

REPORTER'S PRIVILEGE: 4TH 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 and helped shape the law in their states and federal circuits, this guide is meant to help both journalists who want to know more about the reporter's privilege and lawyers who need to know the ins and outs of getting a subpoena quashed.

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

Above the law?

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

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

of the state, or supporters of criminal defendants, or as advocates for one side or the other in civil disputes.

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dis-

sent from the Court's opinion and said that the First Amendment provided journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority. Although the high court has not revisited the issue, almost all the federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege.

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

If your state has a shield law, your lawyer must determine whether it will apply to you, to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, or if your situation seems to fall outside its scope, the state's courts may have recognized some common law or constitu-

tional privilege that will protect you. Each state is different, and many courts do not recognize the privilege in certain situations.

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lawyers are trained to give a legal citation for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute sup-

porting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

4TH CIR.

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I. Introduction: History & Background

The Fourth Circuit has been less aggressive than many of its counterparts in enunciating a reporter's privilege. The Court first explored a testimonial privilege in 1976 but indicated that to invoke the privilege, a journalist must claim confidentiality of the information sought or vindictiveness on the part of the questioning party. *United States v. Steelhammer*, 539 F.2d 273 (4th Cir. 1976), *rev'd en banc*, 561 F.2d 539 (4th Cir. 1977). In *LaRouche v. Nat'l Broadcasting Co., Inc.*, 780 F.2d 1134, 12 Media L. Rep. 1585 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986), the Fourth Circuit followed several Circuits in adopting a balancing test for determining whether a reporter's privilege will protect a confidential source-reporter relationship. The applicability of the privilege and the balancing test to nonconfidential information remained unclear, however. *See In re Shain*, 978 F.2d 850, 20 Media L. Rep. 1930 (4th Cir. 1992) (relying upon *Steelhammer* to hold that the absence of confidentiality or vindictiveness fatally undermined the reporter's claim to a First Amendment privilege for nonconfidential information obtained from a nonconfidential source). Nevertheless, the Fourth Circuit's recent decisions indicate the vitality of a qualified First Amendment privilege for both confidential and nonconfidential sources and information.

In *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 21 Media L. Rep. 1426 (4th Cir. 1993), *cert. denied* 510 U.S. 869 (1993), the Church sued a drug company executive for libel based on a statement made by the executive in a *USA Today* editorial board meeting and published by the newspaper. The Church moved to compel production by *USA Today* of materials relating to the board meeting, even though the executive offered to stipulate to the quotation's accuracy. The Fourth Circuit, in affirming the district court's denial of the Church's motion, applied the *LaRouche* balancing test despite the nonconfidential nature of the information sought and the absence of vindictiveness. *Id.* at 1335. Lower courts have followed, expanding the qualified privilege to encompass nonconfidential information. *See Food Lion Inc. v. Capital Cities/ABC Inc.*, 951 F. Supp. 1211, 25 Media L. Rep. 1182 (M.D.N.C. 1996) (applying a modified balancing test in permitting limited discovery of nonconfidential hidden camera investigations); *Penland v. Long*, 922 F. Supp. 1080, 24 Media L. Rep. 1410 (W.D.N.C. 1995) (applying *LaRouche* test in granting motion to quash plaintiffs' subpoena for nonconfidential information on interviews with defendant).

Most recently, the Fourth Circuit in *Ashcraft v. Conoco, Inc.* reinforced the application of a reporter's privilege and balancing test where the protection of confidential news sources or information is threatened. 218 F.3d 282, 28 Media L. Rep. 2103 (4th Cir. 2000). Cory Reiss, a reporter for the Wilmington, N.C., *Morning Star*, was found in civil contempt and ordered to an indefinite term of imprisonment for refusing to disclose his sources of information about an allegedly confidential, \$36 million court settlement. *Id.* at 286. Before Mr. Reiss was required to report to jail, the Fourth Circuit stayed the order pending appeal, and on appeal the Court found that under its *LaRouche* test, the state had not asserted a compelling interest sufficient to overcome Reiss' privilege to withhold the names of his confidential sources. *Id.* at 288.

II. Authority for and source of the right

The reporter's privilege in the Fourth Circuit was developed in the wake of the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). First the Eastern District of Virginia in *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505 (E.D.Va. 1976), and then the Fourth Circuit in *United States v. Steelhammer*, 539 F.2d 273 (4th Cir. 1976), *rev'd en banc*, 561 F.2d 539 (4th Cir. 1977), construed the limited holding of *Branzburg* as permitting a reporter's privilege in some cases. Justice Powell's concurrence in *Branzburg*, advocating a "balance of ... vital constitutional and societal interests," provided the framework for the three-part test adopted by the Fourth Circuit in *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 12 Media L. Rep. 1585 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986): "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information." *Id.* at 1139.

Though state shield laws are discussed in depth in the individual state sections, it should be noted here that three of the five states in the Fourth Circuit — Maryland, North Carolina and South Carolina — have enacted shield

laws that offer journalists varying degrees of protection for sources and information. *See* Md. Code Ann., Cts. & Jud. Proc. § 9-112 (1992); N.C. Gen. Stat. Ch. 8, Art. 7 § 8-53.9 (1999); S.C. Code § 19-11-100 (1995). None of the shield laws has been addressed in a federal court opinion.

III. Scope of protection

A. Generally

Compared to that of the other circuits' privilege laws, the scope of protection provided by the reporter's privilege in the Fourth Circuit falls in the middle of the spectrum. Unlike several other circuits, the Fourth Circuit has not stated explicitly that nonconfidential information from nonconfidential sources is protected by the same privilege as confidential information. *Compare* *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999); *Shoen v. Shoen*, 5 F.3d 1289, 1294 (9th Cir. 1993); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). However, neither has the Fourth Circuit explicitly rejected a qualified privilege for nonconfidential information, as the Fifth Circuit did in *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

The result has been a mixed bag of decisions. In *Church of Scientology Int'l v. Daniels*, the Fourth Circuit applied the *LaRouche v. Nat'l Broadcasting Co.* balancing test in spite of the nonconfidential nature of the information sought by the libel plaintiff church from *USA Today*, a third party. *Church of Scientology*, 992 F.2d 1329, 1335, 21 Media L. Rep. 1426 (4th Cir. 1993), *cert. denied* 510 U.S. 869 (1993); *LaRouche*, 780 F.2d 1134, 1139, 12 Media L. Rep. 1585 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986). However, district courts since *Church of Scientology* have varied in their application of the *LaRouche* test to nonconfidential information. *See* *United States v. King*, 194 F.R.D. 569 (E.D. Va. 2000) (holding there is no privilege without a showing of confidentiality or harassment by the seeking party); *Penland v. Long*, 922 F. Supp. 1080, 24 Media L. Rep. 1410 (W.D.N.C. 1995) (holding a qualified privilege exists for nonconfidential information).

