REPORTER'S PRIVILEGE: D.C. CIR.

The Reporters Committee for Freedom of the Press

A chapter from our comprehensive compendium of information on the reporter's privilege —the right not to be compelled to testify or disclose sources and information in court — in each state and federal circuit.

The complete project can be viewed at
www.rcfp.org/privilege

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The Reporter's Privilege Compendium: An Introduction

Since the first edition of this guide was published in 2002, it would be difficult to say that things have gotten better for reporters faced with subpoenas. Judith Miller spent 85 days in jail in 2005 for refusing to disclose her sources in the controversy over the outing of CIA operative Valerie Plame. Freelance videographer Josh Wolf was released after 226 days in jail for refusing to testify about what he saw at a political protest. And at the time of this writing, former *USA Today* reporter Toni Locy is appealing her contempt conviction, which was set to cost her as much as $5,000 a day, for not revealing her sources for a story on the anthrax investigations.

This recent round of controversies underscores a problem that journalists have faced for decades: give up your source or pay the price: either jail or heavy fines. Most states and federal circuits have some sort of reporter's privilege —the right to refuse to testify —that allows journalists to keep their sources confidential. But in every jurisdiction, the parameters of that right are different. Sometimes, the privilege is based on a statute enacted by the legislature —a shield law. In others, courts have found the privilege based on a constitutional right. Some privileges cover non-confidential information, some don't. Freelancers are covered in some states, but not others.

In addition, many reporters don't work with attorneys who are familiar with this topic. Even attorneys who handle a newspaper's libel suits may not be familiar with the law on the reporter's privilege in the state. Because of these difficulties, reporters and their lawyers often don't have access to the best information on how to fight a subpoena. The Reporters Committee for Freedom of the Press decided that something could be done about this, and thus this project was born. Compiled by lawyers who have handled these cases an d helped shape the law in their states and federal circuits, this guide is meant to help both journalists who want to know more about the reporter's privilege and lawyers who need to know the ins and outs of getting a subpoena quashed.

Journalists should note that reading this guide is not meant as a substitute for working with a licensed attorney in your state when you try to have a subpoena quashed. You should always consult an attorney before trying to negotiate with a party who wants to obtain your testimony or when appearing in court to get a subpoena quashed or testifying. If your news organization does not have an attorney, or if you are not affiliated with an established organization, the Reporters Committee can help you try to find an attorney in your area.

Above the law?

Outside of journalism circles, the reporter's privilege suffers from an image problem. Critics often look at reporter's shield laws and think that journalists are declaring that they are "above the law," violating the understood standard that a court is entitled to "every man's evidence," as courts themselves often say.

But courts have always recognized the concept of "privileges," allowing certain individuals to refuse to testify, out of an acknowledgment that there are societal interests that can trump the demand for all evidence. Journalists need to emphasize to both the courts and the public that they are not above the law, but that instead they must be able to remain independent, so that they can maintain their traditional role as neutral watchdogs and objective observers. When reporters are called into court to testify for or against a party, their credibility is harmed. Potential sources come to see them as agents of the state, or supporters of criminal defendants, or as advocates for one side or the other in civil disputes.

Critics also contend that exempting journalists from the duty to testify will be detrimental to the administration of justice, and will result in criminals going free for a lack of evidence. But 35 states and the District of Columbia have shield laws, and the Department of Justice imposes restrictions on federal agents and prosecutors who wish to subpoena journalists, and yet there has been no indication that the courts have stopped working or that justice has suffered.

Courts in Maryland, in fact, have managed to function with a reporter's shield law for more than a century. In 1896, after a reporter was jailed for refusing to disclose a source, a Baltimore journalists' club persuaded the General Assembly to enact legislation that would protect them from having to reveal sources' identities in court. The statute has been amended a few times —mainly to cover more types of information and include broadcast journalists once that medium was created. But the state has never had the need to rescind the protection.

And the privilege made news internationally in December 2002 when the appeals court of the United Nations International Criminal Tribunal decided that a qualified reporter's privilege should be applied to protect war correspondents from being forced to provide evidence in prosecutions before the tribunal.

The hows & whys of the reporter's privilege

In the course of gathering news, journalists frequently rely on confidential sources. Many sources claim that they will be subject to retribution for exposing matters of public importance to the press unless their identity remains confidential.

Doctor-patient, lawyer-client and priest-penitent relationships have long been privileged, allowing recipients to withhold confidential information learned in their professional capacity. However, the reporter's privilege is much less developed, and journalists are frequently asked to reveal confidential sources and information they have obtained during newsgathering to attorneys, the government and courts. These "requests" usually come from attorneys for the government or private litigants as demands called subpoenas.

In the most recent phase of a five-year study on the incidence of subpoenas served on the news media, *Agents of Discovery*, The Reporters Committee for Freedom of the Press reported that 1,326 subpoenas were served on 440 news organizations in 1999. Forty-six percent of all news media responding said they received at least one subpoena during 1999.

In criminal cases, prosecutors argue that reporters, like other citizens, are obligated to provide relevant evidence concerning the commission of a crime. Criminal defendants argue that a journalist has information that is essential to their defense, and that the Sixth Amendment right to a fair trial outweighs any First Amendment right that the reporter may have. Civil litigants may have no constitutional interest to assert, but will argue that nevertheless they are entitled to all evidence relevant to their case.

When reporters challenge subpoenas, they argue that they must be able to promise confidentiality in order to obtain information on matters of public importance. Forced disclosure of confidential or unpublished sources and information will cause individuals to re-

fuse to talk to reporters, resulting in a "chilling effect" on the free flow of information and the public's right to know.

When asked to produce their notes, documents, or other unpublished material obtained during news gathering, journalists argue that these subpoenas intrude on the editorial process, and thus violate their First Amendment right to speak without fear of state interference. Some litigants who request information from the media are simply lazy. Rather than investigating to find appropriate witnesses, these litigants find it simpler and cheaper to compel journalists to reveal their sources or to hand over information.

But journalists also have legitimate reasons to oppose subpoenas over published, non-confidential information. Responding to such subpoenas consumes staff time and resources that should be used for reporting and editing.

If a court challenge to a subpoena is not resolved in the reporter's favor, he or she is caught between betraying a source or risking a contempt of court citation, which most likely will include a fine or jail time.

Most journalists feel an obligation to protect their confidential sources even if threatened with jail time. When appeals have been exhausted, the decision to reveal a source is a difficult question of journalism ethics, further complicated by the possibility that a confidential source whose identity is revealed may try to sue the reporter and his or her news organization under a theory of promissory estoppel, similar to breach of contract. The U.S. Supreme Court has held that such suits do not violate the First Amendment rights of the media. (*Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991))

The sources of the reporter's privilege

First Amendment protection. The U.S. Supreme Court last considered a constitutionally based reporter's privilege in 1972 in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Justice Byron White, joined by three other justices, wrote the opinion for the Court, holding that the First Amendment does not protect a journalist who has actually witnessed criminal activity from revealing his or her information to a grand jury. However a concurring opinion by Justice Lewis Powell and a dissenting opinion by Justice Potter Stewart recognized a qualified privilege for reporters. The privilege as described by Stewart weighs the First Amendment rights of reporters against the subpoenaing party's need for disclosure. When balancing these interests, courts should consider whether the information is relevant and material to the party's case, whether there is a compelling and overriding interest in obtaining the information, and whether the information could be obtained from any source other than the media. In some cases, courts require that a journalist show that he or she promised a source confidentiality.

Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dissented from the Court's opinion and said that the First Amendment provided journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority. Although the high court has not revisited the issue, almost all the federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege.

However, some courts, including the federal appeals court in New Orleans (5th Cir.), have recently interpreted *Branzburg* as holding that the First Amendment protects the media from subpoenas only when the subpoenas are being used to harass the press. (*United States v. Smith*, 135 F.3d 963 (5th Cir. 1998)).

State constitutions, common law and court rules. Many states have recognized a reporter's privilege based on state law. For example, New York's highest court recognized a qualified reporter's privilege under its own state constitution, protecting both confidential and non-confidential materials. (*O'Neill v. Oakgrove Construction Inc.*, 71 N.Y.S.2d 521 (1988)). Others states base a reporter's privilege on common law. Before the state enacted a shield law in 2007, the Supreme Court in Washington state recognized a qualified reporter's privilege in civil cases, later extending it to criminal trials. (*Senear v. Daily Journal-American*, 97 Wash.2d 148, 641 P.2d 1180 (1982), *on remand*, 8 Media L. Rep. 2489 (Wash. Super. Ct. 1982)). And in a third option, courts can create their own rules of procedure. The Utah Supreme Court adopted a reporter's privilege in its court rules in 2008, as did the New Mexico high court years before.

Even in the absence of an applicable shield law or court-recognized privilege, journalists occasionally have been successful in persuading courts to quash subpoenas based on generally-applicable protections such as state and federal rules of evidence, which allow the quashing of subpoenas for information that is not relevant or where the effort to produce it would be too cumbersome.

Statutory protection. In addition to case law, 35 states and the District of Columbia have enacted statutes —shield laws —that give journalists some form of privilege against compelled production of confidential or unpublished information. The laws vary in detail and scope from state to state, but generally give greater protection to journalists than the state or federal constitution, according to many courts.

However, shield laws usually have specific limits that exclude some journalists or certain material from coverage. For instance, many of the statutes define "journalist" in a way that only protects those who work full-time for a newspaper or broadcast station. Freelance writers, book authors, Internet journalists, and many others are left in the cold, and have to rely on the First Amendment for protection. Broad exceptions for eyewitness testimony or for libel defendants also can remove protection from journalists, even though these situations often show the greatest need for a reporter's privilege.

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

A subpoena is a notice that you have been called to appear at a trial, deposition or other court proceeding to answer questions or to supply specified documents. A court may later order you to do so and impose a sanction if you fail to comply.

Do I have to respond to a subpoena?

In a word, yes.

Ignoring a subpoena is a bad idea. Failure to respond can lead to charges of contempt of court, fines, and in some cases, jail time. Even a court in another state may, under some circumstances, have authority to order you to comply with a subpoena.

What are my options?

