaintiff's attempt to obtain information from a media defendant, the Shield Law protects unpublished information to the extent it does not reveal the identity of a personal source of information, the Superior Court concluded that because the libel plaintiff's burden of proof remains the same, there was "no reason ... why the rationale of *Hatchard* is not equally applicable in cases where materials relevant to plaintiff's burden are in the possession of a media entity which is not a party." *Id.* at 885. *Glanton*, 705 A.2d at 884.

The rationale, but not the result, of *Hatchard* and *Glanton*, however, was altered by the Supreme Court's decision in *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003). *Bowden* was a criminal prosecution, not a defamation case. The Pennsylvania Supreme Court held that the rule set forth in *Hatchard* was the rule in *all* cases, not just defamation cases, even though the primary rationale for the decisions in *Hatchard* and *Glanton* was that the unique burden of proof *New York Times v. Sullivan* placed in libel plaintiffs justified a limitation of the Shield Law to confidential source information.

In *Castellani*, the Pennsylvania Superior Court ruled that the Shield Law remained an absolute privilege even though at issue in the underlying defamation case was whether the newspaper's confidential source violated grand jury secrecy. A concurring opinion stated that it would "not foreclose the possibility, as does the majority, that in a future case – for example where, in a criminal prosecution of a grand jury leak, a reporter's evidence about the source of that leak is sought – the Shield Law may have to yield." In that case, and "only in such case, where the interest of the state and the public in disclosure is at its zenith, can we consider creating an exception to what is, on its face, an unambiguous Shield Law." Although the concurring opinion implied that this would be consistent with the panel's decision, that is far from clear, as the panel decision expressly stated that the possible commission of a crime does not permit a court to create an exception to the Shield Law.

No adverse inference may be drawn at trial from the media's reliance on the Shield Law, but neither can an inference of reliability or accuracy of information be drawn from the existence of an unidentified source. *See Sprague v. Walter*, 543 A.2d 1078, 1086 (Pa. 1988).

2. First Amendment privilege

In defamation cases, Pennsylvania courts apply the same analysis with respect to the First Amendment reporter's privilege. *See supra* § III.A.2. The privilege, however, may be slightly weaker where the media is a party as opposed to third party witness, as the Supreme Court noted in *Bowden*: "[T]he Third Circuit has recognized that the status of the media member as a party or non-party witness is relevant to the balancing inquiry, explaining that it should be more difficult to compel production from a non-party witness who has no personal interest in the matter." *Bowden*, 838 A.2d at 754-55 (citing *Riley*).

In *Glanton*, the plaintiffs were township commissioners who subpoenaed *The Philadelphia Inquirer* for testimony and documents primarily relating to an *Inquirer* article that quoted a defendant as accusing the plaintiffs of, among other things, "thinly disguised racism." *Glanton*, 705 A.2d at 881-82. During discovery, plaintiffs subpoenaed the notes and other unpublished materials of the reporter who wrote the article, as well as the notes of any of the interviews of the newspaper's reporters with the defendants and any materials received by the newspaper in preparing any article about the defendants in the five years before the article at issue was published. *See* 705 A.2d at 883. On appeal, the Superior Court held that (1) the reporter's notes were necessary to determine whether the potentially defamatory statements, which the defendant denied making, referred to the plaintiffs (or to someone else); (2) the reporter's notes were the only memorialization of the interview; and (3) the reporter and one of the defendants were the only parties to the interview. *See id.* at 885. Accordingly, the Superior Court ordered the reporter to testify and produce the notes and materials used in preparing the article in question. *See id.* The Superior Court held, however, that the First Amendment reporter's privilege barred the plaintiff from obtaining the other information it sought from the newspaper — that is, the notes from any of the interviews of the newspaper's re-

porters with the defendants and any materials received by the newspaper in preparing any article about the defendants in the five years before the article was published. *See id.* at 886. The Superior Court reasoned that such materials were not crucial to the plaintiffs' case. *See id.*

IV. Who is covered

Pennsylvania's Shield Law applies to anyone "engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purposes of gathering, procuring, compiling, editing or publishing news." 42 Pa. C.S.A. § 5942(a). There is no Pennsylvania statutory or case law directly addressing the definitions of "engaged on, connected with, or employed by" or "general circulation" or what it means to gather, procure, compile, edit or publish news.

In Pennsylvania, the First Amendment reporter's privilege has been extended to members of the "news media," including "reporters." *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997). There are no Pennsylvania cases that discuss the definitions of "news media" or "reporter" for the purposes of the privilege.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The Pennsylvania Shield Law and First Amendment reporter's privilege apply to reporters. *Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997). There are no Pennsylvania cases that actually define the term "reporter" for the purposes of the privileges.

b. Editor

The Pennsylvania Shield Law and First Amendment reporter's privilege apply to editors. In *In re Taylor*, the Pennsylvania Supreme Court extended the Shield Law's protections to the president and general manager of a newspaper and the editor of another newspaper, all of whom were subpoenaed by an investigating grand jury. *See In re Taylor*, 193 A.2d 181, 182, 186 (Pa. 1963). There are no Pennsylvania cases that actually define the term "editor" for the purposes of the privileges.

c. News

The Pennsylvania Shield Law is expressly limited to those persons "gathering, procuring, compiling, editing or publishing news." There is no case law addressing this issue under the First Amendment reporter's privilege. And there is no Pennsylvania statutory or case law that defines what is considered "news" for the purposes of either the Shield Law or the First Amendment reporter's privilege.

d. Photo journalist

Although the Pennsylvania Shield Law appears to apply to photojournalists, there is no statutory or case law that expressly addresses whether photojournalists or photographs are protected as a general rule. *See Shetler v. Zeger*, 1989 WL 234087, *5-6, 4 Pa. D. & C.4th 564, 573 (C.P. Franklin June 1, 1989) (implying Shield Law could apply to photojournalists). *But see Commonwealth v. Ruch*, 1984 WL 605, *2, 28 Pa. D. & C.3d 488, 491 (C.P. Montgomery Jan. 12, 1984) (photographs of object in plain view in or from public areas not protected). Pennsylvania trial courts have held that the First Amendment protects photographs taken by a newspaper photographer if those photographs are sources of information rather than just records of events similar to personal observations. *Commonwealth v. Linderman*, 1992 WL 563407, *2, 17 Pa. D. & C.4th 102, 106 (C.P. Chester Sept. 4, 1992); *see also In re Pittsburgh Citizen Police Review Bd.*, 29 Media L. Rep. 1156, 1158 (C.P. Allegheny 2000) (newspaper photographs taken in course of newsgathering activity protected by qualified privilege); *Shetler*, 1989 WL 234087, at *6, 4 Pa. D. & C.4th 564, 573.

e. News organization / medium

The Pennsylvania Shield Law has been applied not only to persons but also to media organizations. *See LAL v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984) (television station); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264,

278-79 (3d Cir. 1980) (television station). The Shield Law provides that its protections apply to radio or television stations only if those stations "maintain[] and keep[] open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast." 42 Pa. C.S.A. § 5942(b).