B. Absolute or qualified privilege

The Fourth Circuit does not recognize an absolute privilege against disclosure. Even when a journalist is attempting to protect the identities of confidential sources — likely the strongest case for a reporter's privilege — the courts of the Fourth Circuit balance the interests involved using the three-part test put forth in *LaRouche*: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information." 780 F.2d at 1139. Though one district court recently maintained that a showing of confidentiality and harassment by the seeking party is a predicate for conducting a balancing analysis, *Church of Scientology* provides a strong indication that the Fourth Circuit intends its *LaRouche* test to be used to evaluate requests for nonconfidential information as well. *Church of Scientology*, 992 F.2d at 1335; *see also* *Food Lion Inc. v. Capital Cities/ABC Inc.*, 951 F. Supp. 1211, 1214, 25 Media L. Rep. 1182 (M.D.N.C. 1996) (applying a modified balancing test in permitting limited discovery of nonconfidential hidden camera investigations); *Penland*, 922 F. Supp. at 1084 (applying *LaRouche* test in granting motion to quash plaintiffs' subpoena for nonconfidential information on interviews with defendant); *contra* *United States v. Lindh*, 210 F. Supp. 2d 780, 783 (holding there is no First Amendment privilege without a showing of confidentiality or harassment by the seeking party); *King*, 194 F.R.D. at 584-85 (same).

C. Type of case

1. Civil

Most of the reporter's privilege cases in the Fourth Circuit have arisen in the civil context, and as a result the privilege in civil cases is better developed than its criminal counterpart. The Fourth Circuit first discussed a testimonial privilege in *United States v. Steelhammer*, in which reporters for the *Charleston Gazette* were summoned to testify in a civil contempt hearing. 539 F.2d 273 (4th Cir. 1976), *rev'd en banc*, 561 F.2d 539 (4th Cir. 1977). The Fourth Circuit introduced its balancing test for confidential information in the context of a civil defamation case. *LaRouche*, 780 F.2d at 1135. In *Church of Scientology*, also a civil defamation case but with the media as a third party, the Fourth Circuit indicated its intention to apply its *LaRouche* test to nonconfidential information as well. *Church of Scientology*, 992 F.2d at 1335. Most recently, the Fourth Circuit in *Ashcraft v. Conoco, Inc.*, an envi-

ronmental torts suit, reinforced the application of a reporter's privilege for confidential news sources or information. 218 F.3d 282, 28 Media L. Rep. 2103 (4th Cir. 2000).

At the district court level, the most protective opinions have come in civil cases. In *Bischoff v. United States*, 25 Media L. Rep. 1286 (E.D. Va. 1996), a reporter for the *Houston Post* was subpoenaed to testify in a suit brought by the two plaintiffs against the United States, alleging that FBI and IRS employees unlawfully published their confidential tax information. The reporter moved to quash the subpoena, arguing that his only relevant information was obtained from a confidential source, and the district court granted the motion, holding that a qualified privilege exists in a civil action even where a reporter is believed to have first-hand evidence of criminal conduct. *Id.* at 1287-88. In *Penland*, former prison employees brought a civil rights and defamation suit against a sheriff and subpoenaed from a local newspaper and television station both confidential and nonconfidential information surrounding their interviews with the sheriff. *Penland*, 922 F. Supp. at 1082. The district court granted the motion to quash and issued a protective order, applying the *LaRouche* test and holding the privilege outweighed the need for the information. *Id.* at 1084. Finally, in *Stickels v. General Rental Co.*, 750 F. Supp. 729, 18 Media L. Rep. 1644 (E.D. Va. 1990), a local newspaper reporter challenged a tort defendant's subpoena of photos and negatives of the accident at issue. Though the court ultimately denied the motion to quash the subpoena, it applied the *LaRouche* test to nonconfidential information.

2. Criminal

The few criminal cases in the Fourth Circuit addressing a reporter's privilege indicate the privilege might be less expansive in the criminal context. In *In re Shain*, 978 F.2d 850, 20 Media L. Rep. 1930 (4th Cir. 1992), a South Carolina senator was indicted for accepting a bribe in violation of federal law. To present evidence of intent, the prosecution subpoenaed four reporters to have them confirm in testimony that the senator had made the false statements they reported. The district court denied the reporters' motions to quash, and after the reporters asserted privilege at trial, they were held in contempt and ordered to be confined for the two days of the trial. *Id.* at 852.

The Fourth Circuit affirmed the denial of the motions to quash, finding that absent evidence of confidentiality or governmental harassment, reporters may not assert a First Amendment privilege. *Id.* at 853. The Court cited the Supreme Court's refusal in *Branzburg* to "grant newsmen a testimonial privilege that other citizens do not enjoy," and questionably interpreted *Steelhammer* as stating that "only when evidence of harassment is presented do we balance the interests involved." *Id.* (*Steelhammer* actually stated: "In the balancing of interests ... the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring the reporters to testify." 539 F.2d at 376.) The Fourth Circuit's decision the next year in *Church of Scientology*, in which it applied the *LaRouche* balancing test in spite of the nonconfidential nature of the information at stake, indicates *Shain's* reach might be fairly narrow. However, *Shain* could be construed as permitting a qualified privilege in criminal cases only where the information sought is confidential or there is evidence of governmental harassment.

The only other criminal cases in the Fourth Circuit addressing the reporter's privilege are two lower court cases from the Eastern District of Virginia. In *United States v. King*, 194 F.R.D. 569 (E.D. Va. 2000), the defendants were indicted on several drug-related charges and subpoenaed from a local television station all unedited videotapes of an interview with a government witness. Though the interview protected the witness' identity, the defense counsel independently identified her later, so the tapes could no longer be considered confidential. *Id.* at 571-72. In denying the motion to quash the subpoena, the court engaged in a prolonged analysis of *Branzburg* and other courts' interpretations of it and oddly refused to deem protection for reporters a "privilege," even as it pertains to confidential sources. In the end, however, the *King* court reached basically the same conclusion as the Fourth Circuit in *Shain*: confidentiality and harassment are predicates for conducting *LaRouche* balancing. *King*, 194 F.R.D. at 584-85.

Most recently, in *United States v. Lindh*, 210 F. Supp. 2d 780 (E.D. Va. 2002), "American Taliban" John Phillip Walker Lindh sought the testimony of a freelance journalist in support of his motions to suppress his confession and other evidence. The journalist had interviewed Lindh in 2001 while Lindh was in a hospital in Afghanistan, and Lindh argued, *inter alia*, that the journalist was acting as an agent of the U.S. military. In denying the journalist's motion to quash, the court stated that "today, a First Amendment journalist privilege is properly asserted in

this circuit where the journalist produces some evidence of confidentiality or governmental harassment," neither of which were present in this case. *Id.* at 783. Furthermore, even assuming *arguendo* that "the special circumstances of [the journalist's] role as a war correspondent in Afghanistan is a sufficient factor to trigger the application of the privilege," the court held that the balance at that point weighed in favor of the journalist's duty to testify. *Id.* The court noted that Lindh's Sixth Amendment right to prepare and present a full defense was of paramount importance, that the journalist's testimony was relevant to Lindh's allegation that the journalist was acting as a government agent, and that the journalist was uniquely situated to testify about the conditions of Lindh's confinement, which bore directly on the voluntariness of his statements. *Id.* at 783-84.

From this limited sample of cases, the reporter's privilege in criminal cases in the Fourth Circuit appears to be the same whether the prosecution or defendant issues the subpoena. Furthermore, the *King* case indicated that should the *LaRouche* balancing test ever be called into play in a criminal case, protecting the defendant's Fifth and Sixth Amendment rights would be considered a "compelling interest," as would the state's interest in law enforcement. *See King*, 194 F.R.D. at 585. Thus, as a general matter, the criminal nature of a trial might generally diminish the weight of a reporter's privilege.

