REPORTER'S PRIVILEGE: 5TH CIR.

The Reporters Committee for Freedom of the Press

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

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

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The Reporter's Privilege Compendium: An Introduction

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

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

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

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

Above the law?

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

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

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

5TH CIR.

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I. Introduction: History & Background

The Fifth Circuit has recognized a First Amendment qualified privilege for journalists in certain classes of cases. Where a subpoena seeks the identity of a journalist's *confidential* source in a *civil case*, including a *defamation case* in which the reporter or media organization is a party, the reporter enjoys the privilege, and the party seeking the information must demonstrate with substantial evidence that the information is relevant and not available elsewhere, and that its need for the information is compelling. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726, *as modified*, 628 F.2d 932 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 792, 799 (5th Cir. 1983). However, where a *grand jury* or a party in a *criminal case* seeks the *non-confidential* work product or testimony of a journalist, the Fifth Circuit recognizes no privilege. *United States v. Smith*, 135 F.3d 963, 968, 971-72 (5th Cir. 1998). Rather, the Fifth Circuit has held that the First Amendment protects journalists' non-confidential materials and sources only from criminal process issued with intent to harass. *Id.* at 969, 971.

The law in the Fifth Circuit remains unsettled regarding whether a qualified privilege is available against a subpoena in a *civil case* that seeks the identity of a journalist's *non-confidential* sources or work product, though various *dicta* suggest the Fifth Circuit may not afford the journalist a privilege in those instances. *Pressey v. Patterson*, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990); *Smith*, 135 F.3d at 972. Finally, it remains an open question whether a reporter's *confidential* sources or work product sought in a *grand jury* proceeding or *criminal case* are entitled to qualified protection. Certain language in *Smith*, however, including its construction of *Branzburg*, may cloud the availability of those rights. *Smith*, 135 F.3d at 968, 971-72.

In the most recent decision by the Fifth Circuit addressing the reporter's privilege doctrine, the Fifth Circuit reaffirmed, in an unpublished decision of some notoriety, its position that qualified First Amendment protection of journalists from subpoenas is at its nadir when brought to bear against *grand jury* subpoenas. *In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301, 2303-04 (5th Cir. Aug. 17, 2002) (per curiam) (unpublished). Without deciding whether the information sought by the grand jury was confidential or not, a panel of the court declined to reverse the district court's contempt order, which had remanded freelance writer Vanessa Leggett to custody following her refusal to produce all originals and copies of her notes and tapes of interviews regarding a celebrated Houston murder. *Id.* at 2303. Thus, Leggett remained incarcerated until January 4, 2002, when the term of the grand jury expired, or 168 days all told — the longest period of incarceration of a contemnor-journalist in the history of the United States at that time. A subsequent grand jury returned an indictment without the need for Leggett's testimony.

The leading cases with which any analysis of the reporter's privilege in the Fifth Circuit must begin are *Miller*, *Selcraig*, and *Smith*.

II. Authority for and source of the right

The Supreme Court's plurality decision in *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646 (1972), is the source of the law of the Fifth Circuit on the existence of a First Amendment qualified reporter's privilege. The law of the circuit depends heavily on the Fifth Circuit's narrow view of the holding in that case.

In *Miller v. Transamerican Press, Inc.*, a libel case and the first opinion to recognize the privilege in the Fifth Circuit, the court construed *Branzburg* to hold that, where a reporter faces compulsory process issued by a grand jury, the First Amendment provides only a right to be free from process intended to harass. 621 F.2d 721, 725, *as modified*, 628 F.2d 932 (5th Cir. 1980). The Fifth Circuit distinguished the balance of interests in civil libel cases, however, from that in grand jury proceedings. *Id.* at 725-26. Based on this distinction, *Miller* recognized a qualified First Amendment privilege for reporters in libel cases in which the plaintiff seeks to discover the reporter's confidential sources. *Id.* at 725.

The Fifth Circuit later extended the qualified privilege recognized in *Miller* to confidential information sought in civil cases generally. *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983). In so doing, the court noted that its recog-

nition of a qualified reporter's privilege in *Miller* "was dictated by our careful reading of the plurality and concurring opinions in *Branzburg*." *Id.*

Finally, when considering a reporter's attempt to invoke the privilege to protect non-confidential information subpoenaed in a criminal trial, the Fifth Circuit disagreed with those circuits that have derived a broad, qualified privilege in criminal cases from Justice Powell's concurrence in *Branzburg*. *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998). Rather, the *Smith* court noted that *Branzburg* "explicitly rejected a qualified newsreporters' privilege shielding confidential source information from grand juries," *id.*, and that Justice Powell's concurrence merely "had in mind the 'harassment of newsmen.'" *Id.* (quoting *Branzburg*, 408 U.S. at 709, 92 S. Ct. at 2671 (Powell, J., concurring)). The Fifth Circuit then equated the interests surrounding grand jury proceedings to those that arise in criminal trials. *Id.* at 971. As such, the Fifth Circuit in *Smith* held that no First Amendment qualified privilege exists for non-confidential information sought in criminal cases generally. *Id.* at 972.