In Pennsylvania, the First Amendment reporter's privilege applies, at the very least, to members of the "news media," including the actual media organization itself. *United States v. Cuthbertson*, 630 F.2d 139, 142, 147 (3d Cir. 1980) (television station); *cf. Davis v. Glanton*, 705 A.2d 879, 881, 885 (Pa. Super. 1997) (newspaper filed motion to quash but was not actual subject of subpoena).

2. Others, including non-traditional news gatherers

One Pennsylvania trial court, without analysis, has applied the First Amendment privilege to an internet website that published an anonymous posting of political commentary. *Melvin v. Doe*, 49 Pa. D. & C.4th 449, 477 (CP Allegheny 2000). There is no other Pennsylvania case law that addresses the extent to which the Shield Law or the First Amendment reporter's privilege protects non-traditional news gatherers such as authors, freelancers, students, unpaid news gatherers, or academic researchers. Nor are there any cases addressing whether these privileges apply to bloggers. While the First Amendment privilege arguably applies to bloggers (as some courts around the nation have held), the Pennsylvania Shield Law may not, unless the blogger is a member of the mainstream media (newspapers, magazines, television stations) and thus falls within the definition set forth in the Shield Law.

B. Whose privilege is it?

1. Shield Law

Given that the Pennsylvania Supreme Court in *In re Taylor* held that only the reporter could waive the privilege, it appears that the privilege belongs to the reporter, not the source.

2. First Amendment privilege

The First Amendment privilege belongs to the reporter, not the source. *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997) (discussing "rights of reporters" under the First Amendment); *McMenamin v. Tartaglione*, 590 A.2d 802 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991); *see also United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (even where source permits disclosure of information, First Amendment privilege protects reporters from being compelled to produce unpublished materials).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no requirements under either the Shield Law or the First Amendment privilege as to when the subpoena must be served on a member of the news media.

2. Deposit of security

There is no requirement under either the Shield Law or the First Amendment privilege that the subpoenaing party deposit any security in order to procure the testimony or materials of the reporter.

3. Filing of affidavit

There is no requirement under either the Shield Law or the First Amendment privilege that the subpoenaing party make any sworn statement in order to procure a reporter's testimony or materials.

4. Judicial approval

There is no requirement under either the Shield Law or the First Amendment privilege that the subpoenaing party obtain court approval before serving a subpoena on a reporter. Under the Pennsylvania Rules of Civil Procedure, however, a party serving a subpoena duces tecum must give twenty days notice to the other parties before serving

a third party subpoena; if the other parties object, the proponent of the subpoena must seek court approval before serving the subpoena.

5. Service of police or other administrative subpoenas

There are numerous provisions under Pennsylvania law that provide administrative bodies with the power to issue subpoenas. Provisions that may be important to the exercise of a reporter's statutory and constitutional privilege include the following:

A fire marshal or deputy fire marshal has the power to compel by subpoena the examination of any person or the production of documents in relation to any fire. 16 P.S. § 6106. If a person refuses to appear or to produce documents, the marshal may, upon approval of the superintendent of county police and an authorized representative of the district attorney's office, jail the person until he or she agrees to comply with the subpoena. *Id.* Noteworthy is that testimony taken under oath or affirmation before the fire marshal may not be used in evidence against the person giving it in any civil or criminal proceedings (except in prosecutions against the person for perjury). *Id.* The mayor of the City of Philadelphia has similar authority. 53 P.S. § 16599.

The Bureau of Victims' Services, which is responsible for administering claims for compensation by victims of crime, has the power to subpoena testimony and the production of evidence. 18 P.S. § 11.312.

Housing authority members (administrators appointed by certain municipalities and counties) have the power to subpoena testimony and the production of evidence and to apply to the court for a finding of contempt for any failure to comply with a subpoena. 35 P.S. § 1550.

The Attorney General has the authority to subpoena testimony and the production of evidence and to apply to the court for a finding of contempt for any failure to comply with a subpoena. *See, e.g.*, 35 P.S. § 7131.503; 10 P.S. § 162.16.

The city councils in certain cities may subpoena appearance and testimony in conjunction with an investigation of allegedly negligent or improper official conduct of city officers. 53 P.S. § 22237.

B. How to Quash

1. Contact other party first

Although neither the Shield Law nor the First Amendment privilege require that the subpoenaing party be contacted prior to any motion to quash, it is a good idea. Most subpoenas are withdrawn or severely modified as a result of such calls.

2. Filing an objection or a notice of intent

Pennsylvania does not require the filing of a notice of intent before filing a motion to quash. In some counties, there may be general rules regarding discovery or trial motions. For example, in Philadelphia County, a party filing a motion to quash a discovery subpoena must certify that he or she made an effort to resolve the dispute without court intervention. The news media should check any applicable local rules.

3. File a motion to quash

a. Which court?

The motion to quash should be filed with the court that issues the subpoena.

b. Motion to compel

Because a subpoena is a court order, it is not advised that the news media disregard the subpoena's return date and simply register an objection with the subpoenaing party. If the news media is unable to get the subpoenaing party to withdraw the subpoena, the news media should promptly file a motion to quash. Moreover, the filing of a motion to quash does not stay the news media's obligation to comply with the subpoena, *see, e.g.*, Pa. R. Civ. P. 4013, although such a motion usually has that effect as a practical matter.

c. Timing

The news media should file a motion to quash as soon as possible. Some Pennsylvania trial courts have been disturbed by belated motions, especially regarding trial subpoenas.

d. Language

Although this largely depends on the applicable local court rules, the motion should briefly give the background of the motion, state the argument and relief requested, and include a proposed order and memorandum of law. Because trial court judges are usually unfamiliar with these privileges, it is important to educate the court as to their nature, scope and underlying public policies.

e. Additional material

Pennsylvania courts are not unreceptive to additional materials — such as *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media*, the biennial survey of the incidence of news media subpoenas — although it is unknown whether such materials are read.

4. In camera review

a. Necessity

Neither the Pennsylvania Shield Law nor the First Amendment privilege direct, require or suggest that the court conduct an *in camera* review of materials. The Third Circuit, however, has affirmed a district court's order compelling *in camera* review of a reporter's notes in a criminal trial when the defendant's subpoena complied with the Federal Rules of Criminal Procedure and the information was not available from another source. *See United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (*Cuthbertson I*).