3. Grand jury

There are no cases in the Fourth Circuit in which a privilege is asserted in response to a grand jury subpoena. However, the language in *Shain*, a criminal case, indicates that at the very best, the Court would consider a reporter's privilege only upon a showing of confidentiality and governmental harassment. *See Shain*, 978 F.2d at 852. Even if the reporter makes such a showing to initiate a balance of interests under the *LaRouche* test, a "compelling law enforcement interest" is likely to tip the balance in favor of disclosure. *See King*, 194 F.R.D. at 585.

D. Information and/or identity of source

The reporter's privilege in the Fourth Circuit does not specifically protect the identity of a source or information that implicitly identifies a source, but the case law indicates that the privilege is most powerful in those situations, at least in the civil context. For example, in *Gilbert v. Allied Chemical Corp.*, the first reporter's privilege opinion in the Circuit, the defendant in a toxic tort suit subpoenaed from a communications company various confidential and nonconfidential documents related to news broadcasts. 411 F. Supp. 505 (E.D.Va. 1976). The court granted the motion to quash the subpoena to the extent it required reporters to reveal confidential sources and material that "directly leads to the disclosure of confidences." *Id.* at 510-11. It also issued restrictions on the files that were required to be disclosed so the dissemination of potentially harmful information would be limited. *Id.* at 511-12.

In later cases, courts in the Fourth Circuit have applied the same balancing tests in the context of the identity of a confidential source as they have in the context of nonconfidential information. *See Ashcraft*, 218 F.3d at 287; *LaRouche*, 780 F.2d at 1139; *Bischoff*, 25 Media L. Rep. at 1287; *Miller v. Mecklenburg County*, 602 F. Supp. 675 and 606 F. Supp. 488 (W.D.N.C. 1985), *aff'd* 813 F.2d 402 (4th Cir. 1986), *cert. denied* 479 U.S. 1100 (1987), *further opinion at* 12 Media L. Rep. 1405 (W.D.N.C. 1985). *Ashcraft*, *LaRouche*, and *Bischoff* were decided on other grounds, but *Miller* indicates that the confidentiality of a source might tilt the balance on the "compelling interest" prong of the *LaRouche* or another test in favor of upholding the privilege. *Miller*, 602 F. Supp. at 680 ("The First Amendment protection against disclosure of the name of a confidential source is stronger than the protection against disclosure of non-confidential information revealed by that source.").

E. Confidential and/or non-confidential information

It is well established in the Fourth Circuit that when a reporter invokes a privilege to protect confidential information — information obtained by a news gatherer under a promise of confidentiality — the court will use the *LaRouche* balancing test to determine whether the privilege should be upheld. *Ashcraft*, 218 F.3d at 287 (citing *LaRouche*, 780 F.2d at 1139). The only possible exceptions are in certain criminal cases, where the court might also require evidence of harassment by the party seeking disclosure. *See King*, 194 F.R.D. at 584. However, the Fourth Circuit in *Shain* did not explicitly require both confidentiality and vindictiveness for a successful privilege claim. *See* 978 F.2d at 853.

Concerning nonconfidential information — information obtained other than through a promise of confidentiality — the law in the Fourth Circuit is less clear. A few cases indicate that a reporter's privilege will rarely, if ever, be

upheld for nonconfidential information. *See Shain*, 978 F.2d at 853 (holding that, at least in the criminal context, a balancing of interests will only be appropriate for nonconfidential information where there is evidence of harassment by the party seeking disclosure); *King*, 194 F.R.D. at 584-85 (holding that without a showing of confidentiality, a balancing of interests is inappropriate and the reporter need not be afforded any protection); *Lindh*, 210 F. Supp. at 783 (balancing of interests is justified only where journalist produces some evidence of confidentiality or governmental harassment). However, other recent decisions support the existence of a qualified privilege for nonconfidential sources and information.

In *Church of Scientology*, 992 F.2d 1329, 21 Media L. Rep. 1426 (4th Cir. 1993), *cert. denied* 510 U.S. 869 (1993), the Church sued a drug company executive for libel based on a statement made by the executive in a *USA Today* editorial board meeting and published by the newspaper. 992 F.2d at 1330-31. The Church moved to compel production by *USA Today* of materials relating to the board meeting, even though the executive offered to stipulate to the quotation's accuracy. The Fourth Circuit, in affirming the denial of the Church's motion, applied the *LaRouche* balancing test in spite of the nonconfidential nature of the information sought and the absence of vindictiveness. *Id.* at 1335. Lower courts have followed the Fourth Circuit's lead in applying the qualified privilege to nonconfidential information. *See Food Lion Inc. v. Capital Cities/ABC Inc.*, 951 F. Supp. 1211, 25 Media L. Rep. 1182 (M.D.N.C. 1996) (applying a modified balancing test in permitting limited discovery of nonconfidential hidden camera investigations); *Penland*, 922 F. Supp. at 1084 (applying *LaRouche* test in granting motion to quash plaintiffs' subpoena for nonconfidential information on interviews with defendant).

Even if the analysis of the privilege is the same for confidential and nonconfidential sources and information, it is likely that the nonconfidentiality of a source might tip the balance on the "compelling interest" element in favor of disclosure. *Miller*, 602 F. Supp. at 680 ("The First Amendment protection against disclosure of the name of a confidential source is stronger than the protection against disclosure of non-confidential information revealed by that source.").

F. Published and/or non-published material

The Fourth Circuit reporter's privilege for published material is largely undeveloped; the state of the law might reflect the fact that subpoenaed reporters and media entities will generally provide published materials without complaint. *See Stickels*, 750 F. Supp. at 731 (printed photos of accident are made available to tort defendant); *Gilbert*, 411 F. Supp. at 507 (published material and tapes of television report are provided to toxic tort defendant). Conflict has arisen, however, when reporters are required to testify in court as to the authenticity of statements made during published interviews. In *Shain*, the Fourth Circuit did not cite the published nature of the material as a motivation in its affirmation of contempt findings against four reporters; the Court indicated that whether or not the material was published, the reporters had no privilege without a showing of confidentiality or harassment. 978 F.2d at 853. The concurrence, however, expressed concern that requiring a reporter to testify even as to published material might have a chilling effect, inducing reporters to "think twice about conducting exclusive interviews or reporting statements of denial that may be open to question." *Id.* at 855 (Wilkinson, J., concurring).