Your first response to a subpoena should be to discuss it with an attorney if at all possible. Under no circumstances should you comply with a subpoena without first consulting a lawyer. It is imperative that your editor or your news organization's legal counsel be advised as soon as you have been served.

Sometimes the person who subpoenaed you can be persuaded to withdraw it. Some attorneys use subpoenas to conduct "fishing expeditions," broad nets cast out just to see if anything comes back. When they learn that they will have to fight a motion to quash their subpoenas, lawyers sometimes drop their demands altogether or agree to settle for less than what they originally asked for, such as an affidavit attesting to the accuracy of a story rather than in-court testimony.

Some news organizations, particularly broadcasters whose aired videotape is subpoenaed, have deflected burdensome demands by agreeing to comply, but charging the subpoenaing party an appropriate fee for research time, tape duplication and the like.

If the person who subpoenaed you won't withdraw it, you may have to fight the subpoena in court. Your lawyer will file a motion to quash, which asks the judge to rule that you don't have to comply with the subpoena.

If the court grants your motion, you're off the hook —unless that order is itself appealed. If your motion isn't granted, the court will usually order you to comply, or at the very least to disclose the demanded materials to the court so the judge may inspect them and determine whether any of the materials must be disclosed to the party seeking them. That order can itself be appealed to a higher court. If all appeals are unsuccessful, you could face sanctions if you continue to defy the court's order. Sanctions may include fines imposed on your station or newspaper or on you personally, or imprisonment.

In many cases a party may subpoena you only to intimidate you, or gamble that you will not exercise your rights. By consulting a lawyer and your editors, you can decide whether to seek to quash the subpoena or to comply with it. This decision should be made with full knowledge of your rights under the First Amendment, common law, state constitution or statute.

They won't drop it. I want to fight it. Do I have a chance?

This is a complicated question.

If your state has a shield law, your lawyer must determine whether it will apply to you, to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, or if your situation seems to fall outside its scope, the state's courts may have recognized some common law or constitutional privilege that will protect you. Each state is different, and many courts do not recognize the privilege in certain situations.

Whether or not a statutory or other privilege protects you in a particular situation may depend on a number of factors. For example, some shield laws provide absolute protection in some circumstances, but most offer only a qualified privilege. A qualified privilege generally creates a presumption that you will not have to comply with a subpoena, but it can be overcome if the subpoenaing party can show that information in your possession is essential to the case, goes to the heart of the matter before the court, and cannot be obtained from an alternative, non-journalist source.

Some shield laws protect only journalists who work full-time for a newspaper, news magazine, broadcaster or cablecaster. Freelancers, book authors, scholarly researchers and other "non-professional" journalists may not be covered by some statutes.

Other factors that may determine the scope of the privilege include whether the underlying proceeding is criminal or civil, whether the identity of a confidential source or other confidential information is involved, and whether you or your employer is already a party to the underlying case, such as a defendant in a libel suit.

The decision to fight may not be yours alone. The lawyer may have to consider your news organization's policy for complying with subpoenas and for revealing unpublished information or source names. If a subpoena requests only published or broadcast material, your newspaper or station may elect to turn over copies of these materials without dispute. If the materials sought are unpublished, such as notes or outtakes, or concern confidential sources, it is unlikely that your employer has a policy to turn over these materials —at least without first contesting the subpoena.

Every journalist should be familiar with his or her news organization's policy on retaining notes, tapes and drafts of articles. You should follow the rules and do so consistently. If your news organization has no formal policy, talk to your editors about establishing one. Never destroy notes, tapes, drafts or other documents once you have been served with a subpoena.

In some situations, your news organization may not agree that sources or materials should be withheld, and may try to persuade you to reveal the information. If the interests of the organization differ from yours, it may be appropriate for you to seek separate counsel.

Can a judge examine the information before ordering me to comply with a subpoena?

Some states require or at least allow judges to order journalists to disclose subpoenaed information to them before revealing it to the subpoenaing party. This process, called *in camera* review, allows a judge to examine all the material requested and determine whether it is sufficiently important to the case to justify compelled production. The state outlines will discuss what is required or allowed in your state.

Does federal or state law apply to my case?

A majority of the subpoenas served on reporters arise in state cases, with only eight percent coming in federal cases, according to the Reporters Committee's 1999 subpoena survey, *Agents of Discovery.*

State trial courts follow the interpretation of state constitutional, statutory or common law from the state's highest court to address the issue. When applying a First Amendment privilege, state courts may rely on the rulings of the United States Supreme Court as well as the state's highest court.

Subpoenas in cases brought in federal courts present more complicated questions. Each state has at least one federal court. When a federal district court is asked to quash a subpoena, it may apply federal law, the law of the state in which the federal court sits, or even the law of another state. For example, if a journalist from one state is subpoenaed to testify in a court in another state, the enforcing court will apply the state's "choice of law" rules to decide which law applies.

Federal precedent includes First Amendment or federal common law protection as interpreted by the United States Supreme Court, rulings of the federal circuit court of appeals for the district court's circuit, or earlier decisions by that same district court. There is no federal shield law, although as of May 2008 a bill had passed the House and was moving to the Senate floor.

The federal district court will apply the state courts' interpretation of state law in most circumstances. In the absence of precedent from the state's courts, the federal district court will follow prior federal court interpretations of the state's law. In actions involving both federal and state law, courts differ on whether federal or state law will apply.

Twelve federal circuits cover the United States. Each circuit has one circuit (appellate) court, and a number of district (trial) courts. The circuit courts must follow precedent established by the U.S. Supreme Court, but are not bound by other circuits' decisions.

Are there any limits on subpoenas from federal agents or prosecutors?

Ever since 1973, the Attorney General of the United States has followed a set of guidelines limiting the circumstances in which any agents or employees of the Department of Justice, including federal prosecutors and FBI agents, may issue subpoenas to members of the news media or subpoena journalists' telephone records from third parties. *(28 C.F.R. 50.10)*

Under the guidelines, prosecutors and agents must obtain permission from the Attorney General before subpoenaing a member of the news media. Generally, they must exhaust alternative sources for information before doing so. The guidelines encourage negotiation with the news media to avoid unnecessary conflicts, and specify that subpoenas should not be used to obtain "peripheral, nonessential or speculative" information.

In addition, journalists should not be questioned or arrested by Justice employees without the prior approval of the Attorney General (unless "exigent circumstances preclude prior approval") and agents are not allowed to seek an arrest warrant against a journalist or present evidence to a grand jury against a journalist without the same approval.

Employees who violate these guidelines may receive an administrative reprimand, but violation does not automatically render the subpoena invalid or give a journalist the right to sue the Justice Department.

The guidelines do not apply to government agencies that are not part of the federal Department of Justice. Thus agencies like the National Labor Relations Board are not required to obtain the Attorney General's permission before serving a subpoena upon a member of the news media.

Do the news media have any protection against search warrants?

Subpoenas are not the only tool used to obtain information from the news media. Sometimes police and prosecutors use search warrants, allowing investigators to enter newsrooms and search for evidence directly rather than merely demanding that journalists release it.

The U.S. Supreme Court held that such searches do not violate the First Amendment. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Congress responded by passing the federal Privacy Protection Act in 1980. *(42 U.S.C. 2000aa)*

In general, the Act prohibits both federal and state officers and employees from searching or seizing journalists' "work product" or "documentary materials" in their possession. The Act provides limited exceptions that allow the government to search for certain types of national security information, child pornography, evidence that the journalists themselves have committed a crime, or materials that must be immediately seized to prevent death or serious bodily injury. "Documentary materials" may also be seized if there is reason to believe that they would be destroyed in the time it took to obtain them using a subpoena, or if a court has ordered disclosure, the news organization has refused and all other remedies have been exhausted.

Even though the Privacy Protection Act applies to state law enforcement officers as well as federal authorities, many states, including California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas and Washington, have their own statutes providing similar or even greater protection. *(See section IX.A. in the state outlines.)* Other states, such as Wisconsin, require that search warrants for documents be directed only at parties suspected of being "concerned in the commission" of a crime, which generally exempts journalists.

If law enforcement officers appear with a warrant and threaten to search your newsroom unless you hand over specific materials to them, contact your organization's attorney *immediately*. Ask the officers to delay the search until you have had an opportunity to confer with your lawyer. If the search proceeds, staff photographers or a camera crew should record it.

Although the news organization staff may not impede the search, they are not required to assist with it. But keep in mind that the warrant will probably list specific items to be seized, and you may decide it is preferable to turn over a particular item rather than to allow police to ransack desks and file cabinets or seize computers.

After the search is over, immediately consult your attorney about filing a suit in either federal or state court. It is important to move quickly, because you may be able to obtain emergency review by a judge in a matter of hours. This could result in your seized materials being taken from the law enforcement officials and kept under seal until the dispute is resolved.

Another option allows you to assert your claim in an administrative proceeding, which may eventually lead to sanctions against the official who violated the act. You would not receive damages, however. Your attorney can help you decide which forum will offer the best remedy in your situation.

Whichever option you choose, a full hearing will vindicate your rights in nearly every case, and you will be entitled to get your materials back, and in some cases, monetary damages including your attorney's fees.

The Reporter's Privilege Compendium: A User's Guide

This project is the most detailed examination available of the reporter's privilege in every state and federal circuit. It is presented primarily as an Internet document (found at www.rcfp.org/privilege) for greater flexibility in how it can be used. Printouts of individual state and circuit chapters are made available for readers' convenience.

Every state and federal section is based on the same standard outline. The outline starts with the basics of the privilege, then the procedure and law for quashing a subpoena, and concludes with appeals and a handful of other issues.

There will be some variations on the standard outline from state to state. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

For our many readers who are not lawyers. This project is primarily here to allow lawyers to fight subpoenas issued to journalists, but it is also designed to help journalists understand the reporter's privilege. (Journalists should *not* assume that use of this book will take the place of consulting an attorney before dealing with a subpoena. You should contact a lawyer if you have been served with a subpoena.) Although the guides were written by lawyers, we hope they are useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a legal citation for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 F.2d 456 means the case could be found in the Federal Reports, second series, volume 123, starting at page 456. In most states, the cites will be to the official reporter of state court decisions or to the West Publishers regional reporter that covers that state.