Recently, the Pennsylvania Supreme Court criticized the "refusal" of two reporters to produce the subpoenaed information for *in camera* review. The Court said: "Absent disclosure or *in camera* review, there was simply no way" for the trial court to make the "determination" whether the subpoenaed information was "crucial" to the District Attorney's prosecution. *See Commonwealth v. Bowden*, 838 A.2d 740, 759 n.13 (Pa. 2003).

b. Consequences of consent

Regardless of whether the reporter or publisher consents to *in camera* review, neither the Shield Law nor the First Amendment privilege provides for an automatic stay pending appeal in the event of an adverse ruling.

c. Consequences of refusing

There are no decisions specifically addressing the impact of refusing to consent to an *in camera* review. In *Commonwealth v. Bowden*, the Supreme Court criticized the reporters' refusal to provide the subpoenaed information for *in camera* review, but the Court did not impose any adverse consequences. 838 A.2d at 759 n.13.

5. Briefing schedule

The briefing schedule for a motion to quash depends on the judge and local court rules.

6. Amicus briefs

There is no Pennsylvania state civil or criminal rule of procedure concerning the filing of *amici curiae* briefs at the trial level. Counsel should, of course, consult the local rules for any limitations. Assuming the local rules do not prohibit appearance by *amici curiae*, counsel should feel free to obtain such support.

Pennsylvania appellate courts generally accept *amicus* briefs. Specifically, Pennsylvania Rule of Appellate Procedure 531 provides that any non-party may submit an *amicus curiae* brief, without permission of the court, by the deadline for submission of the brief by the party whose position the *amicus curiae* supports. Oral argument by an *amicus curiae* is by permission only. Pa. R. App. P. 531(b).

For possible *amicus curiae* support, the news media should contact the Pennsylvania Newspaper Association, Teri Henning, Esquire, General Counsel, Pennsylvania Newspapers' Association, 3899 North Front Street, Harrisburg, PA 17110; (717) 703-3076; or Robert C. Clothier, Esquire, Fox Rothschild LLP, 2000 Market Street, Tenth Floor, Philadelphia, PA 19103; (215) 299-2845.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The Pennsylvania Shield Law provides an absolute privilege against compelled disclosure of confidential source information. There is no case law specifically addressing who maintains the burden of establishing the applicability of the Shield Law to the subpoenaed information. If the news media is claiming that the subpoena seeks confidential source information, that assertion should be sufficient absent evidence showing that the information is not confidential.

With respect to the First Amendment privilege, the party seeking disclosure bears the burden of proof. The First Amendment privilege will only be overcome if the party seeking disclosure establishes "a demonstrated, specific need for evidence" that "presents a paramount interest to which the privilege must yield." *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997). The party therefore must do "more than demonstrate a mere possibility that a media entity possesses relevant information." *Id.* at 886. Consistent with this burden, courts can compel disclosure only if they are able to make "specific findings of necessity." *Id.*; see also *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980).

B. Elements

Since the Pennsylvania Shield Law provides an absolute privilege against compelled disclosure of confidential source information, the predominant issues generally are whether the subpoenaed information is confidential source information and whether the Shield Law's protections have been waived by publication of the identity of the confidential source.

Under the First Amendment privilege, the Pennsylvania Supreme Court stated the elements as follows (without actually ruling that there is such a privilege in Pennsylvania):

First, the party "must demonstrate that [it] has made an effort to obtain the information from other sources." *Criden*, 633 F.2d at 358-59; see *United States v. Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir. 1981) ("Cuthbertson II") (same); *Riley*, 612 F.2d at 717 (same).

Second, the party "must demonstrate that the only access to the information sought is through the journalist and [his or] her sources." *Criden*, 633 F.2d at 359; see *Riley*, 612 F.2d at 716 (stating that a showing is required as to the lack of alternative sources); *Davis*, 705 A.2d at 885 (same); *McMenamin*, 590 A.2d at 811 (same).

Third and finally, the party "must persuade the court that the information sought is crucial to [its] claim." *Criden*, 633 F.2d at 359; see *Cuthbertson II*, 651 F.2d at 196 (same); see also *Riley*, 612 F.2d at 716 ("the materiality, relevance and necessity of the information sought must be shown), 717 (information must be crucial information necessary for the development of the case; material sought must 'provide a source of crucial information going to the heart of the [claim]' (citation omitted; alteration in original)); *Davis*, 705 A.2d at 885 (stating that party must demonstrate that information is crucial" to its case); *McMenamin*, 590 A.2d at 811 (same).

Commonwealth v. Bowden, 838 A.2d 740, 755 (Pa. 2003).

In *Bowden*, the Court noted that the Third Circuit has identified "several factors that courts should consider" when applying the privilege to a particular case:

1. *Existence of Confidential Source*: The *Bowden* Court noted that the Third Circuit "has stated that it is important for courts faced with privilege questions to consider whether a reporter's source is confidential, because the lack of a confidential source is a factor that favors production." *Id.* At 754 (citing *Cuthbertson I* and *Criden*).
2. *Civil versus Criminal Case*: The *Bowden* Court noted that the Third Circuit has "stated that the privilege assumes a greater importance in civil than in criminal cases, as in criminal cases the public need to vindicate crime, or the defendant's constitutional right to a fair trial, can take precedence over a reporter's need to maintain confidentiality." *Bowden*, 838 A.2d at 744.

3. *Reporter as Party or Third Party*: The *Bowden* Court noted that the Third Circuit "has recognized that the status of the media member as a party or non-party witness is relevant to the balancing inquiry, explaining that it should be more difficult to compel production from a non-party witness who has no personal interest in the matter." *Bowden*, 838 A.2d at 754-55 (citing *Riley*).

The *Bowden* Court noted that the Third Circuit has emphasized that these "principles and policy considerations ... must inform the application of the three-part test and, in fact, may warrant relaxation of the test in certain circumstances. *Id.* at 755 (quoting *Criden*).

In evaluating claims under the First Amendment reporter's privilege, Pennsylvania courts will balance "the rights of reporters under the First Amendment with those seeking the information the reporters possess." *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991).

Three cases reflect the way Pennsylvania courts apply the First Amendment reporter's privilege: *Davis v. Glanton* and *Commonwealth v. Bowden* and *McMenamin v. Tartaglione*.