As for unpublished materials, the Fourth Circuit applies its three-part *LaRouche* test, a fact-based inquiry, to determine whether a reporter or media entity should be required to provide the requested documents or testimony; *See, e.g., Ashcraft*, 218 F.3d at 287 (reversing contempt order against reporter); *Penland*, 922 F. Supp. at 1084 (granting motion to quash plaintiff's subpoena of information surrounding interview of defendant). In *Stickels*, the district court for the Eastern District of Virginia required the disclosure of unpublished photographs, citing the "unique nature of photos" and their ability to impart especially detailed and credible evidence. 750 F. Supp. at 732. The court also noted that "these particular photos merely preserve images that were so much part of the public domain," indicating that the privilege would be stronger for unpublished photos of private subjects or subjects of which no other photos have been published. *Id.*

G. Reporter's personal observations

While the Fourth Circuit has not enunciated a blanket exception to the reporter's privilege for reporters who are subpoenaed as eyewitnesses, the Court strongly favors disclosure in such situations. In *Steelhammer*, the district court for the Southern District of West Virginia held a civil contempt trial to ascertain whether at a rally two un-

ion members had advocated prolonging a strike in contravention of a court-issued temporary restraining order. Two reporters for the Charleston Gazette were summoned by the court to testify about their observances at the rally. They refused and were judged in contempt of court and held for four to six hours before being released on bail. The Fourth Circuit en banc affirmed the contempt convictions and adopted the dissent from the original three-judge panel. *Steelhammer*, 561 F.2d at 540 (4th Cir. 1977), adopting Winters, J., dissent, *reported at* 539 F.2d 373 (4th Cir. 1976). The Court stated that absent a claim of confidentiality or evidence of vindictiveness on the part of the seeking party, a reporter may not refuse to testify about his or her observances, even if other witnesses to the same events are available. 539 F.2d at 376. Under the *LaRouche* test, which was formulated nine years after *Steelhammer*, the presence of other witnesses would likely militate against disclosure because there exist alternative means of obtaining the information. *See LaRouche*, 780 F.2d at 1139.

The considerations at play in both *Steelhammer* and *LaRouche* were present in *Lindh*, in which a Virginia district court evaluated whether to require a journalist to testify, at a suppression hearing, about his experience interviewing the "American Taliban" at a hospital in Afghanistan. The court denied the journalist's motion to quash, noting that Lindh's Sixth Amendment right to prepare and present a full defense may be outweighed by a First Amendment reporter's privilege only where the journalist's testimony is cumulative or immaterial, and neither of those circumstances was present on the record. 210 F. Supp. 2d at 783. However, the court added that if, by the time the journalist is called to testify, other witnesses have presented testimony that would render the journalist's testimony cumulative, the court may "address anew the balancing of the competing constitutional interests." *Id.* at 784.

H. Media as a party

Despite one district court's assertion that the "privilege ... falls when a media defendant is sued for libel," the Fourth Circuit constitutional privilege does not differentiate between cases where the media entity is a party and cases where it is not. *Bauer v. Brown*, 11 Media L. Rep. 2168 (W.D.Va. 1985). The circuit's three-part balancing test, in fact, originated in a defamation case brought against a media entity. *LaRouche*, 780 F.2d at 1139. In *LaRouche*, the Fourth Circuit affirmed the lower court's denial of a motion to compel NBC to reveal its confidential sources. The Fourth Circuit agreed with the lower court that *LaRouche* had not exhausted alternative means of obtaining the information, one of the prongs of the test. *Id.*

Where a media entity or reporter is charged with other kinds of tortious behavior, however, the Fourth Circuit is likely to heighten its scrutiny of assertions of privilege. In *Food Lion*, the plaintiff grocery chain sued ABC for fraud, trespass and various commercial torts in connection with the television network's hidden-camera investigation of Plaintiff's stores. 951 F. Supp. 1211. The district court, in allowing limited discovery into two other hidden-camera investigations by ABC, added a prong to the *LaRouche* test, requiring the court to be "confident that the party asserting the privilege does not do so as a means of justifying otherwise illegal conduct." *Id.* at 1215.

Finally, while media parties may assert privilege as a constitutional matter, the South Carolina shield statute does not grant a qualified privilege where the one asserting the privilege is a party in interest. S.C. Code § 19-11-100 (1995). The North Carolina and Maryland shield statutes do not differentiate between cases in which a media entity is a party and cases in which it is not.

I. Defamation actions

The Fourth Circuit constitutional privilege is applicable to libel and non-libel cases. As noted in the [preceding section](#), the circuit's three-part balancing test originated in a defamation case. *LaRouche*, 780 F.2d at 1139. In at least one regard, the privilege seems stronger in libel cases than otherwise: Where a libel defendant concedes the authenticity of the allegedly libelous statement, the court has been inclined not to require disclosure of unpublished information surrounding the alleged libel. In both *Church of Scientology* and *Penland*, the courts reasoned that since the statement being sued upon was public, notes on the published statement were not sufficiently relevant and the need for disclosure not sufficiently compelling. *Church of Scientology*, 992 F.2d at 1329; *Penland*, 922 F. Supp. at 1084.

IV. Who is covered

The Fourth Circuit reporter's privilege jurisprudence does not test the boundaries of whom the privilege protects. All of the case law has dealt with persons/entities and information fitting within traditional conceptions of "reporters" and "news." Thus, it is difficult to predict how the courts of the Circuit would classify nontraditional news gatherers, such as students or academic researchers, or nontraditional news outlets, such as newsletters, reports for investors or internet publications.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The reporter's privilege case law does not define "reporter" or specify a minimum number of hours per week a "reporter" must work to invoke the privilege.

b. Editor

The case law does not define an "editor," though a newspaper editor has been permitted to invoke the privilege. See *Maurice v. Nat'l Labor Relations Board*, 691 F.2d 182 (4th Cir. 1982) (holding that business editor of *Charleston (W.Va.) Daily Mail* must exhaust administrative remedies before seeking judicial relief from subpoena).

c. News

The Fourth Circuit does not define "news" for the purpose of determining what information may be protected under the reporter's privilege. Presumably the scope of protection is broad, at least where the news gatherer is working for a traditional journalistic enterprise.

d. Photo journalist

The Fourth Circuit privilege does not define "photojournalist." In the one case specifically addressing the applicability of the privilege to photos, *Stickels v. General Rental Co.*, the newspaper, not the reporter, asserted a privilege. 750 F. Supp. 729, 730, 18 Media L. Rep. 1644 (E.D. Va. 1990). However, there is nothing in the law to indicate the reporter/photographer himself, or any news photographer, could not assert the privilege in his or her own name.

e. News organization / medium

The Fourth Circuit does not explicitly define or limit applicability of the reporter's privilege to certain media, though the case law has not addressed the privilege in the context of the Internet or magazines. The Circuit has applied the privilege to reporters at small and large newspapers, as well as local television stations and national broadcast networks. See, e.g., *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 284, 28 Media L. Rep. 2103 (4th Cir. 2000) (reporter for Wilmington, N.C., Morning Star newspaper); *Bischoff v. United States*, 25 Media L. Rep. 1286 (reporter for Houston Post); *Penland v. Long*, 922 F. Supp. 1080, 1082, 24 Media L. Rep. 1410 (W.D.N.C. 1995) (reporter for local WLOS-TV and reporter for *The Asheville (N.C.) Citizen-Times*); *In re Shain*, 978 F.2d 850, 851, 20 Media L. Rep. 1930 (4th Cir. 1992) (four reporters for South Carolina newspapers); *LaRouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134, 1136, 12 Media L. Rep. 1585 (4th Cir. 1986) (producers of NBC national television shows).

2. Others, including non-traditional news gatherers

The Fourth Circuit has not addressed the reporter's privilege as applied to non-traditional news gatherers, such as authors, freelancers, students, unpaid news gatherers, or academic researchers, or to others connected to the news process, such as newspaper librarians. However, a Virginia district court has applied the privilege to a freelance reporter assigned to cover the recent military conflict in Afghanistan on behalf of CNN. *United States v. Lindh*, 210 F. Supp. 2d 780, 781 (E.D. Va. 2002)

B. Whose privilege is it?

Though there have been no cases in the Fourth Circuit in which a source has attempted to invoke or waive the privilege, the privilege is characterized as belonging to the reporter and not the source. See, e.g., *Ashcraft*, 218

F.3d at 287 ("If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained ..."); *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505, 508 (E.D. Va. 1976) ("the First Amendment, protecting as it does the free flow of information, provides newsmen a privilege ...").