III. Scope of protection

A. Generally

In criminal cases involving non-confidential sources and materials, the Fifth Circuit has taken a strict view of the scope of the privilege established in *Branzburg v. Hayes*, 408 U.S. 665 (1972), refusing to extend a qualified privilege to reporters except where the right to subpoena is not used in good faith by the government, but instead to harass the reporter. *See United States v. Smith*, 135 F.3d 963, 969-71 (5th Cir. 1998). The privilege exists in civil cases to protect the reporter from having to reveal the identity of confidential sources; the court follows a balancing test to weigh the interests protected by the privilege against the interest implicated when a party seeks the information. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726, *as modified*, 628 F.2d 932 (5th Cir. 1980). Fifth Circuit opinions regarding the reporter's privilege cite to other circuits; the Court has recognized in criminal cases that other circuits grant a broader privilege, but notes some similarities to other circuits in the civil context. *Smith*, 135 F.3d at 969 & 972 n.4; *see also Miller*, 621 F.2d at 726 (considering civil libel cases); *In re Selcraig*, 705 F.2d 789, 799 n.14 (5th Cir. 1983) (considering civil cases generally).

B. Absolute or qualified privilege

The reporter's privilege in the Fifth Circuit is a qualified privilege, where it exists at all. In civil cases, the Fifth Circuit recognizes a qualified privilege not to disclose the identity of confidential informants. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *as modified*, 628 F.2d 932 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 797 (5th Cir. 1983). Under the Fifth Circuit's reading of *Branzburg v. Hayes*, 408 U.S. 665 (1972), there is no privilege in criminal cases involving non-confidential sources and materials except to protect the newsperson from harassment, as where the grand jury does not conduct its investigation in good faith. *See United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998).

C. Type of case

1. Civil

The Fifth Circuit has applied a three-part test to determine the scope of the privilege not to reveal the identity of a confidential source in civil suits for libel in which the media is a party: (1) is the information relevant; (2) can the information be obtained by alternative means; and (3) is there a compelling interest in the information? *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (citing *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958)), *as modified*, 628 F.2d 932 (5th Cir. 1980). On rehearing, the panel supplemented its opinion, clarifying what evidence the movant must show to overcome the privilege. *Miller*, 628 F.2d 932, 932 (5th Cir. 1980). Merely pleading a case of libel does not defeat the privilege; rather, the plaintiff must first show "*substantial evidence* that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case." *Miller*, 628 F.2d at 932 (emphasis added); *see In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983).

Moreover, the Fifth Circuit has adopted the qualified privilege in *Miller* in a non-libel, civil case in which the reporter was not a party. Rather, the challenged subpoena sought the identity of the reporter's confidential informant only because that information would help the plaintiff prove his case for punitive damages. *In re Selcraig*, 705 F.2d 789, 797-99 (5th Cir. 1983) (finding no necessity established because plaintiff had not proved by more than mere allegation a *prima facie* case for liability and the reporter's information was relevant only to damages). The Fifth Circuit has not explicitly held that the qualified privilege applies to all civil cases in all instances, however. For example, the Fifth Circuit has not addressed whether confidential information obtained from a confidential informant other than her identity would be covered by the privilege.

In civil cases involving the non-confidential work product of non-party reporters, district courts have recognized the application of the qualified privilege. *Brinston v. Dunn*, 919 F. Supp. 240, 244 (S.D. Miss. 1996); *Holland v. Centennial Homes, Inc.*, 1993 WL 755590, at *6, 22 Media L. Rep. 2270 (N.D. Tex. 1993). However, the Fifth Circuit later questioned whether a qualified privilege protects the press where no confidential relationship exists between the reporter and the informant. *See United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (citing *Pressey v. Patterson*, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990) (stating in *dicta* that a confidential relationship may be a necessary condition for establishing a privilege)); *see also De La Paz v. Henry's Diner, Inc.*, 946 F. Supp. 484, 485 (N.D. Tex. 1996) (declining to extend the privilege to non-confidential material in a civil matter); *Cinel v. Connick*, 792 F. Supp. 492, 498-500 (E.D. La. 1992) (in civil matter involving court order that required media to produce an inventory of materials in its possession for *in camera* review, there was no qualified privilege either under federal law or Louisiana shield statute, La. R.S. 45:1459).

2. Criminal

The Fifth Circuit's treatment of criminal cases — both grand jury proceedings and criminal trials — differs from its treatment of civil cases. According to the Fifth Circuit's reading of *Branzburg v. Hayes*, 408 U.S. 665 (1972), there is no qualified First Amendment privilege available in criminal cases involving non-confidential sources and materials, except in so much as the press is entitled to remain free from governmental harassment, as when the grand jury does not conduct its investigation in good faith. *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998).

In *Smith*, the Fifth Circuit opined that the interests raised in the grand jury proceeding at issue in *Branzburg* were not meaningfully different than those in the criminal trial context in *Smith*. *Id.* at 971. Rather, the public's interest in prosecuting criminals was the same in both instances. *Id.* Thus, except where the government acts to harass the press, no privilege under *Branzburg* exists against producing the identity of non-confidential sources or non-confidential work product in the criminal context. *Id.*

The prosecution in *Smith* subpoenaed an unaired, non-confidential videotape recording of an interview of the defendant by a local television station. *Id.* at 966. The *Smith* court distinguished *Miller*, which had recognized a qualified privilege in civil libel cases, asserting that the public interest in obtaining the information is weaker in civil cases than in the criminal context. *Id.* at 971-72. Thus, no qualified privilege applied in the criminal context for non-confidential information, and the government did not need to meet any special First Amendment balancing test. Instead, absent the qualified privilege, the government merely needed to identify the information it sought with sufficient specificity and show that it was relevant and admissible — that is, the general test for the sufficiency of any subpoena. *Id.* at 972. It is worth noting, however, that the panel in *Smith* did not specifically consider whether the identity of a *confidential* source or information obtained from such a source also lacks the protection of a First Amendment qualified privilege.