First, in *Glanton*, the plaintiffs were township commissioners who subpoenaed *The Philadelphia Inquirer* for testimony and documents primarily relating to an *Inquirer* article that quoted a defendant as accusing the plaintiffs of, among other things, "thinly disguised racism." *Glanton*, 705 A.2d at 881-82. During discovery, plaintiffs subpoenaed the notes and other unpublished materials of the reporter who wrote the article, as well as the notes of any of the interviews of the newspaper's reporters with the defendants and any materials received by the newspaper in preparing any article about the defendants in the five years before the article at issue was published. *See* 705 A.2d at 883. On appeal, the Superior Court held that (1) the reporter's notes were necessary to determine whether the potentially defamatory statements, which the defendant denied making, referred to the plaintiffs (or to someone else); (2) the reporter's notes were the only memorialization of the interview; and (3) the reporter and one of the defendants were the only parties to the interview. *See id.* at 885. Accordingly, the Superior Court ordered the reporter to testify and produce the notes and materials used in preparing the article in question. *See id.* The Superior Court held, however, that the First Amendment reporter's privilege barred the plaintiff from obtaining the other information it sought from the newspaper — that is, the notes from any of the interviews of the newspaper's reporters with the defendants and any materials received by the newspaper in preparing any article about the defendants in the five years before the article was published. *See id.* at 886. The Superior Court reasoned that such materials were not crucial to the plaintiffs' case. *See id.*

Second, in *Bowden*, the trial court ordered two reporters to disclose to the Philadelphia District Attorney's Office verbatim, post-indictment statements made by a homicide defendant about the shooting at issue in pre-trial interviews with the reporters. The Supreme Court, assuming without deciding that there is a First Amendment privilege in Pennsylvania, held that, even if there were, the District Attorney's Office had satisfied the three part test required to pierce the privilege and ordered the reporters to testify about the statements. The Court reasoned that the reporters were the only source of the precise statements made to the reporters by the criminal defendant years before. Citing *Cuthbertson*, the Court stated: "By their very nature, these [verbatim and substantially verbatim] statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time." The Court also found that the statements were "crucial" — meaning "relevant" and "important" — to the criminal prosecution of the defendant, whose "defense at trial rested entirely on his claim" that he acted in "self-defense." The Court concluded that any of the defendant's statements about the shooting were highly relevant and important to his "mental state" and self-defense claim, either as direct evidence or impeachment evidence. Significantly, the Court in *Bowden* did not require the production of the reporters' notes; it only affirmed the trial court's order requiring the reporters to provide, either orally or in writing, the statements made by the defendant. *See Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003).

Finally, in *McMenamin*, the plaintiff sought to call a reporter to testify to the accuracy of certain statements recorded by videotape at a press conference and later used as part of a news report. *McMenamin*, 590 A.2d at 811. The Commonwealth Court held that the First Amendment privilege protected the reporter against testifying because there was no evidence that the same information could not have been obtained from others present at the press conference. *See id.*

1. Relevance of material to case at bar

The Pennsylvania Shield Law provides an absolute privilege against compelled disclosure of confidential source information regardless of a party's "need for the information." *Davis v. Glanton*, 705 A.2d 879, 883 (Pa. Super. 1997). At a minimum, of course, the moving party may only seek materials that are reasonably calculated to lead to the discovery of admissible evidence. *See* Pa. R. Civ. P. 4003.1(a).

To overcome the First Amendment privilege, a party seeking disclosure must establish that the information it seeks is "material, relevant, and necessary." *Glanton*, 705 A.2d at 885; *see also Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979) ("[T]he materiality, relevance and necessity of the information sought must be shown."). A party cannot overcome the privilege by showing the "mere possibility that a media entity possesses relevant information." *Glanton*, 705 A.2d at 886. Rather, to overcome a reporter's First Amendment privilege, the moving party must show that the information it seeks is "crucial." *Id.* According to the Third Circuit in *Riley*, this requirement means that the party seeking the information must show that the information goes "to the heart of the [claim]." *Riley*, 612 F.2d at 717. In *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003), however, the Pennsylvania Supreme Court opined that the "crucial" requirement merely means that the subpoenaed information must have "relevance and importance," a less stringent standard than that articulated by the Third Circuit. *Id.* at 757 n.12.

2. Material unavailable from other sources

Under the Pennsylvania Shield Law, it is irrelevant whether the information is available from other sources. *See Davis v. Glanton*, 705 A.2d 879, 884-85 (Pa. Super. 1997).

To overcome the First Amendment privilege, a party must make a "strong showing that [the information desired] cannot be obtained by alternative means." *Davis v. Glanton*, 705 A.2d at 882; *see also Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979) (requiring a "strong showing by those seeking to elicit the information that there is no other source for the information requested"). The party seeking disclosure must establish that the reporter's materials are "the only source" of the information desired and that "it would be futile to seek [the information] elsewhere." *Glanton*, 705 A.2d at 885-86; *see also United States v. Criden*, 633 F.2d 346, 359 (3d Cir. 1980) (holding that moving party "must demonstrate that the only access to the information sought is through the journalist and her sources"); *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (*Cuthbertson I*) (holding that moving party must "show[] that he is unable to acquire the information from another source that does not enjoy the protection of the privilege"). To this end, courts have required the subpoenaing party to "show that his only practical access to crucial information necessary for the development of the case is through the newsman's sources," *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979) (internal quotation omitted), and that the only access to the information sought is through the journalist and [his or] her sources," *Bowden*, 838 A.2d at 755.

The inquiry into whether the material is unavailable from other sources is very fact sensitive. In *Bowden*, the Supreme Court found that the sole alternative source, a criminal defendant on trial for murder, was "not an acceptable source for the information, not only because it is his own credibility that is at issue, but also because his statements, as they appear in the reporters' notes, are by their very nature unique." *Id.* at 756 (quoting *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (*Cuthbertson I*)). Consequently, the Court held, it was "unnecessary" for the prosecutor "to attempt to seek [the defendant's] statements elsewhere, as any such effort would have been futile." *Id.* On the other hand, in *McMenamin v. Tartaglione*, the Commonwealth Court held that the First Amendment privilege barred the plaintiff from compelling a reporter to testify about statements made by a mayoral candidate at a press conference. *See* 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991). The court noted that although the statements may have been "material, relevant, necessary and perhaps crucial," people other than the reporter could have testified about the candidate's statements. *Id.*

a. How exhaustive must search be?

When a reporter asserts the First Amendment privilege, the party seeking disclosure must establish that it has "exhausted other means of obtaining the information." *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979). When alternative sources for the information exist, the party must show that it has pursued each of those alternatives. *See, e.g., United States v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980); *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991). A party that fails to establish that it has exhausted alternative sources will not be permitted to overcome the privilege, *see, e.g., Riley*, 612 F.2d at 717, un-

less the party can show "it would be futile to seek [the information] elsewhere." *Davis v. Glanton*, 705 A.2d 879, 885-86 (Pa. Super. 1997). For example, in *McMenamin v. Tartaglione*, the plaintiff subpoenaed a reporter to testify about statements made by a mayoral candidate at a press conference. 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991). The Commonwealth Court quashed the subpoena, holding that the plaintiff had not overcome the First Amendment reporter's privilege because there was "nothing to show that [he] could not have obtained the information from other persons present at the ... press conference." *Id.* In *Bowden*, on the other hand, the Court found that there was no alternative source because there were no other persons present when the reporters spoke with the criminal defendant whose self defense claim was at issue. The Court did not require the prosecution to rule out other sources of statements made by the defendant, reasoning that the statements to the subpoenaed reporters were, "by their nature, ... not obtainable from any other source." *Bowden* at 177.