The news organization may assert the constitutional reporter's privilege in conjunction with the individual reporter, e.g., *United States v. King*, 194 F.R.D. 569, 571; *Penland*, 922 F. Supp. at 1082, or on behalf of the individual reporter, e.g. *LaRouche*, 780 F.2d at 1139; *Stickels*, 750 F. Supp. at 730-31; *Gilbert*, 411 F. Supp. at 507. However, one district court has questioned whether a publisher has standing to assert the privilege where the reporter is willing to waive it. In *Bauer v. Brown*, a former teacher brought a section 1983 claim against several former colleagues and other parties arising out of an earlier investigation of the teacher. 11 Media L. Rep. 2168 (W.D. Va. 1985). During that investigation, the defendants had had contacts with a newspaper reporter and television reporter that had resulted in published stories. The plaintiff subpoenaed the reporters to testify and produce all documents related to the interviews or news reports. The television reporter, who by the time of the subpoena was no longer a journalist, agreed to testify, but his notes and other documents were in the possession of the newspaper, which asserted the privilege. *Id.* at 2168-69. The district court granted the motions to quash on other grounds and left open the question of the publisher's standing.

V. Procedures for issuing and contesting subpoenas

Each of the federal district courts within the Fourth Circuit has its own rules and procedures. Counsel are encouraged to review a copy of the relevant local rules, and contact the court with specific questions that are not addressed by the rules.

A. What subpoena server must do

1. Service of subpoena, time

Rule 45 of the Federal Rules of Civil Procedure and Rule 17 of the Federal Rules of Criminal Procedure establish the requirements for issuance of a subpoena in federal courts. The Fourth Circuit does not appear through case law to have departed from these requirements where subpoenas are directed to the news media.

The federal rules, as well as the local rules of most of the courts in the Fourth Circuit, do not specify when a subpoena must be served. The District of South Carolina requires that subpoenas for witnesses in criminal cases be delivered to the Marshal for service at least seven days before the Monday of the week in which the trial is set to begin, except as otherwise ordered by the Court. D.S.C. Crim. R. 17.01. In the Eastern District of Virginia, subpoenas in civil actions must be served at least fourteen days before the date of the hearing or trial, except as otherwise ordered by the Court for good cause shown. E.D.Va. R. 45(E).

2. Deposit of security

The federal rules, as well as the local rules for the district courts in the Fourth Circuit, do not explicitly require that the subpoenaing party deposit security to procure the testimony or materials of the reporter.

3. Filing of affidavit

The federal rules, as well as the local rules for the district courts in the Fourth Circuit, do not require that the subpoenaing party make any sworn statement in order to procure a reporter's testimony or materials. Where the federal government is issuing a subpoena to the news media, it must obtain the express authorization of the Attorney General, and that authorization should be based on representations by the seeking party that the information sought is essential and other alternatives have been exhausted. See 28 C.F.R. § 50.10. However, the guidelines do not provide the media with a cause of action if they are not followed. *In re Shain*, 978 F.2d 850, 853-54, 20 Media L. Rep. 1930 (4th Cir. 1992).

4. Judicial approval

The local rules for district courts in the Fourth Circuit do not require that a judge or magistrate approve subpoenas before they may be served, except in some jurisdictions if the issuing party is pro se. As noted above, when the

federal government is issuing a subpoena to the news media, it must obtain the express authorization of the Attorney General. 28 C.F.R. § 50.10(e).

5. Service of police or other administrative subpoenas

The local rules for district courts in the Fourth Circuit do not include any specific provisions regarding the use and service of administrative subpoenas, including police or fire investigation subpoenas, and none of the case law addresses such subpoenas.

B. How to Quash

1. Contact other party first

Some jurisdictions require that a motion must contain an affirmation that prior to filing, the moving party attempted to confer with opposing counsel and attempted in good faith to resolve the matter. *See, e.g.*, D.S.C. Civ. R. 7.02; W.D.N.C. Local R. 7.1(A). Consult the local rules in your jurisdiction.

2. Filing an objection or a notice of intent

The case law of the Fourth Circuit indicates that a notice of intent need not be filed before a motion to quash, nor does an objection appear to be sufficient in place of a motion to quash.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the court where the subpoena is issued. In most cases this will be the court that is hearing the case, but not always. *See, e.g., Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 981 n.1 (4th Cir. 1992) (where action was pending in the Southern District of New York, but a subpoena was issued for a deposition in the Southern District of West Virginia, the West Virginia court was to hear motion to quash). The Fourth Circuit has not yet ruled on whether a Rule 45 motion to quash or motion to compel may be transferred, upon request from a subpoenaed nonparty, from the court issuing the subpoena to the court where the underlying litigation is pending. However, a recent district court case has found that a court has such authority. *United States v. Star Scientific, Inc.*, 2002 U.S. Dist. LEXIS 10652, *18 (D. Md. 2002) (holding a transfer would be convenient to the nonparty and the court where the litigation is pending would be better able to handle the discovery dispute).

b. Motion to compel

A media party should likely file a motion to quash before the subpoenaing party files a motion to compel. This is because Federal Rule of Civil Procedure 45(c)(2)(B) mandates some response to a subpoena within 14 days, and a failure to respond might be deemed a waiver of objection. *See In re Motorsports Merchandise Antitrust Litigation*, 186 F.R.D. 344, 349-50 (W.D.Va. 1999) (court refuses to quash subpoena after subpoenaed party fails to respond within 14 days and fails to make timely motion to quash).

c. Timing

Pursuant to Federal Rule of Civil Procedure 45(c)(2)(B), if the recipient of a subpoena in a civil action wishes to rely on a written objection, the recipient must serve the objection "within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service." A motion to quash, whether in a civil or a criminal matter, generally is required to be filed "promptly," in accordance with local rules or practice, and in any event prior to the return date of the subpoena (that is, the date by which the recipient is required to appear or otherwise comply with the subpoena).

d. Language

Pursuant to Federal Rule of Civil Procedure 45(d)(2), the motion to quash "shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." The federal rules and local rules for the district courts in the Fourth Circuit do not specify any stock language or preferred text that should be included in the motion.

e. Additional material

There is no statutory or case law addressing this issue in the Fourth Circuit.

4. In camera review

a. Necessity

The federal rules and the local rules of the district courts in the Fourth Circuit do not direct the court to conduct an in camera review of materials or interview with the reporter prior to deciding on a motion to quash, and the case law indicates judges in the Fourth Circuit rarely conduct such reviews or interviews before ruling on a motion to quash. In camera reviews are apparently used more frequently for other purposes, for example, in deciding on a motion to restrain publication, *United States v. King*, 194 F.R.D. 569, 572 (E.D. Va. 2000), or as a safeguard after a media entity is ordered to comply with a subpoena, *Food Lion Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1211, 1216, 25 Media L. Rep. 1182 (M.D.N.C. 1996) (Judge agrees to sit in on depositions and, if defendants feel an answer should be privileged, hear answer out of presence of plaintiff's counsel and determine whether privilege should apply).

b. Consequences of consent

There is no statutory or case law indicating that a stay pending appeal is automatic if a reporter or publisher consents to an in camera review and is then compelled to disclose.

c. Consequences of refusing

There is no statutory or case law addressing the consequences of a reporter or publisher's refusal to consent to an in camera review.