In addition, although *Smith* recognized that a defendant may possess a Sixth Amendment right to non-confidential work product, because the defendant in *Smith* had not joined the government's appeal, the court did not reach that issue. *Smith*, 135 F.3d at 970 n.3. A district court, however, has limited a criminal defendant's ability to invoke his Sixth Amendment right to compulsory process against reporters. *Campbell v. Klevenhagen*, 760 F. Supp. 1206, 1214-16 (S.D. Tex. 1991). The defendant sought to compel two reporters to observe the trial and identify any confidential sources they recognized in the courtroom, who then might provide the defendant with impeachment information. *Id.* The court stated that the defendant's right to compulsory process could only compel testimony in front of the trier of fact (citing *Taylor v. Illinois*, 108 S. Ct. 646, 652 (1988)). *Id.* at 1214.

The court also upheld the privilege under the test from *Miller* because the reporters had no material exculpatory evidence to offer, could not identify their sources, and had indicated that the defense had access to other exculpatory testimony. *Id.* at 1215-16. Note that, while *Campbell* compelled criminal defendants under *Miller* to show that the testimony they seek is material and favorable to their defense, *id.* at 1214, it remains unclear to what extent the Fifth Circuit will apply *Miller*'s balancing test to criminal cases in the wake of *Smith*.

3. Grand jury

The Fifth Circuit construes *Branzburg v. Hayes*, 408 U.S. 665 (1972), narrowly when considering grand jury subpoenas or subpoenas in criminal trials seeking non-confidential information. *See In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. Aug. 17, 2002) (per curiam) (unpublished). It has declined to recognize a qualified reporter's privilege for non-confidential information in the context of a criminal case. *See United States v. Smith*, 135 F.3d 963, 971-72 (5th Cir. 1998). It further has equated the compulsory process at issue in the criminal context with the grand jury subpoena at issue in *Branzburg*. *Id.* at 971. Thus, absent a showing of harassment, reporters must comply with subpoenas for non-confidential information in grand jury and criminal cases in the Fifth Circuit, so long as the information sought is identified with sufficient specificity, is relevant, and is admissible. *Id.*

No Fifth Circuit case has decided whether confidential information provided in response to grand jury subpoenas may be withheld, post-trial, from public view under the reporter's privilege doctrine. However, one district court has indicated a willingness to consider such an argument. *See United States v. Valencia*, 2006 WL 3707867, at *10 (S.D. Tex. 2006) (on a motion for limited protective order, concluding that re-dactions sufficiently protected the identity of the publishers' sources such that the limited disclosures did not undermine any genuine First Amendment interest the publishers might have in protecting their data and sources).

D. Information and/or identity of source

The two leading civil cases in the Fifth Circuit construing the reporter's privilege apply the privilege specifically to protecting the identity of confidential sources. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725, *as modified*, 628 F.2d 932 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983). There is no Fifth Circuit case directly addressing information that implicitly identifies a source of information, though the *Selcraig* court approved the district court's graduated methodology under which it began an *in camera* inquiry of the reporter with general questions, asking increasingly specific questions only as necessary, in order to uphold the privilege to the greatest extent possible. *See Selcraig*, 705 F.2d at 795, 799.

E. Confidential and/or non-confidential information

The Fifth Circuit extends a qualified privilege in civil cases to prevent the disclosure of the identity of confidential sources. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725, *as modified*, 628 F.2d 932 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 797 (5th Cir. 1983). The Fifth Circuit has not, however, specifically considered whether the protection extends to information obtained from a source under a promise of confidentiality. *See Miller*, 621 F.2d 721.

Conversely, the Fifth Circuit has stated that it has never recognized a reporter's privilege for non-confidential information, noting that for testimonial privileges, "the existence of confidential relationship that the law should foster is critical to the establishment of a privilege." *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). The Court cited *dicta* from its decision in *Pressey v. Patterson*, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990), theorizing that, indeed, confidentiality may be a necessary condition for the application of a qualified First Amendment reporter's privilege. *Smith*, 135 F.3d at 972. The *Smith* court further held that, in criminal cases, no reporter's privilege protects non-confidential information. *Id.* Absent such a privilege, the government need merely identify the information it seeks with sufficient specificity and show that it is relevant and admissible. *Id.*

Before *Smith* was decided, district courts were split regarding the application of the reporter's privilege to non-confidential information. For instance, a district court upheld the privilege in a civil case seeking notes and materials for possible impeachment purposes from a non-party reporter who did not witness the facts at issue. *Holland v. Centennial Homes, Inc.*, 1993 WL 755590, at *6, 22 Media L. Rep. 2270 (N.D. Tex. 1993); *see Brinston v. Dunn*, 919 F. Supp. 240, 243—44 (S.D. Miss. 1996) (in civil case, recognizing privilege for non-confidential unpublished information obtained by reporter). However, other district courts had declined to

extend the privilege to non-confidential material in civil matters. *E.g., De La Paz v. Henry's Diner, Inc.*, 946 F. Supp. 484, 485 (N.D. Tex. 1996) (declining to recognize qualified privilege for non-confidential information and, thus, refusing quash subpoena *duces tecum* in civil matter seeking non-party reporter's interview tapes and notes of non-confidential source); *Cinel v. Connick*, 792 F. Supp. 492, 498-500 (E.D. La. 1992) (where court in civil matter ordered submission of inventory of materials held by media defendants for *in camera* review, no privilege under federal law or Louisiana shield statute, La. R.S. 45:1459).