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

The party seeking disclosure should offer evidence that it made attempts to obtain the information from alternative sources, or that such attempts would be futile. *See Davis v. Glanton*, 705 A.2d 879, 885-86 (Pa. Super. 1997). The Pennsylvania courts, however, have not elaborated on the precise quantum of proof a party must offer concerning its search for alternative sources.

c. Source is an eyewitness to a crime

Even where a confidential source is (or may be) an eyewitness to a crime, the Shield Law provides absolute protection against disclosure of confidential source information. In *Castellani v. The Scranton Times, L.P.*, — A.2d —, 2007 WL 10366 (Pa. Super.), 35 Media L. Rep. 1097, 2007 PA Super 2 (2007), the Pennsylvania Superior Court ruled that the Shield Law remained an absolute privilege even though at issue in the underlying defamation case was whether the newspaper's confidential source violated grand jury secrecy. The concurring opinion, however, stated that it would "not foreclose the possibility, as does the majority, that in a future case – for example where, in a criminal prosecution of a grand jury leak, a reporter's evidence about the source of that leak is sought – the Shield Law may have to yield." In that case, and "only in such case, where the interest of the state and the public in disclosure is at its zenith, can we consider creating an exception to what is, on its face, an unambiguous Shield Law." Although the concurring opinion implied that this would be consistent with the panel's decision, that is far from clear, as the panel decision expressly stated that the possible commission of a crime does not permit a court to create an exception to the Shield Law.

Where a source is an eyewitness to a crime, Pennsylvania courts are more likely to hold that the First Amendment reporter's privilege test has been met. No Pennsylvania court has directly addressed the issue, however.

3. Balancing of interests

Because the Shield Law provides an absolute privilege, there is no balancing of interests. *See* Section VI.B.2.c.

When a party seeks information protected by the First Amendment privilege, Pennsylvania courts will balance the "rights of reporters under the First Amendment against the interests of those seeking the information the reporters possess." *Davis v. Glanton*, 705 A.2d 879, 882 (Pa. Super. 1997); *see also McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw.), *aff'd without op.*, 590 A.2d 753 (Pa. 1991). Accordingly, when the subpoenaing party's constitutional rights are implicated, its interest may be weightier. *See United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (*Cuthbertson I*). Nevertheless, courts will apply the same inquiry as in cases when the subpoenaing party's constitutional rights are not implicated. *Compare United States v. Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir. 1981) (*Cuthbertson II*) (applying the standard three-prong test in a case in which the subpoenaing party's Sixth Amendment rights were implicated), *with McMenamin*, 590 A.2d at 811 (applying the same test when no constitutional right is implicated).

4. Subpoena not overbroad or unduly burdensome

In civil suits, a reporter may object to a subpoena on the grounds that the subpoena is overly broad or unreasonably burdensome. *See* Pa. R. Civ. P. 4003.1(a), 4011(b). A reporter who is served with a subpoena can obtain a protective order for "good cause shown" — that is, if the subpoena is overly broad or unreasonably burdensome. *See* Pa. R. Civ. P. 4012(a). The protective order may limit the scope of the subpoena or prohibit the discovery completely.

In a grand jury investigation, a reporter can challenge a subpoena if it seeks information that is not relevant to the investigation. A court will enforce the subpoena, however, if the government submits an affidavit stating that the information sought "is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *Robert Hawthorne, Inc. v. County Investigating Grand Jury*, 412 A.2d 556, 560-61 (Pa. 1980) (quoting *In re Grand Jury Proceedings*, 486 F.2d 85, 93 (3d Cir. 1973)); see also *In re June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d 73, 78 (Pa. 1980). Generally, grand jury subpoenas will not be quashed on grounds that they would cause an economic burden or are inconvenient. See *Robert Hawthorne*, 412 A.2d at 560, 562.

In criminal cases, a reporter may object to a defendant's subpoena if it seeks irrelevant information or is overly broad. See *Commonwealth v. Majia-Arias*, 734 A.2d 870, 878-79 (Pa. Super. 1999).

5. Threat to human life

There is no statutory or case law in Pennsylvania addressing this issue.

6. Material is not cumulative

Although no Pennsylvania court has specifically addressed whether a reporter's material is cumulative evidence, if the material is cumulative, it necessarily is not crucial and likely is available from alternative sources. Accordingly, the party seeking disclosure would not be able to meet its burden in overcoming the First Amendment privilege.

7. Civil/criminal rules of procedure

In civil suits, a reporter may object to a subpoena on the grounds that the subpoena is not reasonably calculated to lead to the discovery of admissible evidence, or is unreasonably burdensome. See Pa. R. Civ. P. 4003.1(a), 4011(b). In such cases, a reporter can obtain a protective order to limit the scope of the subpoena or prohibit the discovery completely. See Pa. R. Civ. P. 4012(a).

8. Other elements

Pennsylvania courts have not expressly considered any other elements in determining whether the reporter's privilege can be overcome.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

The privilege afforded by the Pennsylvania Shield Law can be waived by the reporter, but not by the source. Such waiver is limited only to the information "actually published or publicly disclosed" *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963). While not specifically addressed in *Taylor*, it would appear under this standard that a reporter cannot waive for some purposes but not others; if the information is publicly disclosed, the privilege is waived for all purposes.

There is no Pennsylvania case law directly addressing waiver under the First Amendment reporter's privilege. Some Pennsylvania courts, however, have held that the privilege protects even information that has been published. See *McManamin*. Thus, unlike the Pennsylvania Shield Law, publication does not amount to waiver, though it would certainly be a factor in considering the privilege's application.

2. Elements of waiver

a. Disclosure of confidential source's name

Waiver of the Shield Law protections is limited only to the information "actually published or publicly disclosed" *In re Taylor*, 193 A.2d 181 (Pa. 1963). Publication of a confidential source's name therefore generally waives only disclosure of the identity of the confidential informant as well as any published information provided by that source. See *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346, 349-51 (Pa. 1987); *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997).

There is no Pennsylvania case law directly addressing waiver of the First Amendment reporter's privilege by disclosure of a confidential source's name.

b. Disclosure of non-confidential source's name

The Pennsylvania Shield Law does not protect non-confidential source information.