5. Briefing schedule

The local rules concerning motions in the districts of the Fourth Circuit are described below but are subject to change. Practitioners are urged to consult the relevant local rules when adjudicating a case in a federal jurisdiction, and to note that the presiding judge has discretion to alter most rules.

The District of Maryland requires that a motion "shall be accompanied by a memorandum setting forth the reasoning and authorities in support of it." Oppositions to the motion should be filed within 14 days. D. Md. R. 105.

The Eastern District of North Carolina requires that a motion "shall be filed with an accompanying supporting memorandum," and a response must be filed within 10 days. E.D.N.C. R. 4.03-4.05. The Middle District of North Carolina sets forth that a motion should be accompanied by a brief, and a response should be filed within 20 days. M.D.N.C. Local R. 7.3. In the Western District of North Carolina, motions should be filed with briefs, and responses are expected within 14 days. W.D.N.C. Local R. 7.1-7.2.

The District of South Carolina requires that a motion "shall be timely filed with an accompanying supporting memorandum." D.S.C. Civ. R. 7.04. A response must be filed within 15 days, unless otherwise specified by the court. D.S.C. Civ. R. 7.06.

The Eastern District of Virginia requires that a motion shall be accompanied by a "written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies." E.D. Va. R. 7(E)(1). The opposing party must respond within 11 days unless otherwise directed by the court.

The Northern and Southern Districts of West Virginia requires that a motion "shall be filed timely" and "shall be accompanied by a supporting memorandum of not more than twenty pages." N.D. W.Va. Local R. Civ. P. 4.01(a), S.D. W.Va. Local R. Civ. P. 4.01(a). Responses shall be filed within 14 days. N.D. W.Va. Local R. Civ. P. 4.01(c), S.D. W.Va. Local R. Civ. P. 4.01(c).

6. Amicus briefs

The filing of amicus briefs is governed by Federal Rule of Appellate Procedure 29, which permits an amicus to submit a brief by leave of court or if the brief states that all parties have consented to its filing. The Court of Ap-

peals of the Fourth Circuit appears to accept amicus briefs as a routine matter; they were also accepted at the district court level in *Food Lion*, where the court was reviewing the orders of a magistrate judge.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The Fourth Circuit has held that the reporter's privilege will be overcome "whenever society's need for the ... information in question outweighs the intrusion on the reporter's First Amendment interests." *Ashcraft v. Conoco*, 218 F.3d 282, 287, 28 Media L. Rep. 2103 (4th Cir. 2000). To guide the courts in balancing these interests, the Fourth Circuit in *LaRouche v. Nat'l Broadcasting Co.* adopted a three-part test: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *LaRouche*, 780 F.2d 1134, 1139, 12 Media L. Rep. 1585 (4th Cir. 1986) (citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980)). The Fourth Circuit does not explicitly place the burden of persuasion on the subpoenaing party.

B. Elements

1. Relevance of material to case at bar

The Fourth Circuit's *LaRouche* test requires a showing that the information sought is "relevant" to the case. *LaRouche*, 780 F.2d at 1139. This is apparently a looser requirement than in earlier Fourth Circuit conceptions of the privilege, where the moving party was required to show that the information was "crucial to the case" or went "to the heart of the case." *Miller v. Mecklenburg County*, 602 F. Supp. 675, 679 (W.D.N.C. 1985), *aff'd* 813 F.2d 402 (4th Cir. 1986), *cert. denied* 479 U.S. 1100 (1987), *further opinion at* 12 Media L. Rep. 1405 (W.D.N.C. 1985). Nevertheless, the relevancy requirement retains some bite. In particular, courts will not force disclosure of information that relates to a case if it is not relevant to the showings required under particular claims. For example, in *Penland v. Long*, plaintiffs brought a defamation claim against the town sheriff based on a press release which did not mention plaintiffs by name. The district court upheld two reporters' assertions of privilege concerning their notes from interviews with the sheriff about the press release. The court deemed their notes of minimal relevance because it had already been established that the sheriff was referring to plaintiffs in the release. *Penland*, 922 F. Supp. 1080, 1084, 24 Media L. Rep. 1410 (W.D.N.C. 1995). Likewise, in *Church of Scientology Int'l v. Daniels*, because the defendant was willing to stipulate to the accuracy of his allegedly libelous statement, the Fourth Circuit deemed of "questionable" relevance editors' notes on the meeting at which the statement was made. *Church of Scientology*, 992 F.2d 1329, 1335, 21 Media L. Rep. 1426 (4th Cir. 1993), *cert. denied* 510 U.S. 869 (1993).

2. Material unavailable from other sources

The *LaRouche* test weighs "whether the information can be obtained by alternative means." 780 F.2d at 1139. This requirement is in line with the earliest Fourth Circuit formulations of a balancing test; in *Gilbert v. Allied Chemical Corp.*, the first case in the Fourth Circuit to address a reporter's privilege, the seeking party had to show "that his only practical access to crucial information necessary for the development of the case is through the reporter's sources." *Gilbert*, 411 F. Supp. 505, 510 (E.D. Va. 1976). Forcing a reporter to reveal information "is to be the last resort of the litigants." *Miller*, 602 F. Supp. at 679.

a. How exhaustive must search be?

The courts apply a reasonableness standard — the seeking party must show that the information sought "cannot be reasonably obtained by alternative means." *Penland*, 922 F. Supp. at 1084. However, what constitutes a reasonably exhaustive search has not been clearly established. In *Bischoff v. United States*, the court found that plaintiffs had "made almost no effort" to determine independently who had made improper disclosures of tax information to a newspaper reporter. 25 Media L. Rep. 1286, 1287 (E.D. Va. 1996). Plaintiffs had only sent interrogatories to the government defendant, and the court required at the very least that plaintiffs depose the federal agents who may have been involved with the disclosures before requiring the newspaper reporter to reveal the information. *Id.* Likewise, in *LaRouche*, the Fourth Circuit noted there were still "obvious sources" plaintiff had not deposed, including a public source of one of the stories. 780 F.2d at 1137. On the other hand, in *Penland*, the district court

said it was "satisfied" with plaintiffs' showing even though they had failed to depose a person who may have overheard the information sought from the reporters. 922 F. Supp. at 1084.

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

The subpoenaing party should be required to "demonstrate to the court unsuccessful, independent attempts to gain the requested information" from any known public sources or those who the facts indicate might have the information sought. *LaRouche*, 780 F.2d at 1139. A party challenging a subpoena will have a strong argument that the seeking party has not sought all reasonable alternatives if it has not exhausted its non-party depositions. *Id.*

c. Source is an eyewitness to a crime

A court in the Fourth Circuit has held that, in the context of a civil case, the fact that the source might have witnessed or participated in a crime does not change the application of the balancing test. In *Bischoff*, the district court found that plaintiffs had not made an exhaustive search for those who made potentially illegal disclosures to a reporter, rejecting plaintiffs' contention that a court may dispense with the balancing test when a reporter asserting a privilege is believed to have first-hand evidence about criminal conduct. 25 Media L. Rep. at 1287. However, the court seemed to indicate that the balancing test might not apply in a criminal prosecution over the same disclosures. *Id.* at 1288. The Fourth Circuit's reluctance to recognize a reporter's privilege in criminal cases indicates an unwillingness to protect information obtained from a source who witnessed or participated in a crime. *See In Re Shain*, 978 F.2d 850, 852, 20 Media L. Rep. 1930 (4th Cir. 1992) ("... absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution").