F. Published and/or non-published material

No Fifth Circuit case has identified any relevant distinction between published and non-published material. However, the court has indicated that the media's non-confidential work product is less deserving of protection than the identity of a confidential source, especially in a criminal case. *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998). Turning aside a suggestion to establish a qualified reporter's work-product privilege similar to the attorney work-product privilege, the Court held that, at least in the criminal context, *Branzburg* provided scant justification for doing so. *Smith*, 135 F.3d at 969-70. The *Smith* court also dismissed the media's concerns about being annexed as an investigative arm of the government, the risk of being overburdened by discovery requests, and the resulting incentive for the press to destroy its work product or to hesitate in reporting about criminal matters. *See id.*

Furthermore, the *Smith* court reasoned that the risk of chilling confidential sources from approaching the media was not implicated for non-confidential work product, which presumably will involve only the rights of the journalist who creates the non-confidential work product, not those of an informant. *See id.* at 970. Given this analysis, it remains to be seen whether a privilege exists for work product, even in civil cases, after *Smith*. Several courts had considered the issue before *Smith*, with mixed results. *Compare Brinston v. Dunn*, 919 F. Supp. 240, 244 (S.D. Miss. 1996) (in civil case, upholding privilege for non-confidential, unpublished information obtained by non-party reporter) *and Holland v. Centennial Homes, Inc.*, 1993 WL 755590, at *6, 22 Media L. Rep. 2270 (N.D. Tex. 1993) (in civil case, upholding privilege for non-confidential work product of non-party reporter), *with De La Paz v. Henry's Diner, Inc.*, 946 F. Supp. 484, 485 (N.D. Tex. 1996) (declining to extend privilege to non-party reporter's non-confidential material in a civil matter) *and Cinel v. Connick*, 792 F. Supp. 492, 498-500 (E.D. La. 1992) (declining to extend privilege to inventory of materials held by media defendants for *in camera* review).

G. Reporter's personal observations

Although the qualified reporter's privilege in some circuits does not protect journalists who are eyewitnesses, the Fifth Circuit has not specifically exempted eyewitnesses from the compass of the privilege. Instead, the court has indicated that the privilege that applies in civil cases might be overcome if the journalist is a "percipient witness to a fact at issue." *In re Selcraig*, 705 F.2d 789, 798-99 (5th Cir. 1983). Of course, the party seeking the information must first satisfy the *Miller* test: that is, he must demonstrate with sufficient evidence that the journalist's testimony is relevant, unavailable elsewhere, and necessary to the resolution of the case. *Id.* If such a showing is made, the journalist's "qualified privilege must succumb to . . . [the] discovery needs" of the party seeking the information. *Id.* at 799.

H. Media as a party

The Fifth Circuit does not differentiate between cases where the media is a party and where it is not. Rather, the Fifth Circuit has stated that the elements of the privilege announced in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *as modified*, 628 F.2d 932 (5th Cir. 1980), a libel case against the media, provide an "adequate shield" for reporters even in civil cases where the reporter is a non-party witness. *In re Selcraig*, 705 F.2d 789, 799 (5th Cir. 1983). *But see Holland v. Centennial Homes, Inc.*, 1993 WL 755590, at *4, 22 Media L. Rep. 2270 (N.D. Tex. 1993) (stating that showing of "necessity" under the *Miller* test varies depending on whether reporter is a party, citing *Selcraig*).

I. Defamation actions

There is no explicit "libel exception" precluding the application of the privilege. Indeed, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *as modified*, 628 F.2d 932 (5th Cir. 1980), the leading case adopting the qualified privilege in the Fifth Circuit, was a libel case against the media.

In *Miller*, the court considered a libel suit against a magazine's editor and publisher as well as the corporation that published the magazine. The plaintiff, Miller, was a public figure, and accordingly faced the burden of demonstrating that the media defendants published with "actual malice," that is, with knowledge of the falsity of their publication or reckless disregard for its truth. *Id.* at 724. To help him meet that burden, Miller sought the identity of the confidential source of the allegedly defamatory passage. *Id.* at 723. The journalist asserted his reporter's privilege as a bar to identifying his confidential source. The court distinguished *Branzburg v. Hayes*, 408 U.S. 665 (1972), holding that the reporter's First Amendment interest in protecting his confidential sources in a libel case is stronger than in the context of a grand jury proceeding. *Miller*, 621 F.2d at 725. The *Miller* court also distinguished the Supreme Court's decision in *Herbert v. Lando*, 441 U.S. 153, 169-70 (1979), which had permitted discovery of the media's editorial process in a libel case in which a public figure had to prove actual malice, recognizing that a journalist's confidential sources enjoy greater First Amendment protection than a journalist's thought processes. *Miller*, 621 F.2d at 724-25.

Miller applied a three-part test to determine the scope of the qualified privilege not to reveal confidential source material: (1) is the information relevant; (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information? *Id.* at 726 (citing *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958)). On rehearing, the court supplemented its opinion, explaining that a plaintiff must present *substantial evidence* to overcome the privilege. *Miller*, 628 F.2d 932, 932 (5th Cir. 1980). Specifically, a plaintiff must provide "substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case." *Id.* at 932.

Nevertheless, although *Miller* adopted the qualified reporter's privilege for libel cases in the Fifth Circuit, under the facts of that case the court held that the privilege did not protect the identity of the confidential informant, because the plaintiff could not prove actual malice except by examining the reliability of the journalist's confidential informant. *Id.* at 726.

No reported Fifth Circuit case addresses the question whether courts will assess different penalties — such as instructing the jury to presume the reporter had no source, or presuming actual malice, or entering judgment against the media defendant — for a reporter's failure to comply with compulsory process in libel cases.