There is no Pennsylvania case law directly addressing waiver of the First Amendment reporter's privilege by disclosure of a non-confidential source's name.

c. Partial disclosure of information

Waiver of the Shield Law protections is limited only to the information "actually published or publicly disclosed . . ." *In re Taylor*, 193 A.2d 181 (Pa. 1963). Partial disclosure therefore waives the privilege only as to the information actually disclosed.

There is no Pennsylvania case law directly addressing the waiver of the First Amendment reporter's privilege by partial disclosure of information.

d. Other elements

There is no Pennsylvania case law specifically addressing other elements of waiver of the Shield Law or First Amendment privileges.

3. Agreement to partially testify act as waiver?

Waiver of the Shield Law protections is limited only to the information "actually published or publicly disclosed . . ." *In re Taylor*, 193 A.2d 181 (Pa. 1963). Accordingly, if a reporter agrees to testify to limited information, the privilege is deemed waived only as to the information actually disclosed in that testimony.

There is no Pennsylvania case law directly addressing waiver of the First Amendment reporter's privilege by agreement to partially testify.

VII. What constitutes compliance?

A. Newspaper articles

Newspaper articles are self-authenticating under Pennsylvania law. Pa. R. Evid. 902(6). Accordingly, there is no need for testimony that a particular article actually appeared in the publication.

B. Broadcast materials

Broadcast materials, such as videotapes, must be authenticated if offered as evidence at trial. To authenticate such materials, "a witness who has made the videotape" must identify the objects and people shown in the tape, as well as the time and place the video was made. *Pierce v. Unemployment Comp. Bd. of Review*, 641 A.2d 727, 728 (Pa. Commw. 1994). The editor or film processor does not need to testify to authenticate a video. *See id.* at 729. Rather, anyone "who can confirm that the representation is accurate as to objects depicted, at the relevant time, is sufficient." *Id.*

C. Testimony vs. affidavits

There is no statutory or case law in Pennsylvania specifically addressing this issue. In Pennsylvania, however, an affidavit is generally inadmissible at trial, thereby necessitating the reporter's testimony. Often, reporters may be willing to supply an affidavit during discovery, which may be strategically advantageous for two reasons. First, the case ultimately may not go to trial. Second, the parties may stipulate to the facts stated in the affidavit. Under both of these scenarios, the reporter could avoid having to testify at trial.

D. Non-compliance remedies

If the media refuses to comply with a court order to disclose information, the court can impose contempt sanctions provided by statute. 42 Pa. C.S.A. § 4132 *et seq.* There are two types of contempt under Pennsylvania: civil con-

tempt — which is intended to coerce compliance with a court order — and criminal contempt — which is intended to punish for past failure to obey the court. *See Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003) ("Generally, contempt can be criminal or civil in nature, and depends on whether the core purpose of the sanction imposed is to vindicate the authority of the court, in which case the contempt is criminal, or whether the contempt is to aid the beneficiary of the order being defied, in which case it is civil.").

There are also two subcategories within each: direct contempt — which is noncompliance in the court's presence, such as a refusal to testify — and indirect contempt — which is noncompliance outside the courtroom, such as a violation of an injunction.

1. Civil contempt

Civil contempt has "two sub-species: compensatory or coercive." *Bowden*, 838 A.2d at 761. Compensatory civil contempt "involves compensation that is paid to the party whom the contempt has harmed." *Id.* On the other hand, a coercive civil contempt citation "is intended to coerce the disobedient party into compliance with the court's order through incarceration and/or monetary punishment." *Id.* Before a trial court may order coercive civil contempt, it must consider a number of factors, including "the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Id.* Before imposing a fine, the court must "consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." *Id.* The failure of a trial court to consider the required factors before imposing contempt is an abuse of discretion. *See* Section VII.D.1.a.

Where the contempt is direct, such as where a reporter refuses to disclose information in open court after having been heard on the issue, the reporter will be subject to a summary finding of contempt by the court for disobeying a court order in the court's presence. 42 Pa. C.S.A. § 4132. However, where the contempt is indirect, the district attorney's office, a civil litigant, or the court, on its own initiative, must initiate a multi-step, multi-hearing process. The reason for the multi-step process is to ensure that the reporter is aware of the allegations of contempt and has adequate opportunity to refute those claims.

A court may incarcerate or fine a reporter for refusing in open court to comply with an order to disclose information. However, the only sanction that a court can impose for indirect civil contempt is a monetary fine. In addition, the court may not impose a civil contempt sanction where compliance is impossible. *In re Martorano*, 464 Pa. 66, 346 A.2d 22 (1975).

a. Fines

It remains unclear what limitation exists on the fine a court may impose to coerce a reporter to comply with its orders. In a recent criminal case, *Commonwealth v. Bowden*, a Philadelphia trial court judge imposed on two reporters a contempt fine of \$100 per minute during part of the trial, resulting in a total fine of \$40,000 for each reporter. On appeal, the Superior Court remanded the case to the trial court for reconsideration of the amount of the fine, finding the "steep sanction [an] unprecedented" abuse of discretion. *See* 800 A.2d 327, 335 (Pa. Super. 2002). On further appeal, the Pennsylvania Supreme Court affirmed the Superior Court's ruling, but on different grounds. *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003). It held that the trial court "abused its discretion" by failing to consider the factors required for a finding of coercive civil contempt, *i.e.*, "character and magnitude of the harm threatened by continued contumacy," and "the probable effectiveness of any suggested sanction in bringing about the result desired." *Id.* at 763. To the contrary, the Court found, the trial court expressed "a significant degree of skepticism about the effectiveness of its sanction" by opining that no amount of money was going to compel the reporters to comply with the court's order and testify. *Id.* Lacking the trial court's analysis of the required factors, the Supreme Court was "unable to conduct a meaningful review of the Superior Court's conclusion that the sanction imposed was excessive" and remanded matter to the trial court "for reconsideration of the sanction to be imposed" while "express[ing] no view regarding the Superior Court's conclusion that the sanction imposed by the trial court was excessive." *Id.*

b. Jail

The court has the power to jail a reporter for direct civil contempt, and there is no limit on how long a reporter can be jailed as a contempt sanction. 42 Pa. C.S.A. § 4132. However, the court must release the reporter upon an in-

dication that the reporter intends to obey the court order. Also noteworthy is that a reporter can be jailed upon a finding of contempt if the court imposes a fine as a sanction but the reporter fails to pay the fine. 42 Pa. C.S.A. § 4134, 4136; *see also infra* § VII.D.2.b.