3. Balancing of interests

The third branch of the Fourth Circuit's *LaRouche* test is "whether there is a compelling interest in the information," but in practice, the court determines whether the subpoenaing party's interest is sufficiently compelling by weighing it against the countervailing interests in protecting sources and information. Frequently, the analysis of the subpoenaing party's interest is conflated with discussion of the other *LaRouche* factors. For example, no compelling interest was found in *Penland* largely because the information sought was deemed not relevant. 922 F. Supp. at 1084. By contrast, in *Stickels v. General Rental Co.*, defendant's compelling interest in obtaining the photos seemed largely based on their relevance. 750 F. Supp. 729, 732, 18 Media L. Rep. 1644 (E.D. Va. 1990). In addition, in criminal cases a defendant's constitutional rights to a fair trial and confrontation of the accuser are deemed compelling, as is the prosecution's law enforcement interest. *United States v. King*, 194 F.R.D. 569, 585 (E.D. Va. 2000).

Relevant countervailing interests include the reporter's First Amendment interests, *see Ashcraft*, 218 F.3d at 288 n.12, and the public's interest in the free flow of information, *Miller*, 602 F. Supp. at 679-80 (holding information will be released under seal to protect public's interest).

4. Subpoena not overbroad or unduly burdensome

The overbreadth or burdensome nature of a subpoena is not a factor in determining whether to uphold the constitutional reporter's privilege under *LaRouche*, but several rules and regulations exist to protect the media and others from overly broad or unduly burdensome subpoenas. Federal Rule of Civil Procedure 45(c) requires a judge to modify or quash a subpoena upon timely motion and impose sanctions upon the seeking party if the subpoena subjects a person to "undue burden." Federal Rule of Criminal Procedure 17(c) authorizes the judge to quash a criminal subpoena if "compliance would be unreasonable or oppressive." Regulations issued by the Department of Justice addressing government subpoenas to the media mandate that the subpoena "not be used to obtain peripheral, nonessential, or speculative information" and that the seekers "avoid requiring production of a large volume of unpublished materials. 28 C.F.R. § 50.10(f)(1), (2), (6). There is no case law in the Fourth Circuit interpreting these rules in the context of a subpoena to a news organization.

5. Threat to human life

No cases in the Fourth Circuit address how and to what degree a judge should consider a threat to human life.

6. Material is not cumulative

Whether the expected testimony or material would be cumulative is not a separate category in the reporter's privilege analysis under *LaRouche* but factors into the other categories, particularly the subpoenaing party's compelling interest in the information. "If the material sought turns out to be simply cumulative or useful only for impeachment purposes, then the Plaintiff's 'need' is not nearly as great as in other situations." *Bauer v. Brown*, 11 Media L. Rep. 2168, 2172. In *Shain*, the Fourth Circuit required the reporters to testify about their interviews with the criminal defendant senator, even though the government already had videotape evidence of the defendant committing the crime. However, the Court indicated it might have ruled differently had the reporters' testimony not promised to add evidence of mens rea. *See Shain*, 978 F.2d at 853.

7. Civil/criminal rules of procedure

Rule 45(c) of the Federal Rule of Civil Procedure 45(c) requires a judge to modify or quash a subpoena upon timely motion and impose sanctions upon the seeking party if the subpoena subjects a person to "undue burden." Rule 17(c) of the Federal Rules of Criminal Procedure authorizes the judge to quash a criminal subpoena if "compliance would be unreasonable or oppressive."

8. Other elements

Where a media entity has been accused of allegedly tortious behavior such as fraud, one court has added a prong to the *LaRouche* test, requiring the judge to be "confident that the party asserting the privilege does not do so as a means of justifying otherwise illegal conduct." *Food Lion Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1211, 1215, 25 Media L. Rep. 1182 (M.D.N.C. 1996).

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There is no statutory or case law in the Fourth Circuit addressing this issue.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no statutory or case law in the Fourth Circuit addressing this issue.

b. Disclosure of non-confidential source's name

There is no statutory or case law in the Fourth Circuit addressing this issue.

c. Partial disclosure of information

There is no statutory or case law in the Fourth Circuit addressing this issue.

d. Other elements

There is no statutory or case law in the Fourth Circuit addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law in the Fourth Circuit addressing this issue.

VII. What constitutes compliance?

A. Newspaper articles

Under Federal Rule of Evidence 902(6), newspapers and periodicals are self-authenticating; in other words, they are admissible into evidence without a writer, editor or other witness testifying to their authenticity.

B. Broadcast materials

Unlike newspapers or printed periodicals, videotapes are not self-authenticating. Under Federal Rule of Evidence 902(b)(1), authentication is satisfied by "evidence sufficient to support a finding that the matter is what the proponent claims." Generally, this would require testimony by a witness who can demonstrate the chain of custody of

the tapes, most likely a representative of the broadcaster. The courts do not specify who that representative must be.

C. Testimony vs. affidavits

There appears to be no statute or regulation requiring testimony rather than an affidavit to confirm that an article was true and accurate as published; however, the case law indicates that the general practice of the Fourth Circuit is to require testimony. *See In re Shain*, 978 F.3d 850, 852, 20 Media L. Rep. 1930 (4th Cir. 1992) (reporters held in contempt for refusal to testify to confirm accuracy of quotations in articles).

D. Non-compliance remedies

1. Civil contempt

Civil contempt is the most common remedy applied by Fourth Circuit courts to reporters for non-compliance with a subpoena. Designed to compel compliance with the court order, civil contempt sanctions are typically avoidable through obedience of the order and are mooted when the underlying proceeding is resolved or the information at issue is obtained in another fashion.

a. Fines

There are no recent examples of fines being levied by Fourth Circuit courts against reporters refusing to comply with court orders to disclose sources or information.

b. Jail

Jail is the more common punishment for reporters held in civil contempt in the Fourth Circuit, and sentences appear to be limited only by the discretion of the court. In *United States v. Steelhammer*, two reporters for the *Charleston Gazette* were found in contempt for refusing to testify at the civil contempt hearing of union rally members. The district judge ordered the reporters to be held until further order of the court, not to exceed six months. They were held for four to six hours before being released on bail pending an appeal. Other reporters responded to the questions the Gazette reporters refused to answer, and the underlying case was resolved. On appeal, the Fourth Circuit affirmed the contempt judgments but vacated the unserved portions of the sentences because the underlying proceeding had terminated. *Steelhammer*, 561 F.2d 539 (4th Cir. 1977) (en banc), *rev'g*, 539 F.2d 373 (4th Cir. 1976).