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The Fifth Circuit has not decided the question of who qualifies as a journalist for purposes of asserting the privilege. *See In re Grand Jury Subpoenas*, 2001 WL 940433, at n.4, 29 Media L. Rep. 2301, 2303 n.4 (5th Cir. Aug. 17, 2001) (noting that the Fifth Circuit has not addressed this issue). In *In re Grand Jury Subpoenas*, the court indicated that, were the question before it, it would look to the test devised in other circuits, which asks whether the person claiming the privilege (1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public. *Id.*

b. Editor

No reported decision of the Fifth Circuit addresses who constitutes an "editor" for purposes of asserting the qualified privilege.

c. News

No reported decision of the Fifth Circuit addresses what constitutes "news" for purposes of asserting the qualified privilege.

d. Photo journalist

No reported decision of the Fifth Circuit addresses who constitutes a "photojournalist" for purposes of asserting the qualified privilege.

e. News organization / medium

No reported decision of the Fifth Circuit holds that a particular news medium cannot claim the privilege.

2. Others, including non-traditional news gatherers

Although citizen reporting has increased in recent years, particularly with the advent of the internet, the Fifth Circuit has not yet decided whether the protections of the reporter's privilege extend to non-professional journalists. A district court has upheld the privilege for a freelance reporter submitting an article to a newspaper. *See Holland v. Centennial Homes, Inc.*, 1993 WL 755590, 22 Media L. Rep. 2270 (N.D. Tex. 1993). Further, in *In re Grand Jury Subpoenas*, the Fifth Circuit assumed without deciding that the privilege could apply to a freelance writer. 2001 WL 940433, 29 Media L. Rep. 2301, 2303 (5th Cir. Aug. 17, 2001). Nonetheless, the opinion questions the application of the privilege to "a virtually unpublished freelance writer operating without an employer or a contract for publication," *id.* at 2303 & n.4, and notes Leggett's publication history: "Leggett's body of published work consists of a single article in an FBI publication, *Varieties of Homicide*, and one fictional short story. To date, Leggett has published nothing on the Angleton murder." *Id.* at 2302.

A district court has also suggested that the privilege may cover publishers of industry reports and mar-ket price indices. *See United States v. Valencia*, 2006 WL 3707867, at *1, 10 (S.D. Tex. 2006) (concluding that redactions of information provided in response to grand jury subpoenas sufficiently protected the iden-tity of the publishers' sources and thus did not "undermine any genuine interest the Publishers might have in protecting their data and sources in other civil proceedings").

B. Whose privilege is it?

No reported decision of the Fifth Circuit addresses whether the reporter or the reporter's employer owns the privilege. Similarly, no reported decision of the Fifth Circuit explicitly resolves whether the privilege belongs to the source, the reporter, or both. The court has stated, however, that "a *reporter* has a First Amendment privilege" against revealing confidential sources in civil cases, *Miller*, 621 F.2d at 724 (emphasis added), and that "the first amendment shields *a reporter* from being required to disclose the identity of persons who have imparted information to him in confidence," *Selcraig*, 705 F.2d at 792 (emphasis added).

On the other hand, at least one Fifth Circuit case implies that in some circumstances the privilege may be waived by the source. In a civil action against a police officer, the district court had upheld a reporter's invocation of the privilege against disclosing tapes of a conversation with the officer; in *dicta*, the Fifth Circuit criticized the lower court's enforcement of the privilege, because the officer was evidently not a confidential source and because he had expressly waived the privilege. *See Pressey v. Patterson*, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990). Thus, *Pressey* may indicate that, at least where the material in question relates directly to the source and is not merely the reporter's work product, the source may be empowered to waive the privilege. *But see Holland v. Centennial Homes, Inc.*, 1993 WL 755590, at *6 n.4, 22 Media L. Rep. 2270 (N.D. Tex. 1993) (noting that, although the *Pressey* footnote acknowledged that the police officer may have waived the privilege, it did not address whether the reporter had done so).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

No reported decision of the Fifth Circuit addresses when a subpoena must be served on a member of the news media. Generally, the court from which a subpoena was issued may quash or modify it if the court finds that the subpoena fails to allow reasonable time for compliance. Fed. R. Civ. P. 45(c)(3)(A)(i); *see Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, at 818 (5th Cir. 2004); *Brown v. Greyhound Lines, Inc.*, 1995 WL 811965 (S.D. Tex. 1995) (finding notice of less than 24 hours unreasonable). The Fifth Circuit saw no error when a district court quashed subpoenas *duces tecum* in a criminal case as untimely and otherwise flawed where they were served on the day jury selection was completed. *United States v. Wilson*, 732 F.2d 404, 412 (5th Cir. 1984).

2. Deposit of security

No reported decision of the Fifth Circuit addresses whether a subpoenaing party must deposit any security in order to procure testimony or materials from a reporter.

3. Filing of affidavit

The Fifth Circuit has held that, to overcome the reporter's privilege, a subpoenaing party must demonstrate by sworn affidavit or deposition, not merely by conclusory allegations, that it can make out a *prima facie* case for which the disclosure of the identity of a reporter's confidential news source will be a necessary element of proof. *In re Selcraig*, 705 F.2d 789, 797-98 (5th Cir. 1983).

4. Judicial approval

No reported decision of the Fifth Circuit has addressed whether a judge or magistrate must approve a subpoena before a party can serve it on a journalist or media organization. 28 C.F.R. § 50.10 outlines the government's responsibilities when subpoenaing the media. *See In re Grand Jury Subpoenas*, 2001 WL 940433, 29 Media L. Rep. 2301 (5th Cir. Aug. 17, 2001) (per curiam) (unpublished).

5. Service of police or other administrative subpoenas

No reported decision of the Fifth Circuit has considered whether any special rules exist regarding police or other administrative subpoenas.