2. Criminal contempt

If the contempt is deemed criminal and occurs in open court — such as where a reporter refuses to comply with a court order to disclose information — the court may summarily punish the reporter. 42 Pa. C.S.A. § 4132; *Commonwealth v. Mayberry*, 327 A.2d 86, 89 (Pa. 1974). If the court seeks to impose incarceration as punishment, and the incarceration does not exceed six months, the reporter then has no right to certain protections generally afforded a criminal defendant, such as a jury trial or bail. *Id.*; Pa. R. Crim. P. 86(I). Regardless of the punishment to be imposed, the reporter retains certain other protections, such as the right to due process and the right to have guilt proven beyond a reasonable doubt. *In re Martorano*, 346 A.2d 22 (Pa. 1975).

If the contempt is indirect (*i.e.*, does not occur in open court before the judge), the court generally must provide the right to bail (where incarceration is provided for by statute other than 42 Pa. C.S.A. § 4132, 4133), the right to a speedy and public jury trial, and the right to demand withdrawal of the sitting judge. 42 Pa. C.S.A. § 4136.

a. Fines

There is no cap on the fine a court may impose to punish a reporter for criminal contempt in open court. 42 Pa. C.S.A. § 4132. However, a court generally may not impose a fine greater than \$100 for indirect criminal contempt. 42 Pa. C.S.A. § 4136.

b. Jail

The court has the power to jail a reporter for contempt, and there is no limit to the jail sentence a court may impose for direct criminal contempt. 42 Pa. C.S.A. § 4132 A court generally may not incarcerate a reporter for indirect criminal contempt for more than 15 days. 42 Pa. C.S.A. § 4136. A reporter can be jailed upon a finding of contempt if the court imposes a fine as a sanction and the reporter fails to pay the fine, but the reporter must be released after 15 days if the criminal contempt is indirect. 42 Pa. C.S.A. §§ 4134, 4136. If the criminal contempt is direct and the reporter is unable to pay the fine, the reporter must be released after 3 months. 42 Pa. C.S.A. § 4134.

3. Other remedies

No adverse inference may be drawn at trial from the media's reliance on the Shield Law, but neither can an inference of reliability or accuracy of the information be drawn from the existence of an unidentified source. *Sprague v. Walter*, 543 A.2d 1078, 1086 (Pa. 1988).

VIII. Appealing

A. Timing

1. Interlocutory appeals

The media can appeal immediately as a matter of right from a trial court order denying a motion to quash under the collateral order doctrine, which applies where (1) the order to be appealed is separable and collateral to the main case; (2) the order impacts rights that are too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost. Pa. R. App. P. 313; *Pugar v. Greco*, 483 Pa. 68, 394 A.2d 543 (1978). The collateral order doctrine is particularly applicable to privilege disputes. *See, e.g., Ben v. Schwartz*, 729 A.2d 547 (Pa. 1999) (allowing appeal from order requiring disclosure of files subject to executive and statutory privilege); *Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super. 1992) (allowing appeal from order requiring production of documents involving canon law privilege); *Commonwealth v. Miller*, 593 A.2d 1308 (Pa. Super. 1991) (allowing appeal from order requiring production of statutorily-privileged documents).

In *Castellani*, the Pennsylvania Superior Court held that a paper's and reporter's appeal of the trial court's order requiring the compelled disclosure of a confidential source was an appealable order under the collateral order doctrine. The Court held that it could address the appeal without analysis of the underlying defamation case, that "no effective means of reviewing an order that requires the production of putatively protected material after a final judgment has been entered in the case," and, most importantly, that "these privileges are "deeply rooted in the public policy of this commonwealth and the public policy of the United States. It cannot be gainsaid that these privileges exist to preserve the free flow and exchange of ideas and information to the news media and that such inter course is essential to the existence of a democratic republic." *Castellani v. The Scranton Times, L.P.*, — A.2d —, 2007 WL 10366 (Pa. Super.), 35 Media L. Rep. 1097, 2007 PA Super 2 (2007).

In grand jury proceedings, however, the collateral order doctrine is likely unavailable, thereby forcing the subpoenaed party to suffer contempt in order to be able to appeal. *In re the Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 510 (Pa. 2006) ("[T]he determination of whether a particular order is separable and collateral from a grand jury proceeding is a difficult, if not impossible, undertaking" because grand jury secrecy leaves the court "with no record to use in determining whether or not the contested order is collateral to the proceeding.") (citing *In re Grand Jury Subpoena*, 190 F.3d 375, 384 (5th Cir. 1999)).

The media may also petition the appellate court for permission to appeal under the rules governing interlocutory orders if (1) an appeal is not allowed under the collateral order doctrine, and (2) the trial court certifies the question for interlocutory appeal. 42 Pa. C.S.A. § 702; Pa. R. App. P. 1301 *et seq.* Unlike under the collateral order, such an appeal, by its very nature, is not a matter of right. Certification depends on whether the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matters." *In re the Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 510 (Pa. 2006) (citing Section 702(b)). Because the newspaper in that case was able to appeal the order ruling it in contempt, however, the Superior Court ruled that the trial court's denial of certification was not an abuse of discretion. *Id.*

Interlocutory appeals and appeals as of right generally must be filed within 30 days of the entry of the order appealed. Pa. R. App. P. 341, 903, 1311.

Appeals to the Pennsylvania Supreme Court are generally by allowance only. Pa. R. App. P. 3421(d); 1111 *et seq.* In exceptional circumstances, the Supreme Court can also exercise extraordinary jurisdiction over a matter using its "King's Bench" powers "in order to conserve judicial resources ... and provide guidance to the lower courts on a question that is likely to recur." *Commonwealth v. Martorano*, 634 A.2d 1063, 1067 n.6 (Pa. 1993) (citing *Commonwealth v. Lang*, 537 A.2d 1361 (Pa. 1988)); *see also* 42 Pa. C.S.A. § 502; 42 Pa. C.S.A. § 726 ("Supreme Court may, on its own motion or upon petition of any party, in any matter ... involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof ..."); Pa. R. App. P. 3309; *Silver v. Downs*, 425 A.2d 359, 362 (Pa. 1981); *In re Petition of Dwyer*, 406 A.2d 1355, 1358 n.4 (Pa. 1979). The courts of appeals also maintain the power to issue writs of prohibition or mandamus where a lower court wrongly exercises or refuses to exercise its discretion within the limits of the law. 42 Pa. C.S.A. §§ 721, 741, 761.

It is unclear whether under Pennsylvania law a reporter must suffer contempt to preserve an issue on appeal — *i.e.*, whether compliance with a court order renders the issue moot. *See, e.g., Commonwealth v. Genovese*, 337 A.2d 364, 366-68 (Pa. Super. 1985) (allowing television station that complied with order not to publish names of jurors participating in murder trial to appeal after completion of trial although compliance rendered order technically moot).