In 1991, four reporters for South Carolina newspapers refused to testify in a criminal trial. The district judge found them in contempt and ordered them confined during the two days of trial; the reporters spent at least one of those days in jail before being released pending an appeal. *Shain*, 978 F.3d at 852. The contempt convictions were affirmed, but by then the underlying proceeding had ended. *Id.* at 854. Most recently, in 1998, a reporter for the Wilmington, N.C., *Morning Star*, was found in civil contempt and ordered to an indefinite term of imprisonment for refusing to disclose his sources of information about an allegedly confidential, \$36 million court settlement. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 286-87, 28 Media L. Rep. 2103 (4th Cir. 2000). Before the reporters was required to report to jail, the Fourth Circuit stayed the order pending appeal, and on appeal the Court reversed the contempt order on the grounds that the sealing order the reporter allegedly violated was invalid. *Id.* at 287-88.

2. Criminal contempt

The court never specifies whether the contempt order in *Shain*, discussed above, was criminal or civil. *Shain*, 978 F.2d at 852. The fixed jail sentence is more indicative of a criminal contempt finding; however, the failure to impose the remainder of the sentence when the contempt order was affirmed on appeal indicates the Fourth Circuit considered the order to be civil and mooted upon resolution of the underlying suit. There are no other cases in the Fourth Circuit in which a reporter has been found in criminal contempt for failure to disclose sources or information.

3. Other remedies

There is no statutory or case law in the Fourth Circuit discussing this issue.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Generally, one served with a subpoena, either for trial or discovery, may not appeal a denial of a motion to quash without first resisting the subpoena and being found in contempt. *United States v. Ryan*, 402 U.S. 530, 533 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328 (1940). There have been no cases in the Fourth Circuit in which a motion to quash has been appealed before a reporter is held in contempt or a final order issued. See *Ashcraft v. Conoco Inc.*, 218 F.3d 282, 284 (4th Cir. 2000) (reporter appeals contempt order); *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1335, 21 Media L. Rep. 1426 (4th Cir. 1993), *cert. denied* 510 U.S. 869 (1993) (plaintiff appeals summary judgment); *In re Shain*, 978 F.2d 850, 851, 20 Media L. Rep. 1930 (4th Cir. 1992) (reporters appeal contempt order); *LaRouche v. Nat'l Broadcasting Co., Inc.*, 780 F.2d 1134, 1136, 12 Media L. Rep. 1585 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986) (plaintiff appeals final judgment); *United States v. Steelhammer*, 539 F.2d 273 (4th Cir. 1976), *rev'd en banc*, 561 F.2d 539, 540 (4th Cir. 1977) (reporters appeal contempt order).

2. Expedited appeals

Fourth Circuit Court of Appeals Rule 12(c) provides that upon its own motion or the motion of a party, the Court may expedite an appeal. According to the rule, "A motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on existing record, and the need for oral argument." The case law does not clarify the standards for granting an expedited appeal or indicate any special considerations for situations involving news media subpoenas.

B. Procedure

1. To whom is the appeal made?

Appeals from the federal district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia, as well as from final judgments by magistrate judges in those federal districts, are brought to the United States Court of Appeals for the Fourth Circuit. Fed. R. App. P. 3; Fed. R. Civ. P. 73(c).

To appeal other orders by magistrate judges, including rulings on motions to quash and contempt citations, the reporter must file objections within 10 days of receiving a copy of the order. The district judge to whom the case is assigned shall then consider the objections and modify or set aside any portion of the order found to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72. Likewise, a reporter subpoenaed in an administrative hearing must follow the established administrative appeal procedure before seeking relief from the federal courts. Fed. R. App. P. 15; *Maurice v. NLRB*, 691 F.2d 182, 183 (4th Cir. 1982) (instructing district court to dismiss case brought by editor who failed first to invoke appeals procedure provided by NLRB regulations).

2. Stays pending appeal

A party seeking a stay pending appeal must ordinarily make a motion in the district court that issued the judgment. Such a motion may also be made to the Court of Appeals upon a showing that moving first in the district court would be impracticable, or that the district court denied the initial motion. Fed. R. App. P. 8(a). When weighing whether to grant a stay pending appeal, courts generally consider four factors: 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). Because of the fundamental constitutional implications of holding reporters in contempt, courts are inclined to grant stays in such cases. See *Ashcraft*, 218 F.3d at 287 (appeals court stays district court's contempt order, keeping reporter out of jail pending appeal).

3. Nature of appeal

Final judgments and contempt orders may be appealed as of right by filing a notice of appeal with the district clerk within 30 days after the judgment or order is entered. 28 U.S.C. § 1291; Fed. R. App. P. 4(a). Courts also

permit some interlocutory appeals; however, parties generally may not appeal denials of motions to quash without first resisting the subpoena and being found in contempt. *Ryan*, 402 U.S. 530 (1971); *Cobbledick*, 309 U.S. 323, 328 (1940). There have been no cases in the Fourth Circuit in which a motion to quash has been appealed before a reporter is held in contempt or a final order issued. See *Ashcraft*, 218 F.3d at 284 (reporter appeals contempt order); *Church of Scientology*, 992 F.2d at 1335 (plaintiff appeals summary judgment); *Shain*, 978 F.2d at 851 (reporters appeal contempt order); *LaRouche*, 780 F.2d at 1136 (plaintiff appeals final judgment); *Steelhammer*, 561 F.2d at 540 (reporters appeal contempt order).

4. Standard of review

The Fourth Circuit reviews both denials of motions to compel discovery and civil contempt orders under an abuse-of-discretion standard. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000) (companion to *Ashcraft* case discussed elsewhere); *Church of Scientology*, 992 F.2d at 1335 (reviewing motion to compel discovery); *LaRouche*, 780 F.2d at 1139 (same). The standard is not heightened by the constitutional implications of these cases, nor is de novo review required.

5. Addressing mootness questions

The Fourth Circuit permits appeal of a contempt order even if the trial or grand jury for which the reporter was subpoenaed has concluded, on the grounds that such a controversy is "capable of repetition but evading review." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); see *United States v. Steelhammer*, 539 F.2d 373, 378 (4th Cir. 1976) (Winters, J., dissenting), adopted in 539 F.2d 539 (4th Cir. 1977) (review en banc) ("While the case is thus moot in the sense that the reporters have lost the ability to purge themselves, their contentions raise an important point difficult to advance at the appellate level before mootness ensues and likely to arise again in continuing litigation ...").

Contempt orders can also be appealed even if the underlying controversy has been resolved if there is a chance of further proceedings. See *Shain*, 978 F.2d at 853 n.2 (appeal remains live controversy because defendant has been granted a new trial and government has indicated if case is retried it intends to subpoena reporters again).

6. Relief

The Fourth Circuit has the authority to dissolve a district court's contempt order, and it has been willing to do so rather than merely to order the trial judge to reconsider the issues. See *Ashcraft*, 218 F.3d 282, 288 (4th Cir. 2000) (reversing district court's contempt order, thereby invalidating any contempt sanctions).

IX. Other issues

A. Newsroom searches

There have been no Fourth Circuit cases applying the federal Privacy Protection Act, 42 U.S.C. § 2000aa, or addressing newsroom searches and/or seizures more generally.

B. Separation orders

There is no statutory or case law in the Fourth Circuit discussing this issue.

C. Third-party subpoenas

There is no statutory or case law in the Fourth Circuit discussing subpoenas to third parties (credit card companies, telephone companies, etc.) designed to elicit information about a reporter's sources.

D. The source's rights and interests

There is no statutory or case law in the Fourth Circuit discussing whether sources may intervene anonymously to halt disclosure of their identities, or whether they may sue over disclosure after the fact.