Note that the complete citation for a case is often given only once, and subsequent cites look like this: "*Jackson* at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Because this outlines were written for each state, yet searches and comparisons result in various states and sections being taken out of the sequence in which they were written, it may not always be clear what these second references refer to. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively. You may have to work backwards through that state's outline to find the first reference in some cases.

We have encouraged the authors to avoid "legalese" to make this guide more accessible to everyone. But many of the issues are necessarily technical and procedural, and removing all the legalese would make the guides less useful to lawyers who are trying to get subpoenas quashed.

Updates. This project was first posted to the Web in December 2002. The last major update of all chapters was completed in September 2007. As the outlines are updated, the copyright notice on the bottom of the page will reflect the date of the update. All outlines will not be updated on the same schedule.

REPORTER'S PRIVILEGE COMPENDIUM

D.C. CIR.

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I. Introduction: History & Background

Several high profile cases -– including one involving the 85-day jailing of a *New York Times* reporter who defied a court order to reveal her source to a grand jury -– have reshaped the landscape of the reporter's privilege within the D.C. Circuit. These cases have reinforced the existence of a First Amendment privilege in the civil context, all but foreclosed its existence in the grand jury context, and raised the possibility of a federal common law reporter's privilege available in all contexts.

The United States Court of Appeals for the District of Columbia Circuit, and the District Court for the District of Columbia, continue to recognize a qualified First Amendment privilege in civil cases against compelled disclosure of sources and other unpublished information; however, the factors to be considered by the court in determining whether the privilege is overcome have been slightly altered. To overcome the privilege it still must be demonstrated that (1) the party seeking the information has exhausted all reasonable, alternative means of identifying the source and (2) the information goes to the heart of the plaintiff's claim. *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005); *see also Mgmt. Info. Techs., Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 471 (D.D.C. 1993); *Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984). However, whether and to what extent the court must engage in a separate balancing of the public's interest in protecting the newsgathering process against the private interest in disclosure remains an active topic of judicial debate. *See Lee v. Dept. of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (J. Tatel, dissenting and J. Garland, dissenting from denial of rehearing *en banc*) (Circuit Court split 4-4; dissents assert panel in *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005), failed to balance the public and private interests); *Lee v. Dept. of Justice*, 401 F.Supp.2d 123 (D.D.C. 2005) (district court holds qualified privilege standard does not include a third factor to balance the public benefits and private harms of forced disclosure); *cf. Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 335-36 (D.D.C. 1994) (concluding that the plaintiff had "demonstrated no overwhelming or compelling societal interest in overcoming the presumption of favoring First Amendment protections for a reporter's sources," and suggesting that if the information sought demonstrated government corruption the societal interest in disclosure may overcome the First Amendment protection).

The privilege remains strongest in civil cases where the journalist or news organization is not a party. *See, e.g., Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). The courts also will evaluate the privilege, but accord it somewhat less weight, in civil cases where the press is a party. *See, e.g., Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974) (affirming District Court order directing journalists to identify sources who were eyewitnesses to events reported on).

The qualified First Amendment privilege is also recognized in enforcement actions by federal agencies, although it is not quite as strong as in the civil context. *See U.S. Commodity Futures Trading Commission v. McGraw-Hill Companies, Inc.*, 390 F.Supp.2d 27 (D.D.C. 2005); *U.S. Commodity Futures Trading Commission v. Whitney*, 441 F.Supp.2d 61 (D.D.C. 2006).

The D.C. Circuit, however, does not appear to recognize a First Amendment reporter's privilege in the grand jury context. *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006). The press may still seek protection from the court where harassment or bad faith can be established. *See In re Special Counsel Investigation*, 332 F.Supp.2d 26 (D.D.C. 2004). Some case law recognizes the privilege in criminal proceedings outside the grand jury context, which cannot be overcome unless the party seeking the information shows a compelling need for the information, *see, e.g., United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000), *cert. denied sub nom., Ahn v. United States*, 532 U.S. 924 (2001) (affirming lower court's granting of reporters' motion to quash subpoena that would have required reporters to reveal sources of story, concluding that reporters' testimony was not relevant to the case); *United States v. Hubbard*, 493 F. Supp. 202, 205 (D.D.C. 1979) (quashing subpoena from criminal defendant to reporter on ground of "newsman's privilege" because alternative means of obtaining the information existed and the "testimony of the reporter would be far less than necessary to a fair resolution of th[e] case"). But a recent opinion calls into question the application of the privilege in these other criminal contexts. *United States v. Libby*, 432 F. Supp. 2d 26 (D.D.C. 2006) (declining to recognize a First Amendment reporter's privilege in context of criminal prosecution at trial stage).

Although it has yet to command a majority of the D.C. Circuit, recent opinions have raised the hope for the eventual recognition of a federal common law reporter's privilege in both the civil and criminal contexts. District court opinions have rejected the existence of the common law privilege, *In re Special Counsel Investigation*, 338 F. Supp. 2d 16 (D.D.C. 2004) (the ruling of *Branzburg v. Hayes* forecloses this issue); *Lee v. Dept. of Justice*, 401 F.Supp.2d 123 (D.D.C. 2005) (declining to create a federal common law privilege in civil context), the D.C. Circuit has not ruled on the issue. *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006) (no need to reach question of whether a common law reporter's privilege exists, because if one existed, it would be overcome in this case). However, Judge Tatel has issued well-reasoned concurrences in the D.C. Circuit that strongly advocate for this privilege. *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005) (J. Tatel, concurring), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006); *In re Grand Jury Subpoena Miller*, 405 F.3d 17 (D.C. Cir. 2005) (J. Tatel, concurring).

II. Authority for and source of the right

A. Shield law statute

The D.C. Circuit will not apply the D.C. Free Flow of Information Act, D.C. Code Ann. §§ 16-4702 - 16-4703 (2001) in federal causes of action in federal court. *Lee v. Dept. of Justice*, 287 F.Supp.2d 15 (D.D.C. 2003); *In re Special Counsel Investigation*, 332 F.Supp.2d 26 (D.D.C. 2004).

B. State constitutional provision

Not relevant.

C. Federal constitutional provision

The D.C. Circuit holds that the First Amendment confers a qualified privilege on the news media against compelled disclosure. "The First Amendment guarantees a free press primarily because of the important role it can play as a 'vital source of public information.' . . . But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with [the press'] news gathering ability." *Zerilli v. Smith*, 656 F.2d 705, 710-11 (D.C. Cir. 1981) (internal footnotes omitted); *see also Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

D. Other sources

While not commanding a majority of the Circuit, several judges have expressed strong support for a common law reporter's privilege. *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005) (J. Tatel, concurring), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006); *In re Grand Jury Subpoena Miller*, 405 F.3d 17 (D.C. Cir. 2005) (J. Tatel, concurring); *see also In re Grand Jury Subpoena Miller*, 438 F.2d 1138 (D.C. Cir. 2006) (per curiam); *U.S. v. Libby*, 432 F.Supp.2d 26 (D.C. Cir. 2006). *But see In re Special Counsel Investigation*, 338 F. Supp. 2d 16 (D.D.C. 2004) (the ruling of *Branzburg v. Hayes* forecloses this issue); *Lee v. Dept. of Justice*, 401 F.Supp.2d 123 (D.D.C. 2005) (declining to create a federal common law privilege in civil context).

The common law privilege would stem from Federal Rule of Evidence 501, authorizing federal courts to develop evidentiary privileges in federal question cases according to "the principles of the common law as they may be interpreted . . . in light of reason and experience." 397 F.3d at 989 (quoting Fed. R. Evid. 501), opinion superseded by 438 F.3d 1141 (D.C. Cir. 2006). Circuit Judge Tatel, the leading proponent for the common law privilege, explains that "reason and experience" call for recognition of the privilege in light of the fact that 49 states plus the District of Columbia have recognized at least a qualified reporter's privilege; the federal courts have routinely limited discovery of sources in both civil and criminal contexts; and the Department of Justice guidelines for issuing subpoenas to reporter's establishes a federal policy of protecting newsgathering. *Id.* at 995.

The privilege would be a qualified one, overcome only where (1) the requesting party demonstrates a need for the information; (2) that party has exhausted alternative sources, and (3) the court determines that "the public interest in protecting a reporter's sources" is outweighed by "the private interest in compelling disclosure." *Id.* at 997-998.

III. Scope of protection

A. Generally

The D.C. federal courts have extended the qualified privilege against compelled disclosure to both confidential sources and other unpublished information. In either situation, the person seeking the disclosure can only overcome the privilege by showing: (1) the party seeking the information has exhausted all reasonable alternative means of identifying the source and (2) the information sought goes to the heart of the plaintiff's claim. *See, e.g. Tripp v. Dept. of Defense*, 284 F.Supp.2d 50 (D.D.C. 2003); *Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981) (holding that civil discovery of material developed in preparation of a news article is equally as invidious as the compelled disclosure of confidential sources).

B. Absolute or qualified privilege

The privilege against disclosure for news media sources and news or information is a qualified privilege under D.C. federal case law. *See e.g., Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 118 (D.D.C. 2002) (noting in general that qualified First Amendment privilege may be overcome by a sufficient showing by the party seeking the information.). The D.C. Circuit has stated in dicta that if a federal common law privilege were to exist, it would similarly be a qualified privilege. *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005), opinion superseded by 438 F.3d 1141 (D.C. Cir. 2006).

C. Type of case

1. Civil

The privilege is the strongest in the civil context. The D.C. Circuit has held that in "the ordinary case," the privilege should prevail over civil litigants' interests:

> Although [*Branzburg v. Hayes*, 408 U.S. 665 (1972)] may limit the scope of the reporter's First Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective criminal law enforcement is absent, that case is not controlling . . . . In general, when striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press. . . . Thus, in the ordinary case, the civil litigant's interest in disclosure should yield to the journalist's privilege.

Zerilli v. Smith, supra, 656 F.2d at 711-12; *see also Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005) (reaffirming First Amendment privilege in civil cases); *U.S. CFTC v. McGraw-Hill Companies, Inc.*, 390 F. Supp. 2d 27 (D.D.C. 2005) (noting that "in civil cases, the privilege typically prevails because any interest in overcoming the privilege is by definition a private rather than a public interest"); *Mgmt. Info. Techs., Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 471 (D.D.C. 1993) (noting that "[t]he D.C. Circuit has made it clear that in a civil case the reporter's privilege is entitled to great weight").