B. How to Quash

1. Contact other party first

Rule 45 requires that a party objecting to a subpoena for documents give notice in writing to the subpoenaing party within 14 days of receipt of the subpoena. Fed. R. Civ. P. 45(c)(2)(B). If a party objects to a subpoena on the grounds that the material requested is privileged, it must expressly state this in the objection and include a description of the privileged documents, which could be used by the subpoenaing party to contest the privilege. Once a party objects to a subpoena, the subpoenaed materials may only be obtained through a court order to compel production. *Id.*

Most local rules require a party moving to quash or to compel to submit a certificate of conference with the motion, indicating that the attorney for the moving party conferred "with an attorney for each party affected by the requested relief to determine whether the motion is opposed." N.D. Tex. L.R. 7.1(a). Similarly, the Federal Rules require a party moving to compel to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." Fed. R. Civ. P. 37(a)(2)(B).

2. Filing an objection or a notice of intent

Regardless of whether a party intends to file a motion to quash, it should notify the subpoenaing party within 14 days of receipt of the subpoena if it objects to producing the subpoenaed materials so as to shift to the other party the burden of seeking an order to compel. Fed. R. Civ. P. 45(c)(2)(B). Whether a party must file a notice of intent to quash before filing a motion to quash will be a matter of the local rules for the federal district court in which the motion to quash will be filed.

3. File a motion to quash

a. Which court?

A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. Fed. R. Civ. P. 45(a)(2). However, a subpoena for attendance at a deposition shall issue from the court for the district in which the deposition is to be taken. *Id.* Similarly, a subpoena for production or inspection of documents and things unaccompanied by a subpoena for the attendance of a person shall issue from the court for the district in which the production or inspection is to be made. *Id.* To challenge subpoenas issued by district courts other than that before which the action is pending, a party must file its motion to quash in the district court that issued the challenged subpoena. *Id.* 45(c)(3)(A).

b. Motion to compel

Once a party sends its written objection to the subpoenaing party, the subpoenaed testimony or material may only be obtained through an order to compel. Fed. R. Civ. P. 45(c)(2)(B).

c. Timing

Under Rule 45, a court is authorized to quash a subpoena "on timely motion." Fed. R. Civ. P. 45(c)(3)(A). A party resisting a subpoena "may" assert objections to a subpoena within 14 days of receipt, or before the time provided in the subpoena if less than 14 days. *Id.* 45(c)(2)(B). A district court upheld a magistrate judge's finding that a subpoenaed party waived a particular objection to a subpoena that was not made until more than six weeks after the subpoena was served. *Seabulk Towing, Inc. v. Oceanografia S.A. de C.V.*, 2002 WL 398771 (E.D. La. Mar. 12, 2002) (citing Fed. R. Civ. P. 45(c)(2)(B)). The magistrate judge had stated that a party's failure to serve written objections within the time specified in Rule 45 constituted waiver. 2002 WL 188419, at *1 (E.D. La. Feb. 4, 2002).

The Fifth Circuit noted but did not consider a district court's finding that a motion to quash a subpoena was untimely where the appellants had already appeared before the grand jury, been granted use immunity, and been held in contempt twice before filing the motion to quash. *In re Grand Jury Proceedings*, 613 F.2d 62, 64 (5th Cir. 1980).

d. Language

No reported decision of the Fifth Circuit requires the movant to recite any specific language in a motion to quash. However, a certificate of conference and proposed order may be required under the applicable local rules. *See, e.g.*, N.D. Tex. L.R. 7.1(a) (requiring a brief, certificate of conference, and proposed order to accompany any motion to compel or to quash).

e. Additional material

Although no reported decision of the Fifth Circuit addresses whether any specific additional material should be attached to motions and memoranda to quash asserted by media organizations and journalists, the Fifth Circuit has recognized that the press, like other parties, "has a relevant and protectible interest in not being unduly burdened, as, for example, by overly broad subpoenas for large amounts of data of dubious relevance." *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). Such a burden, however, "is case specific." *Id.* Further, the court reasoned that "[w]e are pointed to no empirical basis for assertions that the media will avoid important stories or destroy its archives in response to rare requests for criminal discovery." *Id.* As such, a party challenging a subpoena based on the burden it imposes on the media as an institution would be advised to submit any "empirical" evidence supporting that proposition — as well as evidence of the specific burden imposed by the subpoena at issue in the case.

4. In camera review

a. Necessity

Although there is no specific requirement that judges conduct an *in camera* review of materials prior to deciding a motion to quash, *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992), courts often do. *See, e.g., Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 723, *as modified* 628 F.2d 932 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 795 (5th Cir. 1983). In *Arditti*, the court held that the trial judge did not abuse its discretion when it declined to review documents subpoenaed by the IRS before determining that they were not privileged. *Arditti*, 955 F.2d at 345 (5th Cir. 1992). However, in *Selcraig*, the trial court endeavored to elicit the subpoenaed testimony *in camera*

prior to revealing the information to the plaintiff's lawyers in order to determine whether it was relevant to the plaintiff's claim. *In re Selcraig*, 705 F.2d at 794-95. The court also undertook an *in camera* inspection in *Miller* before concluding that certain documents and summaries had to be produced to the plaintiff. *Miller*, 621 F.2d at 723.