For a reporter to appeal an order issued in a grand jury proceeding, however, there must be a civil contempt order entered against the reporter. Compliance with a grand jury subpoena, therefore, precludes the possibility of an appeal. *In re the Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 509-10 (Pa. 2006). "Requiring the choice between compliance with the subpoena and the possibility of contempt preserves the interest in expeditious grand jury proceedings." *Id.* at 510.

2. Expedited appeals

If an expedited or emergency appeal is sought, the media can force the lower court to enter an appealable order in writing, as required to start an appeal. Pa. R. App. P. 301(e). There are no other specific provisions of Pennsylva-

nia's appellate rules governing expedited appeals, but, in the interest of expediting a decision, and to secure the just, speedy and inexpensive determination of a matter, an appellate court may shorten the time periods provided in the rules or otherwise modify application of the appellate rules in a particular case. Pa. R. App. P. 105.

B. Procedure

1. To whom is the appeal made?

Appeals from the civil courts of common pleas, including appeals from rulings compelling a reporter to comply with a subpoena notwithstanding any privilege objections, are generally taken to the Superior Court, although certain matters must be appealed to the Commonwealth Court or the Supreme Court, as provided by statute. 42 Pa. C.S.A. §§ 722, 742, 762. Appeals from the Superior Court and the Commonwealth Court are taken to the Supreme Court. 42 Pa. C.S.A. §§ 723, 724. Appeals from rulings by governmental agencies typically are taken to the Commonwealth Court, although there are agencies whose decisions are appealed directly to the Supreme Court. 42 Pa. C.S.A. §§ 725, 763.

Appeals to the Pennsylvania Supreme Court are generally by allowance only. Pa. R. App. P. 3421(d), 1111 *et seq.* In exceptional circumstances, the Supreme Court can also exercise extraordinary jurisdiction using its "King's Bench" powers "in order to conserve judicial resources ... and provide guidance to the lower courts on a question that is likely to recur." *Commonwealth v. Martorano*, 634 A.2d 1063, 1067 n.6 (Pa. 1993) (citing *Commonwealth v. Lang*, 537 A.2d 1361 (Pa. 1988)); *see also* 42 Pa. C.S.A. § 502; 42 Pa. C.S.A. § 726 ("Supreme Court may, on its own motion or upon petition of any party, in any matter ... involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof"); Pa. R. App. P. 3309; *Silver v. Downs*, 425 A.2d 359, 362 (Pa. 1981); *In re Petition of Dwyer*, 406 A.2d 1355, 1358 n.4 (Pa. 1979). The courts of appeals also maintain the power to issue writs of prohibition or mandamus where a lower court wrongly exercises or refuses to exercise its discretion within the limits of the law. 42 Pa. C.S.A. § 721, 741, 761.

2. Stays pending appeal

In order to avoid a finding of contempt, the media must seek a stay pending appeal of an order compelling the disclosure of information. The stay must first be requested in the lower court, unless impracticable. Pa. R. App. P. 1732.

In addition, an order providing monetary relief, such as an order imposing a fine for contempt of court, is automatically stayed by filing security, cash or bond, in the amount of 120% of the amount ordered by the court below. Pa. R. App. P. 1731, 1735.

In *Commonwealth v Bowden*, 838 A.2d 740 (Pa. 2003), the reporters, having been ordered to testify, sought a stay from the trial court, which was denied, from the Superior Court, which was granted and then dissolved, and, finally, from the Supreme Court, which similarly issued a temporary stay order that was ultimately dissolved. *Id.* at 744.

3. Nature of appeal

See supra § VIII.A.1.

4. Standard of review

Although no court has formally adopted this principal, where First Amendment issues are on appeal, Pennsylvania appellate courts will in effect make an independent examination of the whole record. *Brown v. Philadelphia Tribune Co.*, 668 A.2d 159, 162 (Pa. Super. 1995) (quoting *Bose v. Consumer Union of the United States, Inc.*, 466 U.S. 485 (1984)). Moreover, an appellate court is not bound by the trial court's conclusions of law and is free to modify erroneous applications of law by the trial court. *See* 16 Goodrich-Amram Standard Pennsylvania Practice § 91:83 at 561 (1995) (and cases cited therein).

On appeal from a finding of contempt, the appellate court may reverse upon finding that the trial court abused its discretion or committed an error of law. *Commonwealth v Bowden*, 838 A.2d 740 (Pa. 2003); *Stambaugh v. Reed Twp.*, 510 A.2d 1289 (Pa. Commw. 1986). "Discretion is abused when the course pursued represents not merely

an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." *Bowden*, 838 A.2d at 762.

5. Addressing mootness questions

An appeal from an order denying a motion to quash is not moot even though the underlying case is concluded because such an order is capable of repetition yet evading review. *Kurtzman v. Hankin*, 714 A.2d 450, 452 (Pa. Super. 1998); *Commonwealth v. Buehl*, 462 A.2d 1316, 1319 (Pa. Super. 1983).

It is unclear whether under Pennsylvania law a reporter must suffer contempt to preserve an issue on appeal — *i.e.*, whether compliance with a court order renders the issue moot. *See Commonwealth v. Genovese*, 337 A.2d 364, 366-68 (Pa. Super. 1985) (allowing television station that complied with order not to publish names of jurors participating in murder trial to appeal after completion of trial although compliance rendered order technically moot).

For a reporter to appeal an order issued in a grand jury proceeding, however, there must be a civil contempt order entered against the reporter. Compliance with a grand jury subpoena, therefore, precludes the possibility of an appeal. *In re the Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 509-10 (Pa. 2006). "Requiring the choice between compliance with the subpoena and the possibility of contempt preserves the interest in expeditious grand jury proceedings." *Id.* at 510.

6. Relief

An appellate court can reverse an order denying a motion to quash and quash the subpoena. If the trial court did not consider the various factors in the First Amendment qualified privilege test, the appellate court could remand the case for application of those factors. Finally, where the trial court imposed a contempt sanction, the appellate court could reverse the finding of contempt and imposition of the sanction, or could remand to the trial court for consideration of the proper factors for contempt. *See Bowden*, 838 A.2d at 765.

If a reporter is held in contempt and incarcerated, whether for civil or criminal contempt, the reporter's counsel should consider filing a writ of habeas corpus seeking release because the reporter has been jailed in violation of the reporter's constitutional rights.

IX. Other issues

A. Newsroom searches

There is no Pennsylvania law that addresses the impact of the federal Privacy Protection Act (42 U.S.C. § 2000aa) on newsroom searches or other seizures from the media.

B. Separation orders

There is no Pennsylvania law that addresses the scope of separation orders issued against reporters who are both trying to cover a trial and are on a witness list for that trial.

C. Third-party subpoenas

There is no statutory or case law in Pennsylvania addressing this issue.

D. The source's rights and interests

There is no statutory or case law in Pennsylvania addressing this issue.