2. Criminal

The D.C. Circuit, citing *Branzburg v. Hayes*, has declined to recognize the existence of qualified First Amendment privilege in the grand jury context. *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006). The press, however, may still seek protection from the court where harassment or bad faith can be established. *See In re Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004). In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court held that, unless she can show harassment, a journalist may be required to testify in grand jury investigations that are conducted in good faith. In *Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1049 (D.C. Cir. 1978), the court broadly applied *Branzburg* and held that, in a criminal investigation, journalists "certainly have no right to resist good faith subpoenas duces tecum directed at a third-party's business records." Specifically, the court held that journalists have no First Amendment privilege to receive notice of or object to subpoenas directed to telephone companies for journalists' long-distance telephone billing records. "The First Amendment does not guarantee journalists, or other citizens, a special right to immunize themselves from good faith investigations simply be-

cause they may be engaged in gathering information." *Id.* at 1051; *see, e.g., United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972) (denying motion to quash filed by *Los Angeles Times* Washington Bureau Chief and requiring him to produce tapes of interview with chief prosecution witness, to give defense access to any impeachment evidence that the tapes may contain).

There is case law recognizing the privilege in criminal proceedings outside the grand jury context unless the party seeking the information shows a compelling need for the information. *See, e.g., United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000), *cert. denied sub nom., Ahn v. United States*, 532 U.S. 924 (2001) (affirming lower court's granting of reporters' motion to quash subpoena that would have required reporters to reveal sources of story, concluding that reporters' testimony was not relevant to the case); *United States v. Hubbard*, 493 F. Supp. 202, 205 (D.D.C. 1979) (quashing subpoena from criminal defendant to reporter on ground of "newsman's privilege" because alternative means of obtaining the information existed and the "testimony of the reporter would be far less than necessary to a fair resolution of th[e] case"). However, a recent opinion calls into question the application of the privilege in these other criminal contexts. *See United States v. Libby*, 432 F. Supp. 2d 26 (D.D.C. 2006) (declining to recognize a First Amendment reporter's privilege in context of criminal prosecution at trial stage where reporter involved in activities that are predicate for offense charged).

3. Grand jury

The D.C. Circuit, citing *Branzburg v. Hayes*, has declined to recognize the existence of qualified First Amendment in the grand jury context. *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006). However, the press, like other citizens, may still seek protection from the court where harassment or bad faith can be established. *See, e.g., In re Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004); *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 8 (D.D.C. 1996) (the well-established rule for evaluating subpoenas under Fed. R. Crim. P. 17(c) applies to subpoenas implicating the First Amendment); *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567 (D.C. Cir. 1977) (holding government need not make preliminary showing before newsperson may be compelled to appear before a grand jury; newsperson not immune from grand jury questioning absent bad faith or harassment). In *In re Grand Jury 95-1*, *supra*, the federal district court declined to distinguish between cases in which journalists are subpoenaed to testify about criminal conduct which they observe and those seeking testimony about the journalists' general news gathering and editorial functions. 59 F. Supp. 2d at 13. "The line should be drawn at the nature of the proceeding; not depending on how the reporter obtained the information." *Id.* In *U.S. v. Libby*, the court held that no First Amendment privilege from a Rule 17(c) subpoena could apply where the reporter was personally involved in the activities that are the predicate for the criminal offense. 432 F. Supp. 2d 26, 44 (D.D.C. 2006).

D. Information and/or identity of source

The qualified privilege specifically protects the identity of a source absent a compelling need for disclosure, i.e., that the source's identity is crucial to the matter and the party seeking the information has exhausted all other reasonable alternative means of obtaining the information. *See e.g., Zerilli*, 656 F. 2d at 713; *Blumenthal v. Drudge*, 186 F.R.D. 236, 244 (D.D.C. 1999); *Grunseth*, 868 F. Supp. at 335.

Case law from this jurisdiction also suggests that the privilege protects information that implicitly identifies a source. For example, in *Tavoulareas v. Piro*, 93 F.R.D. 35, 40 (D.D.C. 1981), the court determined that whether the media defendant could be compelled to respond to the plaintiff's discovery requests depended in part on whether the responses would reveal the identities of any confidential sources and stated: "To the extent, however, that The Post concludes in exercise of good faith that a particular response may expose a source to whom the defendants have extended an assurance of confidentiality, The Post need not answer." *See also e.g., NLRB v. Mortensen*, 701 F. Supp. 244, 247 (D.D.C. 1988) (rejecting the argument that First Amendment interests were not implicated because the Board sought only confirmation or verification of statements and not the identity of confidential sources, stating that "[r]egardless of whether the movant seeks confidential or non-confidential sources, or whether they seek disclosure or verification of statements, the Board is attempting to examine the reportorial and editorial process.").

E. Confidential and/or non-confidential information

Looking to the decisions of other jurisdictions for guidance, courts in this circuit have observed that a party seeking non-confidential information generally may make a lesser showing of need and materiality than one seeking the identity of confidential sources. *NLRB v. Mortensen*, 701 F. Supp. at 248 (holding that NLRB subpoenas seeking authentication of quotes published in *Washington Post* articles necessarily implicate the First Amendment interests of the journalists; court applied the *Branzburg* balancing test and ultimately ordered the journalists to comply with the subpoenas); *but see Tripp v. Dept. of Defense*, 284 F.Supp.2d 50 (D.D.C. 2003) ("While the D.C. Circuit has never ruled directly on the issue, other Circuits, as well as District Courts within this Circuit, have concluded that the qualified 'reporter's privilege' protects both confidential and non-confidential information obtained by the reporter during the course of the reporter's newsgathering efforts."); *cf. Tavoulareas v. Piro*, 93 F.R.D. 35 (D.D.C. 1981) (protecting confidential sources while requiring *Washington Post* to answer questions regarding once-confidential sources discovered through plaintiff's alternative efforts). In *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 119 (D.D.C. 2002), the court surveyed other decisions addressing whether the qualified privilege applies to information regardless of confidentiality, concluding that nonconfidential information is privileged. The *Hutira* court stated, however, that it needed to take the nonconfidential nature of the privilege into account because "journalists have a stronger interest against compelled disclosure of confidential information than they do nonconfidential information." *Id*. at 121.

Yet, the courts of this circuit have held that as to resource materials — as opposed to source's identities — the balance of interest test applies whether the material sought is confidential or non-confidential. *See, e.g.*, *Maughan v. NL Indus.*, 524 F. Supp at 95 (noting that compelling a reporter to produce resource material such as personal notes no doubt constitutes a "significant intrusion into and certainly a chilling effect upon the newsgathering and editorial process," and thus, the "compelled production of such materials is equally as invidious as the compelled disclosure of . . . confidential informants.") (quotations omitted); *see also Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984) (same); *Tripp, supra*, 284 F.Supp.2d at 54.

It should be noted as an aside that in *Steele v. Isikoff*, 130 F. Supp. 2d 23, 31 (D.D.C. 2000), the court held that a reporter's promise of confidentiality to a source is a moral obligation not a contractual requirement. Consequently, the court held that a source has no breach of contract remedy available to it if the reporter does not keep his promise of confidentiality.

F. Published and/or non-published material

Courts in this circuit have held that the privilege protects not only the sources of a reporter's information, but also a reporter's notes, diaries, and any other material generated in connection with the editorial process. *See, e.g.*, *Maughan v. NL Indus.*, 524 F. Supp 93, 95 (D.D.C. 1981) (noting that compelling a reporter to produce resource material such as personal notes no doubt constitutes a "significant intrusion into and certainly a chilling effect upon the newsgathering and editorial process," and thus, the "compelled production of such materials is equally as invidious as the compelled disclosure of . . . confidential informants.") (quotations omitted); *see also Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984) (same); *Tripp v. Dept. of Defense*, 284 F. Supp. 2d 50 (D.D.C. 2003).

In *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006), the court refused to assign any importance to the fact that the reporters did not reveal the information obtained from the confidential source – the identity of which was sought by the Special Counsel investigating the leak of classified information involving the identity of a CIA covert agent. The Circuit Court explained:

> Narrowly drawn limitations on the public's right to evidence, testimonial privileges apply "only where necessary to achieve [their] purpose," *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), and in this case the privilege's purpose is to promote dissemination of useful information. It thus makes no difference how these reporters responded to the information received, any more than it matters whether an attorney drops a client who seeks criminal advice (communication subject to the crime-fraud exception) or a psychotherapist seeks to dissuade homicidal plans revealed during counseling (information *Jaffe* [*v. Redmond*] suggested would not be privileged, see 518 U.S. [1] at 18 n. 19, 116 S.Ct. 1923). In all such cases, because the communication is unworthy of protection, recipients' reactions are irrelevant to whether their testimony may be compelled in an investigation of a source.

Id. at 1003.

G. Reporter's personal observations

Case law suggests that, at least in the grand jury context, whether or not the subpoena concerns the reporter's direct observations is of no legal significance. *See In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 8 (D.D.C. 1996) (rejecting the newsperson's argument of a distinction between cases in which journalists are subpoenaed to testify about criminal conduct which they observe and write about, and those seeking testimony about journalists' general news gathering and editorial functions). However, in *U.S. v. Libby*, the court held that no First Amendment privilege from a Fed. R. Crim. P. 17(c) subpoena could apply where the reporter was personally involved in the activities that are the predicate for the criminal offense. 432 F. Supp. 2d 26, 44 (D.D.C. 2006).

H. Media as a party

The D.C. Circuit has noted that when the media is a party, the equities weigh somewhat more heavily in favor of disclosure of a source. *See Zerilli*, 656 F.2d at 714; *SEC v. McGoff*, 647 F.2d 185 (D.C. Cir. 1981) (concluding that subpoenas duces tecum sought by SEC in its investigation of a publisher and his media companies were not overly broad and subject to First Amendment objection, where publisher was not a disinterested third party but was the principal actor in the matters the SEC sought to investigate, and the SEC demonstrated a substantial relationship between the information sought and an important government interest; lower court authorized publisher, however, to retain documentation relating solely to "editorial policy" or news gathering); *see also generally Mgmt. Info Techs., Inc.*, 151 F.R.D. at 477 (noting that a "leading indicator for the importance of the reporter's information to the case is whether the reporter is a party"); *Tripp v. Dept. of Defense*, 284 F.Supp.2d 50 (D.D.C. 2003) (same).