b. Consequences of consent

A reporter is entitled to request a stay pending appeal from an adverse ruling, but such a stay is not necessarily guaranteed from the reporter's consent to the judge's *in camera* inspection. Rather, a reporter must follow the standard procedures for filing an appeal and requesting a stay pending appellate resolution. Fed. R. App. P. 8(a)(1)(A). In *Selcraig*, for instance, the trial court ordered the imprisonment of a reporter for refusing to identify confidential sources. *In re Selcraig*, 705 F.2d 789, 795 (5th Cir. 1983). The order for imprisonment was stayed, however, pending the reporter's appeal of the trial judge's contempt determination. *Id.*

c. Consequences of refusing

As in any case of non-compliance with a court instruction, a reporter who refuses to consent to an *in camera* review of subpoenaed materials may be held in contempt, and subjected to a fine or imprisonment. *In re Selcraig*, 705 F.2d 789, 795 (5th Cir. 1983). In *Selcraig*, the trial court held a reporter in civil contempt for refusing to answer the judge's questions regarding his confidential sources *in camera*. *Id.* at 792. The Fifth Circuit reversed the contempt finding because the subpoenaing party did not demonstrate that the information was necessary to the presentation of his claim. However, it did express approval for the trial court's method of questioning the reporter *in camera* and suggested that it "serve as a model for any other inquiries." *Id.* at 799.

5. Briefing schedule

The local rules of each district court typically will provide a timetable for briefing and opposing motions filed in that district. For example, the Northern District of Texas requires a movant to accompany any motion to quash with a brief in support and a proposed order. N.D. Tex. L.R. 7.1(d), (h). Non-movants must file response briefs to an opposed motion within 20 days of the date on which the motion and brief were filed. *Id.* 7.1(e). Unless otherwise directed by the presiding judge, the movant's reply brief must be filed within 15 days of the filing of the response brief. *Id.* 7.1(f). Of course, a presiding judge may be willing to impose a modified briefing schedule if necessitated by the circumstances.

6. Amicus briefs

The Fifth Circuit may accept amicus briefs. 5th Cir. L.R. 29, 31.2. In *Selcraig*, the court responded specifically to the assertions made by the amicus curiae regarding the reporter's privilege. *In re Selcraig*, 705 F.2d 789, 795 (5th Cir. 1983). Those wishing to file an amicus brief in the Fifth Circuit must file a motion within seven days after the filing of the principal brief whose position the amicus brief will support. 5th Cir. L.R. 29.1. Similarly, in some instances amicus briefs may be filed in district courts with the permission of the presiding judge. *See, e.g.*, N.D. Tex. L.R. 7.2(b).

VI. Substantive law on contesting subpoenas

In civil cases, the Fifth Circuit has recognized a qualified privilege for reporters. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 723, *as modified*, 628 F.2d 932 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983). This privilege can be overcome only if the party seeking the information provides *substantial evidence* showing that the information is relevant, cannot be obtained by alternative means, and has a compelling interest in obtaining it. *Miller*, 621 F.2d at 726.

In *Miller*, a libel case, the court held that the reporter's privilege had been overcome because the plaintiff demonstrated that learning the identity of the confidential sources was the only way he could prove his claim of malice. *Miller*, 621 F.2d at 726. In *Selcraig*, a civil case in which the media was not a party, the court found that the party serving the subpoena had not demonstrated that the identity of a reporter's confidential sources was necessary to the presentation of the plaintiff's civil rights claim. *In re Selcraig*, 705 F.2d 789, 797 (5th Cir. 1983). The court

reasoned that the identity of the sources would only be necessary if the plaintiff succeeded in proving a prima facie case for liability. *Id*. at 798.

The Fifth Circuit has not ruled on whether a reporter's privilege exists with regard to non-confidential sources of information in civil cases. However, in a footnote to *Pressey v. Patterson*, 898 F.2d 1018 (5th Cir. 1990), the court suggested that had the question been before it, it would have reversed the trial court's application of the privilege to tape recorded interviews with a non-confidential source. *Id.* at 1022 n.4. Similarly, *Smith* recognized that "the existence of a confidential relationship that the law should foster is critical to the establishment of a privilege," and that the Fifth Circuit has "never recognized a privilege for reporters not to reveal confidential information." *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998). Before *Smith* was decided, district courts had reached different conclusions regarding the use of the reporter's privilege to protect non-confidential sources. In *De La Paz v. Henry's Diner*, the court held that no privilege existed for tape recorded interviews with the defendants in a suit filed for negligence, defamation, invasion of privacy, and other claims. 946 F. Supp. 484 (N.D. Tex. 1996). In contrast, the district court for the Southern District of Mississippi held that the privilege applied and that the party seeking the information had not overcome the privilege because the subpoenaed testimony was not relevant and necessary to her motion for summary judgment. *Brinston v. Dunn*, 919 F. Supp. 240, 244 (S.D. Miss. 1996).

Finally, the Fifth Circuit has construed the Supreme Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972), to preclude application of a qualified First Amendment reporter's privilege against subpoenas seeking non-confidential sources in grand jury proceedings and criminal cases. In *Smith*, the Fifth Circuit read *Branzburg* to preclude assertion of a reporter's privilege when a journalist is subpoenaed to testify before a grand jury, and held that the public interests at issue in the criminal trial context were no less compelling than those at stake in the grand jury setting. *United States v. Smith*, 135 F.3d 963, 970-71 (1998). In so doing, it reversed the lower court's decision to quash a subpoena for videos of a reporter interviewing a suspected arsonist. Citing *Branzburg*, the court concluded that only when grand jury process is not exercised in good faith may the press receive protection for non-confidential information that is subpoenaed in a criminal case. *Id*. at 969, 971.

A. Burden, standard of proof

The subpoenaing party bears the burden of proving the elements necessary to overcome a reporter's privilege. *Miller v. Transamerican Press, Inc.*, 628 F.2d 932, 932 (5th Cir. 1980). Proof of each element of the test must be demonstrated by substantial evidence. *Id.*; *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983).