And in *Anderson v. Nixon*, 444 F. Supp. 1195 (D.D.C. 1978), the court required that the journalist-plaintiff answer questions in pre-trial depositions regarding confidential sources, warning that refusal to answer would result in default. The court suggested that the plaintiff waived his qualified privilege by initiating and maintaining the lawsuit. The case ultimately was dismissed because the plaintiff continued to assert the privilege.

I. Defamation actions

Case law suggests that even in defamation cases involving a media defendant, the same balancing test applies to determine whether the reporter's privilege under the First Amendment can bar disclosure of news information. *See e.g.*, *Zerilli*, 656 F.2d at 714 ("disclosure is by no means automatic in libel cases"); *Dowd v. Calabrese*, 577 F. Supp. 238 (D.D.C. 1983). Thus, a defamation plaintiff, as in any other case, must show the relevance of the sources' identities to the plaintiff's case — particularly as it affects plaintiff's burden of proof — as well as the absence of alternative means of obtaining the information or the exhaustion of every reasonable alternative source of information. *Id.* at 241. If the plaintiff fails to satisfy this burden the privilege will attach. The privilege, however, may not be used as a sword and a shield. The courts will not permit the journalist-defendant to use the existence of the unidentified sources as evidence of truth or lack of actual malice. *Id*. at 244. Additionally, if the disclosure would only go to a facet of the case that would, at most, involve a collateral matter, and result in cumulative evidence undermining the reporter's credibility, the privilege will attach. *See e.g.*, *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19, 22 (D.D.C. 1986); *Dowd*, 577 F. Supp. 238. Moreover, speculation that the source does not exist or will say the reporter published inaccurate information is not sufficient evidence to overcome the privilege. *Liberty Lobby*, 111 F.R.D. at 22 n.3; *Dowd*, 577 F. Supp. at 241. Conversely, if the unidentified source is the basis for the statement at the heart of the libel action, i.e., the only source of the story, the equities generally weigh in favor of disclosure. *See Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974) (holding privilege did not attach because the identity of the source was central to the plaintiff's proof); *Liberty Lobby*, 111 F.R.D. at 21; *Dowd*, 577 F. Supp. at 243 n. 17.

Essentially, in a defamation case (as in any other case), the person seeking the information must show: (1) the information cannot be obtained by alternative means, and (2) a compelling need for the information exists in that it is crucial to the plaintiff's case and without it the reporter would be effectively shielded from liability. *Liberty Lobby*, 111 F.R.D. at 23.

IV. Who is covered

The jurisdiction's case law suggests that the privilege applies to members of the news media. As shown below in section A.1.a., this jurisdiction does not narrowly restrict members of the news media to those persons working for established publications or programs. Rather, the courts look more broadly to whether the person who seeks to invoke the privilege intended to disseminate the information to the public.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

In *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19, 20 (D.D.C. 1986), the court held that "the privilege is not limited to the writs of large established newspapers and media enterprises but is equally applicable to the sole publisher of a newsletter or other writing or paper distributed to the public to inform, to comment or to criticize, albeit such a publication may be unpopular in the eyes of many of its potential readers." Similarly, in *Alexander v. FBI*, 186 F.R.D. 21, 50 (D.D.C. 1998) the court, following the Second Circuit's decision in *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 142 (2d. Cir. 1987), held that whether a person is a journalist or reporter, and thus is protected by the First Amendment privilege, depended upon the person's interest at the inception of the information-gathering process. An individual who is involved in activities associated with gathering and disseminating the news, although not a member of the "institutionalized press," may successfully claim the privilege if she demonstrates "through competent evidence the intent to use material — sought, gathered, or received — to disseminate information to the public and that such intent existed at the inception of the news gathering process." *Alexander*, 186 F.R.D. at 50 (quotation omitted). The court explained that essentially the issue of whether someone falls within the scope of the definition of a journalist or reporter is a fact issue for the court. *Id.* The court noted that "prior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination and that the primary relationship between the one seeking to invoke the privilege and his sources must have as its basis the intent to disseminate the information to the public garnered from that relationship." *Id.* (quotation omitted). Consequently, the court determined that a former aide to President Clinton, George Stephanopoulos, could invoke the privilege when he made an adequate showing that at the time he acquired information for his book, his intent was to disseminate the information to the public. *Id.* Additionally, Stephanopoulos offered evidence that he made regular appearances as a news commentator and news analyst on a Sunday morning television program. *Id. See also Tripp v. Dept. of Defense*, 284 F.Supp.2d 50, 57-58 (D.D.C. 2003) (applying this analysis and finding that a reporter for military publication *Stars and Stripes* qualified for First Amendment protections).

b. Editor

No statutory or case law addressing this issue exists.

c. News

No statutory or case law addressing this issue exists.

d. Photo journalist

No statutory or case law addressing this issue exists.

e. News organization / medium

None of the federal cases in D.C. specifically define a news organization. However, in *United States v. Hubbard*, 493 F. Supp. 202, 205 (D.D.C. 1979), the court rejected the notion that a newsperson reporting for a newspaper should be distinguished from a newsperson who is writing a book for his own personal gain. The court, noting that reporters normally receive salaries for their news gathering efforts, ruled that the fact that the news gathering is conducted for financial gain is legally irrelevant, and stated: "Such financial gain does not taint the importance of the services to our cherished first amendment goals." *Id.* The court, citing the Supreme Court decision *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938), also noted that the reporter's privilege must encompass all news gathering efforts, not simply those for newspapers: "'The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"

Also citing *Lovell*, the district court in *Tripp v. Dept. of Defense* held that the military publication Stars and Stripes is a newspaper and therefore "media" that qualifies for First Amendment protections. 284 F.Supp.2d 50, 55-57 (D.D.C. 2003) (case law recognizing *Stars and Stripes* as a "newspaper," recent legislative history, DOD directives, and an affidavit of the Editorial Director support finding that the publication should be afforded First Amendment protections).

2. Others, including non-traditional news gatherers

The U.S. Supreme Court has held that the concept of "press" should be given broad meaning: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). This suggests that "press," for purposes of applying the reporter's privilege, includes non-traditional news gatherers. *See also* the discussion of *Alexander v. FBI*, 186 F.R.D. 21 at section A.1.a, *supra*.

District courts in the Circuit have extended the privilege to the publisher of daily and bi-weekly indices and price ranges for the natural gas market, where the information was based, in part, on transaction data submitted by participating companies as well as extra-market factors that may affect the market. *U.S. CFTC v. McGraw-Hill Companies, Inc.*, 390 F. Supp. 2d 27 (D.D.C. 2005); *U.S. CFTC v. Whitney*, 441 F. Supp. 2d 61 (D.D.C. 2006). The court found that the publication engaged in "journalistic analysis and judgment in addition to simply reporting data." *Id.* at 32. It further explained that:

> While the record reflects that Platts [the publisher and a division of McGraw-Hill] may not be involved in what is most commonly considered traditional news gathering, the privilege applies to a broad range of news gatherers. *Cf. Branzburg*, 408 U.S. at 703-05, 92 S.Ct. 2646 (noting that any attempt to define news or a newsgatherer for purposes of the privilege treads dangerously close to discriminating on the basis of content); 23 Wright Et Al., 23 Fed. Prac. & Proc. Evid. § 5426 (2005) (noting that, under Federal Rule of Evidence 501, "[p]erhaps the most difficult question in formulating the privilege is determining the persons to whom it applies" but that "[t]he weight of authority indicates an extremely broad view of who should be able to claim the privilege.").

Id. See also In re Grand Jury Subpoena Miller, 397 F.3d 964, 979-80 (J. Sentelle, concurring), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006) (in rejecting the creation of a federal common law privilege, Judge Sentelle noted the difficulty in defining who the privilege would apply to and questioned whether it should apply to "the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way"); *but see Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999) (extending First Amendment privilege to defendant who maintained "Drudge Report" site on World Wide Web).

B. Whose privilege is it?

The First Amendment privilege against certain press disclosures belongs to a person who is involved in a news gathering or news disseminating activity. *See Lohrenz v. Donnelly*, 187 F.R.D. 1, 7 (D.D.C. 1999) ("court is not aware of any privilege that allows a party, especially a non-reporter to cloak documents or knowledge simply by providing this information to a member of the media."); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198 (D.D.C. 1978) ("Although the public interest in a fully informed press provides its basis, the privilege is that of the reporter not the informant or the public.") (quotations omitted); *see also In re Grand Jury Subpoena Miller*, 397 F.3d 964, 1000 (J. Tatel, concurring) (Because "the reporter privilege safeguards public dissemination of information –- the *reporter*'s enterprise, not the sources," the privilege belongs to the reporter.), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006) (emphasis in original).

V. Procedures for issuing and contesting subpoenas

The following sections are concerned with the legal procedures required to serve a subpoena on a member of the news media and to defeat or quash the service.

A. What subpoena server must do

1. Service of subpoena, time

Subpoenas to compel disclosure from the news media (like any other nonparty subpoena), if required in a civil proceeding, are governed by Fed. R. Civ. P. 45, and if required in a criminal proceeding, are governed by Fed. R. Crim. P. 17.

Under Fed. R. Civ. P. 45, a subpoena must be served by a person who is not a party to the action and is 18 years or older. Alternative means of service, like registered mail, are not available. *See FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1312 (D.C. Cir. 1980). The subpoena must provide the name of the court from which it was issued, the name of the court in which the action is pending, the title of the action, the civil action number, the time and place for the deposition, the hearing, the trial, or production of documents; and a command requiring the subpoenaed person to attend the deposition and provide testimony; produce and permit inspection and copying of documents or other tangible items in the person's possession, custody, or control; or allow the inspection of a premises; and the text of Fed. R. Civ. P. 45(c) and (d). The subpoena may be served anywhere in the district of the court from which it is issued; at any place within 100 miles of the place of the hearing, trial, deposition, production, or inspection noted in the subpoena; or anywhere in the state where a state rule would permit service of a subpoena issued by a state court sitting in the place of the trial, hearing, deposition, production, or inspection. Additionally, a subpoena may be served at any other place when authorized by federal law. *See e.g.*, 15 U.S.C. § 23 (permitting writ of subpoena for a distance greater than 100 miles with permission of court after proper application and cause shown).

Under Fed. R. Crim. P. 17, a subpoena may be served by the Marshal, a deputy Marshal, or by any other person who is not a party and who is not less than 18 years of age. The subpoena must state the name of the Court, and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. Service is made by delivery of a copy of the subpoena to the person named therein and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. A subpoena requiring attendance at a hearing or trial may be served any place in the United States. A subpoena for taking a deposition or examining records should be issued from the court for the district in which the deposition or examination will occur.

Certain federal regulations specifically govern the issuance of subpoenas to the press. For example, Department of Justice regulations provide in pertinent part that a prosecutor must (1) make reasonable attempts to obtain the information sought from alternative sources before considering the issuance of a subpoena to a member of the press; (2) pursue negotiations with the media during which the government must make clear its needs and its willingness to be sensitive to the media's interests; and (3) obtain express authorization from the Attorney General for issuance of the subpoena. *See e.g.*, 28 C.F.R. § 50-10(a)-(f). The regulations also require prosecutors to demonstrate to the Attorney General: (1) that the request is supported by reasonable grounds to believe a crime has occurred; (2) that the information sought would tend to establish guilt or innocence and thus is essential to a successful investigation; (3) if the subpoena is not limited to verification of the accuracy of published information, that exigent circumstances exist; and (4) that the subpoenas concern a limited subject matter, cover a reasonably limited time period, and do not require production of large volumes of unpublished materials. *Id.*

2. Deposit of security

No statutory or case law addressing this issue exists. However, as noted above, the subpoenaing party must provide with the subpoena served pursuant to Fed. R. Civ. P. 45 and Fed. R. Crim. P. 17 (unless a sufficient showing is made that the defendant cannot pay the fee), a check sufficient to compensate the witness for one day's travel expenses and testimony fee. *See* 18 U.S.C. § 1821.

3. Filing of affidavit

An affidavit is not necessary to obtain a subpoena. However, the party may need to file an affidavit with its motion to quash or motion to compel in order to establish facts necessary to show that the privilege does or does not apply.

4. Judicial approval

Judicial approval is not necessary for a subpoena issued under Fed. R. Civ. P. 45. However, with regard to subpoenas issued under Fed. R. Crim. P. 17, defense counsel upon an ex parte application may request that the Court issue a subpoena provided that the defendant makes a satisfactory showing that the defendant is financially unable to pay the witness and the presence of the witness is necessary to an adequate defense.

5. Service of police or other administrative subpoenas

No statutory or case law exists addressing this issue.

B. How to Quash

Under Fed. R. Civ. P. 45, a court may quash or modify a subpoena which does not permit a reasonable time for compliance, requires a deponent to travel further than is permitted by the rules, requires the disclosure of privileged information or unduly burdens the witness. When ruling on a motion to quash or modify a subpoena, the Court general considers: (1) the relevance of the evidence sought; (2) the need of the seeking party for the evidence; (3) any likely hardship faced by the witness in responding to the subpoena; and (4) whether the witness is a party to the action.

Fed. R. Crim. P. 17 does not specify procedures for quashing or otherwise objecting to the subpoena. The rule provides, however, that failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed in contempt of the Court. *See e.g., In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 8 (D.D.C. 1996) (noting that the well-established rule set forth in *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991), for evaluating subpoenas under Rule 17(c) applies to subpoenas implicating the First Amendment.) Essentially, the person seeking to quash the subpoena must show that the subpoena constitutes an improper fishing expedition or was issued out of malice or with the intent to harass, and that the subpoena was not adequately tailored to produce relevant information.

1. Contact other party first

No statutory or case law addressing this issue exists. However in an effort to prevent having to go to court, you may want to try to resolve the issue with the other party prior to filing a motion to quash. Often, counsel issuing subpoena to a newsperson is unaware of the privilege issues.

2. Filing an objection or a notice of intent

The criminal subpoena provisions do not address this issue. The civil subpoena provisions seem to suggest that when objecting to a subpoena to command appearance at a hearing or trial or deposition, the objecting party shall file a motion to quash. However, the federal rules provide that when objecting to a subpoena to provide information, a written objection supported by a description of the nature of the documents, communications, or things not produced may be filed. *Compare* Fed. R. Civ. P. 45(c) *with* Fed. R. Civ. P. 45(d). The written objection must be served within 14 days of the service of the subpoena, or before the time specified in the subpoena for compliance, if that is less than 14 days.

3. File a motion to quash

The appropriate means of objecting to a subpoena is by timely written objection or by timely motion to quash or modify the subpoena. *See Judicial Watch, Inc. v. United States Dept. of Commerce*, 34 F. Supp. 2d 47, 56 (D.D.C. 1998).

a. Which court?

A motion to quash or a motion to compel should be filed with the court that issued the subpoena. However, if the court which issued the subpoena does not have jurisdiction over the party, the subpoenaed party should file a miscellaneous matter in the court in its jurisdiction and seek a protective order.

b. Motion to compel

No statutory or case law exists on this issue. However, when challenging a subpoena, the subpoenaed person or entity most likely should file a motion to quash or other objection to the subpoena and not wait for a motion to compel.

c. Timing

A motion to quash is timely if made at any time before the date specified in the subpoena for compliance.

d. Language

No stock language or preferred text should be included in a motion to quash. But the motion must persuasively establish that the subpoena does not permit a reasonable time for compliance, requires a deponent to travel further than is permitted by the rules, requires the disclosure of privileged information, or unduly burdens the witness, in order to successfully quash the subpoena.

e. Additional material

No statutory or case law addressing this issue exists. However, case law does suggest generally, that the court will consider any supporting documentation to the motion to quash. *See Freeman v. Seligson*, 405 F.2d 1326, 1331 (D.C. Cir. 1968).

4. In camera review

a. Necessity

In the grand jury context, the D.C. Circuit has permitted in camera, ex parte review of secret evidentiary submissions in support of enforcement of the subpoenas. *In re Grand Jury Subpoena Miller*, 397 F.3d 964, 973-74 (D.C. Cir. 2005), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006). The D.C. Circuit rejected the reporters' argument that denial of access to this evidence constituted violation of their due process rights because of well-established authority that "a district court can ensure [grand jury] secrecy is protected by provisions for sealed, or when necessary *ex parte*, filings." *Id.* at 973 (quoting *In re Grand Jury*, 121 F.3d 729, 757 (D.C. Cir. 1997). In issuing his opinion, Judge Tatel even redacted a substantial portion of his concurrence to preserve grand jury secrecy and to protect classified information. The court later unsealed portions of the opinion where the information therein was no longer secret. *In re Grand Jury Subpoena Miller*, 438 F.3d 1138 (D.C. Cir. 2006). The opinion was reissued as *In re Grand Jury Subpoena Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

No case law states that in camera review is required before a court may compel production of information being sought from a reporter. Case law regarding other privileges generally suggests that in camera review is not always necessary. *See Linder v. NSA*, 94 F.3d 693, 696-97 (D.C. Cir. 1996) (rejecting argument that the district court should have examined sample documents in camera before ruling on the motion to quash, and stating that "A court may rely on affidavits in lieu of an in camera review when they are sufficiently detailed, as they were in this case."). The decision whether to perform in camera review is left to the broad discretion of the court. *See Kay v. FCC*, 976 F. Supp. 23, 34 (D.D.C. 1997) (court denied plaintiff's motion for in camera review and granted defendant's motion to quash). However, case law also suggests that the court should proceed to review the sought-after information if the person seeking the information has made an adequate showing of need. *See In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

b. Consequences of consent

No statutory or case law addressing this issue exists.

c. Consequences of refusing

No statutory or case law addressing this issue exists.

5. Briefing schedule

No special rules exist for motions to quash. Rather, the general motions practice rules govern.

6. Amicus briefs

No statutory or case law addressing this issue exists. However, Rule 29 of the Fed. R. of Appellate Procedure and Rule 29 of the D.C. Circuit's Rules, address motions for leave to file an amicus briefs.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The journalist or other proponent of the privilege must establish that the privilege applies, *i.e.*, that he obtained the information with the intent and purpose of disseminating it to the public. *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 119 n.4 (D.D.C. 2002). Thereafter, the burden shifts to the party seeking the information to show that the sources' identities are extremely relevant to her case, particularly as to burden of proof, and that either no other available means of obtaining the information exists or all other reasonable alternatives have been exhausted. *See, e.g., Zerilli v. Smith*, 656 F.2d 705, 711-714 (D.C. Cir. 1981); *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005). There is some question whether a third prong exists that would require the court to engage in a balancing of the public's interest in protecting the newsgathering process against the private interest in disclosure has been brought into question. *See Lee v. Dept. of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (J. Tatel, dissenting and J. Garland, dissenting from denial of rehearing en banc) (dissents assert the panel in *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005), failed to balance the public and private interests); *Lee v. Dept. of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005) (the *Zerilli* qualified privilege standard does not include a third factor to balance the public benefits and private harms of forced disclosure); *cf. Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 335-36 (D.D.C. 1994) (concluding that the plaintiff had "demonstrated no overwhelming or compelling societal interest in overcoming the presumption of favoring First Amendment protections for a reporter's sources," and suggesting that if the information sought demonstrated government corruption the societal interest in disclosure may overcome the First Amendment protection).

B. Elements

The subpoenaing party needs to demonstrate by competent evidence that (1) the material sought goes to the heart of the matter and is crucial to his or her case; and (2) the party has exhausted every reasonable alternative source of information. Some question exists about whether there is a third prong that would require the court to engage in a balancing of the public's interest in protecting the newsgathering process against the private interest in disclosure has been brought into question. *See Lee v. Dept. of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (J. Tatel, dissenting and J. Garland, dissenting from denial of rehearing en banc) (dissents assert the panel in *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005), failed to balance the public and private interests); *Lee v. Dept. of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005) (the *Zerilli* qualified privilege standard does not include a third factor to balance the public benefits and private harms of forced disclosure); *cf. Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 335-36 (D.D.C. 1994) (concluding that the plaintiff had "demonstrated no overwhelming or compelling societal interest in overcoming the presumption of favoring First Amendment protections for a reporter's sources," and suggesting that if the information sought demonstrated government corruption the societal interest in disclosure may overcome the First Amendment protection); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 119 (D.D.C. 2002) (setting forth the factors that the D.C. Circuit has identified for applying the privilege in a civil case).

1. Relevance of material to case at bar

A high degree of relevance is required; the sources' identities must go to "the heart of the plaintiffs' claim." *Carey v. Hume*, 492 F. 2d 631, 634 (D.C. Cir. 1974); *see also U.S. v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000) (affirming grant of motion to quash because reporter's testimony was not "essential and critical" to the case.) It is not sufficient that the information sought is relevant to some issue in the case; rather the information must be crucial to the case, its presence is essential to a just resolution.

In the context of subpoenas issued pursuant to Federal Rule of Evidence 17(c), where the court determines that the subpoena satisfies the requirements of the rule, the court need not determine whether the information is central to the requesting party's case. *U.S. v. Libby*, 432 F. Supp. 2d 26, 50 (D.D.C. 2006) (the only documents at issue under a Rule 17(c) subpoena must be relevant and admissible, thus, by their very nature, the documents are "crucial to the defendant's case and go to the heart of his defense").

2. Material unavailable from other sources

The person seeking disclosure must establish that the material sought remains unavailable from other sources. *See Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981) (noting that if alternative means of obtaining the information exist, the subpoenaed reporter will not be compelled to testify). And the person seeking the information must show that he exhausted every reasonable alternative source of the information. *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 115, 122 (D.D.C. 2002) (granting motion to quash subpoena for documents and testimony from journalist, holding party seeking information must first contact individuals discussed in published article); *Zerilli*, 656 F.2d at 713 (stating "reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information."); *NLRB v. Mortensen*, 701 F. Supp. 244, 248 (D.D.C. 1988) (noting that the "party seeking the information must show that his only practical access to crucial information necessary for the development of the case is through the newsman's sources") (quotations omitted); *see also generally Tavoulareas v. Piro*, 93 F.R.D. 11 (D.D.C. 1981) (denying motion to compel sources as premature in part because plaintiffs had yet to exhaust alternative sources for the information).

a. How exhaustive must search be?

The exhaustion factor requires that all "reasonable" sources of evidence be tapped. *Lee v. Dept. of Justice*, 287 F.Supp.2d 15, 20-23 (D.D.C. 2003) (plaintiff demonstrated exhaustion of alternative sources where he issued six document requests, one set of interrogatories, four sets of requests for admissions, and a total of 20 depositions). There is no specific number of depositions necessary to satisfy the exhaustion requirement, *Lee v. Dept. of Justice*, 413 F.3d 53, 61 (D.C. Cir. 2005), though the D.C. Circuit suggested that as many as 60 depositions may not suffice. *Carey v. Hume*, 492 F. 2d 631 (D.C. Cir. 1974).

The number of depositions necessary for exhaustion must be determined on a case-by-case basis. *Lee v. Dept. of Justice*, 413 F.3d 53 at 61. It is not necessary to depose every individual who could conceivably identify the source. *Id. Cf. Zerilli v. Smith*, 656 F.2d at 724 (although limits to the obligation to pursue alternative sources exist, the exhaustion obligation is "clearly very substantial").

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

The subpoenaing party must demonstrate that it has already conducted a search for the material outside of subpoenaing the news media or that such a search would be futile. *See United States v. Hubbard*, 493 F. Supp. 202, 205 (D.D.C. 1979) (quashing subpoena to reporter to testify at criminal suppression hearing because (among other reasons) "alternative means" to obtain the sought-after information existed); *see also Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974).

c. Source is an eyewitness to a crime

No statutory or case law addressing this issue exists.

3. Balancing of interests

There is a substantial question whether a third prong requires the court to engage in a balancing of the public's interest in protecting the newsgathering process against the private interest in disclosure has been brought into question. *See Lee v. Dept. of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (J. Tatel, dissenting and J. Garland, dissenting from denial of rehearing en banc) (dissents asset the panel in *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005), failed to balance the public and private interests); *Lee v. Dept. of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005) (the *Zerilli* qualified privilege standard does not include a third factor to balance the public benefits and private harms of forced disclosure); *cf. Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 335-36 (D.D.C. 1994) (concluding that the plaintiff had "demonstrated no overwhelming or compelling societal interest in overcoming the presumption of favoring First Amendment protections for a reporter's sources," and suggesting that if the information sought demonstrated government corruption the societal interest in disclosure may overcome the First Amendment protection). Some cases treat the balancing of interests not as a separate prong in the analysis, but rather by analysis of the other two factors – *i.e.*, that the requesting party exhausted all reasonable alternative sources and that the information is central to the party's case. *See, e.g., U.S. CFTC v. McGraw-Hill Companies, Inc.*, 390 F. Supp. 2d 27, 34 (D.D.C. 2005).

4. Subpoena not overbroad or unduly burdensome

Because the issue of whether to quash a subpoena is a matter within the court's discretion, a magistrate most likely may determine whether a subpoena is overly broad or unduly burdensome.

5. Threat to human life

No statutory or case law addressing this issue exists. However, if the person seeking the information has shown by competent evidence that the information is relevant and that no other sources exists, the court arguably may consider whether the subpoenaed information involves a threat to human life as part of the sometimes third element, *i.e.*, whether a compelling societal interest in disclosure exists. *See generally Zerilli*, 656 F.2d at 711; *Grunseth*, 868 F. Supp. at 335-36; *but see Lee v. Dept. of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (J. Tatel, dissenting and J. Garland, dissenting from denial of rehearing en banc) (dissents assert the panel in *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005), failed to balance the public and private interests); *Lee v. Dept. of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005) (the *Zerilli* qualified privilege standard does not include a third factor to balance the public benefits and private harms of forced disclosure).

6. Material is not cumulative

If the material sought would be cumulative, the court most likely would recognize the privilege. In such a case, the equities taken into consideration during the judicial balancing and assessing the party's need for the information would weigh in favor of non-disclosure. *See generally Zerilli*, 656 F.2d 705.

7. Civil/criminal rules of procedure

The rules of procedure (both criminal and civil) allow the subpoenaed party to object to the subpoena by moving to quash the subpoena or responding by written objection to the subpoena. Fed. R. Civ. P. 45; Fed. R. Crim. P. 17.

8. Other elements

Other than sometimes requiring the person seeking the information to show a compelling societal interest in disclosure, the courts in this jurisdiction have not identified other elements that must be established before the privilege can be overcome. *See generally Zerilli*, 656 F.2d at 711; *Grunseth*, 868 F. Supp. at 335-36; *but see Lee v. Dept. of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (J. Tatel, dissenting and J. Garland, dissenting from denial of rehearing en banc) (dissents assert the panel in *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005), failed to balance the public and private interests); *Lee v. Dept. of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005) (the *Zerilli* qualified privilege standard does not include a third factor to balance the public benefits and private harms of forced disclosure).

C. Waiver or limits to testimony

Although no cases in this jurisdiction have ruled explicitly that the privilege was waived, in *Alexander v. Nixon*, 444 F. Supp. 1195 (D.D.C. 1978), the court appears to suggest that if a reporter brings suit in which his sources may have relevant information, the reporter may waive his "qualified privilege of silence." *Id.* at 1199-1200. There, however, the court granted the motion to compel against the newsperson because the information sought lied at the heart of the case, could not be obtained by other sources, and was essential to the fair determination of the cause. *Id.* at 1200.

1. Is the privilege waivable at all?

Although no case law in this jurisdiction has held that the privilege has been waived, case law does suggest that this privilege, like the other evidentiary privileges, may be waived. *See Alexander*, 444 F. Supp. at 1200. The privilege belongs to the reporter and therefore can only be waived by the reporter. *In re Grand Jury Subpoena Miller*, 397 F.3d 964, 999-1000 (D.C. Cir. 2005) (J. Tatel, concurring), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006) (Case law "(including persuasive district court decisions from this circuit) indicate that only reporters, not sources, may waive the privilege.") (citing *U.S. v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198-99 (D.D.C. 1978)). A source's waiver is irrelevant to the reasons for the privilege. *Id.* at 1000. *But see Lee v. Dept. of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005) (district court ordered reporter to "contact each and every one of his Government sources to inform them of the Court's order so that, should they release him from his pledge of confidentiality, [the reporter] can reconsider whether he needs to further resist the order of the Court and, perhaps,

this matter can become moot without further litigation;" required submission of a sworn statement within 48 hours attesting to fulfillment of the order and whether reporter is ready to identify his sources).

2. Elements of waiver

a. Disclosure of confidential source's name

No statutory or case law addressing this issue exists.

b. Disclosure of non-confidential source's name

No statutory or case law addressing this issue exists.

c. Partial disclosure of information

No statutory or case law addressing this issue exists.

d. Other elements

No statutory or case law addressing this issue exists.

3. Agreement to partially testify act as waiver?

No statutory or case law addressing this issue exists.

VII. What constitutes compliance?

This section examines what members of the news media must do to comply with a valid, upheld subpoena request.

A. Newspaper articles

Under Fed. R. Evid. 902(6), newspapers are self-authenticating, however, the statements within them may be inadmissible hearsay. See Charles Alan Wright and Victor James Gold, 31 Fed. Prac. & Proc. Evid. § 7140 ("Even assuming authenticity is established, that does not mean that the item is necessarily admissible since admissibility issues other than authenticity may still be raised under the Evidence Rules"); see also Advisory Committee Note, Fed. R. Evid. 902(6) ("Establishing authenticity of the publication may, of course, still leave open questions of authority and responsibility for the items contained therein"). Thus, it is unlikely that a subpoena for a newsperson's testimony about an article's contents, once upheld by a court, would be satisfied with the submission of a copy of the article alone.

B. Broadcast materials

No statutory or case law addressing this issue exists. However, secondary sources suggest that the person who recorded the broadcast tape need not be called in order to authenticate it. Rather, a witness who is familiar with the object or scene depicted in the video can lay the predicate foundation. *See generally* Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, 16 Am. Jur. Proof of Facts 3d § 493 (1992).

C. Testimony vs. affidavits

No statutory or case law suggests that a newsperson may submit an affidavit and be excused from the obligations of a subpoena for testimony after a motion to quash has been denied or a motion to compel has been granted.

D. Non-compliance remedies

1. Civil contempt

In order to hold a reporter in contempt, the requesting party must demonstrate by "clear and convincing" evidence that (1) the court's discovery order compelling disclosure is reasonably clear and specific, and (2) the reporter failed to comply with the order. *See Lee v. Dept. of Justice*, 401 F. Supp. 2d 123, 142 (D.D.C. 2005) (holding reporter contempt and issuing a fine of $500 per day until he complies with the discovery order); *Lee v. Dept. of*

Justice, 413 F.3d 53, 61 (D.C. Cir. 2005). The court has broad discretion in fashioning an appropriate contempt sanction. *Lee v. Dept. of Defense*, 327 F. Supp. 2d 26, 33 (D.D.C. 2004).

Sanctions imposed in a civil contempt proceeding ordinarily are conditional, *i.e.*, the person held in civil contempt may avoid sanctions by promptly complying with the court's order. 18 U.S.C § 401. This is so because the purpose of civil contempt is not to punish but to exert only so much authority of the court as is needed to assure compliance. *See United States v. Liddy*, 354 F. Supp. 208, 217 (D.D.C. 1972) (holding that newspaper bureau chief, "having flaunted the order of the court to produce the tapes in his possession thereby bringing disrespect upon the court, is cited for contempt pursuant to 18 U.S.C. § 401 and [Fed. R. Crim. P. 17(g),] and remanded to the custody of the Attorney General unless and until he purges himself of the contempt"). Courts have shown a willingness to stay the imposition of fines and confinement pending appeal of the contempt order. *See, e.g., Lee*, 401 F.Supp.2d at 142; *Lee*, 327 F. Supp. 2d at 33; *In re Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004).

a. Fines

District courts in the Circuit have issued fines in both civil and criminal proceedings. See *Lee v. Dept. of Justice*, 401 F. Supp. 2d 123, 142 (D.D.C. 2005) (civil context; ordered a fine of $500 per day until compliance with the discovery order); *In re Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004) (grand jury context; ordered a fine of $1,000.00 per day until compliance with the discovery order). In *Lee*, the district court held that a nominal sanction of $1.00 a day is "insufficient to coerce compliance," yet a fine of $1,000.00 a day is too punitive in the civil context. *Id.* (splitting the difference by imposing a fine of $500.00 a day). Courts have shown a willingness to stay the imposition of fines pending appeal of the contempt order. *See, e.g., Lee*, 401 F. Supp. 2d at 142; *Lee*, 327 F. Supp. 2d at 33; *In re Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004).

b. Jail

In *In re Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004), the district court held a reporter in contempt and ordered him to be confined until the reporter was willing to comply with the discovery order. The period of confinement was limited to the life of the term of the grand jury, including extensions, and in no event in excess of eighteen months. *Id. See also* 18 U.S.C. § 402. Courts have shown a willingness to stay the imposition of fines and confinement pending appeal of the contempt order. *See In re Special Counsel Investigation*, 332 F. Supp. 2d at 34. The D.C. Circuit affirmed this contempt finding as well as the contempt finding of *New York Times* reporter, Judith Miller, in *In re Grand Jury Subpoena Miller*, 397 F.3d 964 (D.C. Cir. 2005), *opinion superseded by* 438 F.3d 1141 (D.C. Cir. 2006). Courts have shown a willingness to stay the imposition of confinement pending appeal of the contempt order. *See In re Special Counsel Investigation*, 332 F. Supp. 2d at 34.

2. Criminal contempt

Under Fed. R. Crim. 42, in imposing a fine or jail for criminal contempt, the trial court may properly consider the extent of the willful and deliberate defiance of the court's order, the seriousness of consequences of the contumacious behavior, the necessity of effectively terminating the defiance as required by the public interest and the importance of deterring such acts in the future. Consequently, the law imbues the trial court with great discretion in fashioning the appropriate criminal contempt sanction. *United States v. United Mine Workers*, 330 U.S. 258 (1947). Nevertheless case law suggests that if the court proceeds without a jury in a contempt proceeding, the district court shall impose no greater imprisonment than 90 days. *Rollerson v. United States*, 343 F.2d 269 (D.C. Cir. 1964)

3. Other remedies

No statutory or case law addressing this issue exists.

VIII. Appealing

A. Timing

1. Interlocutory appeals

An order denying or granting a motion to quash a subpoena ordinarily is not considered final and appealable. A party cannot appeal a discovery order, but must either comply or refuse to do so and appeal from a contempt order. *See Lee v. Dept. of Defense*, 413 F.3d 53, 59 (D.C. Cir. 2005). Review of the contempt order includes review of the underlying issue of whether the reporter's privilege applies in the case. *Id.* But, if a motion to quash a subpoena served on a non-party is granted by a court in a district other than where the action is pending, the order is final and appealable as it is the final disposition of the issues before it. *See* 9 *Moore's Fed. Prac.* § 45.04[8][a] (Matthew Bender 3d ed. 2002). If the court in a jurisdiction other than where the action is pending denies the motion to quash, the order is not final and appealable without an adjudication of contempt. *Id.*; *see also Cobbledick v. United States*, 309 U.S. 323, 325, 327 (1940); *Office of Thrift Supervision Dept. of Treasury v. Dobbs*, 931 F.2d. 956, 957 (D.C. Cir. 1991) (stating that to "obtain review of subpoena, a party must refuse to comply with the subpoena, be held in contempt by the trial court, and appeal the finding of contempt to the appellate court"); *In re Sealed Case*, 162 F.3d 670, 673 (D.D.C. 1998) (noting well-settled law holds that "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey") (citation omitted).

2. Expedited appeals

No statutory or case law addressing this issue exists. However, pursuant to D.C. Circuit Rule 47.2, a party appealing an order of confinement under 28 U.S.C. § 1826 may seek an expedited appeal. In any event, expedited appeals are granted at the court's discretion.

B. Procedure

1. To whom is the appeal made?

An order from the District Court of the District of Columbia must be appealed to the United States Court of Appeals for the District of Columbia Circuit. If the decision is levied by a magistrate, the reporter may request that a district court judge reconsider a magistrate's ruling by filing a motion to reconsider within 10 days after being served with the order, unless a different time is prescribed by the magistrate or the judge. The motion shall specifically designate the order or part thereof to which objection is made, and the basis for the objection. *See* U.S. District Court Rules for the District of Columbia LCVR 72.2.

2. Stays pending appeal

Under Rule 8 of the Federal Rules of Appellate Procedure and Corresponding Circuit Rules of the District of Columbia Circuit, a party moving for a stay of judgment or of an order of the district court must state whether such relief was previously requested from the district court and the ruling on that request. In the motion, the party must state with specificity the reasons for granting the stay and discuss: (1) the likelihood the party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3 the possibility of harm to other parties if relief is granted; and (4) the public interest. *See generally*, *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

Courts have shown a willingness to stay the imposition of fines and confinement pending appeal of the contempt order. *See, e.g.*, *Lee*, 401 F. Supp. 2d at 142; *Lee*, 327 F. Supp. 2d at 33; *In re Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004).

3. Nature of appeal

As noted in section VIII.A.1. above, the right to appeal and the procedures governing the appeal depend on whether the person seeking to quash the subpoena is a party or non-party and whether the court has granted or denied the motion to quash. A party generally must wait until the final deposition of the case to appeal the presiding court's order regarding its motion to quash. *See* section VIII. A.1. Conversely, the order granting a motion to quash by a court other than the court hearing the case may be appealed. *See id.* And, an order by such a court denying a motion to quash may be appealed after a finding of contempt by the court. *See id.*

4. Standard of review

A trial court's decision to quash or modify a subpoena will not be reversed on appeal unless the court abused its discretion. *See, e.g.*, *Zerilli*, 656 F.2d at 710. Under the precedent of *Zerilli*, the D.C. Circuit will "review legal rulings of the trial court de novo but…will defer to the sound discretion of the trial court where the balancing of relevant factors is involved." *Lee v. Dept. of Defense*, 413 F.3d 53, 59 (D.C. Cir. 2005).

5. Addressing mootness questions

No statutory or case law addressing mootness in cases concerning the news gathering privilege exist. However, case law generally states that: "Even where litigation poses a live controversy when filed, the doctrine [of mootness] requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (citation omitted); *see e.g.*, *Dobbs*, 931 F.2d at 957 (concluding that an appeal from enforcement of a subpoena becomes moot once the party has complied with the subpoena). When a case is deemed moot while pending appeal, federal courts generally reverse or vacate the judgment below and remand with a direction to dismiss the case. *Id.* at 706. A noted exception to the mootness doctrine is if the action is capable of repetition yet evading review. *Id.* at 703. In order to fall within this exception the party must show: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quotations omitted). In estimating the likelihood of an event's occurring in the future, the courts may consider how often it has occurred in the past. *Clarke*, 915 F.2d at 704.

6. Relief

The reporter may request that the district court reverse the district court's order compelling him or her to comply with the subpoena and reverse the contempt order. *See generally In re Sealed Case*, 877 F.2d 83 (D.C. Cir. 1989) (upholding portions of the contempt order but reversing other portions of contempt order and order compelling the appellant to comply with the subpoena).

IX. Other issues

A. Newsroom searches

The federal courts of D.C. have not applied or construed the federal Privacy Protection Act, 42 U.S.C. § 2000aa.

B. Separation orders

No statutory or case law addressing this issue exists.

C. Third-party subpoenas

Subpoenas can be issued to third parties (credit card companies, telephone companies, Internet service providers, etc.) in an attempt by others to discover a reporter's source. This jurisdiction has held that "journalists in this context have no First Amendment interest in third-party records which disclose the identity of a secret source and consequently, have no First Amendment right to notice of subpoenas directed at such records." *Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1053 (D.C. Cir. 1978).

D. The source's rights and interests

No statutory or case law addressing this issue exists.