B. Elements

The elements that must be met in the Fifth Circuit to overcome a reporter's privilege were derived from the Second Circuit's test in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958). The *Garland* test, adopted by the court in *Miller*, asks: "1) is the information relevant; 2) can the information be obtained by alternative means, and 3) is there a compelling interest in the information?" *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726, *as modified*, 628 F.2d 932 (5th Cir. 1980). The privilege may only be overcome if the party serving the subpoena shows "i) substantial evidence that the challenged statement was published and is both factually untrue and defamatory; ii) reasonable efforts to discover the information from alternative sources have been made; iii) no other reasonable source is available; and iv) knowledge of the identity of the informant is necessary to proper preparation and presentation of the case." *Miller v. Transamerican Press, Inc.*, 628 F.2d 932 (5th Cir. 1980). Because the reporter's privilege does not apply when non-confidential information is sought in grand jury proceedings or criminal cases, no special balancing is required for subpoenas seeking such information in those instances. *United States v. Smith*, 135 F.3d 963, 970-71 (1998). Absent the application of the privilege, the government need merely identify the information it seeks with sufficient specificity and show that it is relevant and admissible. *Id.* at 972.

1. Relevance of material to case at bar

In both *Miller* and *Selcraig*, the Fifth Circuit held that, when the privilege applies, a party must provide substantial evidence that the sought-after information is relevant to overcome the privilege. *Miller v. Transamerican Press, Inc.*, 628 F.2d 932, 932 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983). Regardless of whether the privilege exists in a particular case, however, the subpoenaing party always bears the burden of demonstrating that the material sought is relevant. *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992).

Subpoenaed material is considered relevant if it pertains to the charges or claims at issue in the case. *Id*. In *Arditti*, the court cited *United States v. Nixon* to illustrate how one might meet the relevance burden. In *Nixon*, the prosecutor was able to subpoena the President's audio tapes of conversations because he demonstrated, through the use of sworn testimony of participants in the conversations, that they might contain information relevant to the charges. *Arditti*, 955 F.2d at 345 (citing *United States v. Nixon*, 418 U.S. 683, 697-702 (1974)).

2. Material unavailable from other sources

To overcome the reporter's privilege, the subpoenaing party must demonstrate with substantial evidence that the information sought is not available from other sources. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726, *as modified*, 628 F.2d 932 (5th Cir. 1980). An attempt to obtain the information from other sources must be undertaken regardless of time, cost, or productivity concerns. *Lenhart v. Thomas*, 944 F. Supp. 525, 530 (S.D. Tex. 1996).

a. How exhaustive must search be?

Whether a party has satisfactorily shown that it cannot obtain the information depends on the circumstances of the case. In *Lenhart*, the court considered whether the subpoenaing party had satisfied its burden of attempting to obtain the identity of certain grand jurors who spoke to a reporter through other means than subpoenaing the reporter. *Lenhart v. Thomas*, 944 F. Supp. 525, 530 (S.D. Tex. 1996). It noted that the requirement was not satisfied in a Supreme Court case when the subpoenaing party failed to depose 65 people in an effort to obtain the information. *Id*. (citing *In re Roche*, 448 U.S. 1312 (1980)). The district court then concluded that the subpoenaing party in *Lenhart* had not satisfied its burden of seeking the information from other sources, because its investigation consisted of merely asking the grand jurors to confess to speaking with the press. *Id*.

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

Prior to subpoenaing a member of the news media, a party should pursue any potential alternative sources for obtaining the information sought from the media. *Lenhart v. Thomas*, 944 F. Supp. 525, 530 (S.D. Tex. 1996). Substantial evidence is required in order to prove that reasonable efforts have been made to obtain the subpoenaed information from an alternative source and no other reasonable source is available. *Miller v. Transamerican Press, Inc.*, 628 F.2d 932 (5th Cir. 1980).

c. Source is an eyewitness to a crime

Given the holding in *Smith* that no privilege applies to non-confidential sources in grand jury proceedings or criminal cases, a reporter's obligation to disclose the identity of a non-confidential source in a criminal case will be the same whether or not the reporter is an eyewitness to the crime. *United States v. Smith*, 135 F.3d 963, 970-71 (5th Cir. 1998). Further, despite the availability of the qualified privilege in civil cases, *Selcraig* suggests that the privilege of a reporter who is called upon to testify as an eyewitness to a crime may be overcome. *In re Selcraig*, 705 F.2d 789, 799 (5th Cir. 1983). Because the reporter is "a percipient witness to a fact at issue," depending on the circumstances of the case, it may be that the reporter's "qualified privilege must succumb to . . . [the plaintiff's] discovery needs." *Id.*

3. Balancing of interests

The Fifth Circuit has rejected a balancing of interests when determining whether to quash a subpoena for non-confidential materials sought in grand jury proceedings or criminal cases. *United States v. Smith*, 135 F.3d 963, 968 (5th Cir. 1998). According to *Smith*, *Branzburg* holds that "the needs of the press are not to be weighed against the needs of the government in considering grand jury subpoenas." *Id*.

In civil cases, however, the courts will often balance First Amendment interests against the subpoenaing party's interest in obtaining the testimony or material from the reporter. In *Holland v. Centennial Homes*, the court weighed the constitutional protections of the First Amendment against the interests favoring liberal discovery. 1993 WL 755590, at *3 (N.D. Tex. Dec. 21, 1993). It concluded that, in the absence of some compelling concern, the reporter's interest in protecting her work product outweighed any other interests. *Id*. at *6. In *Miller*, the court considered the difficulty the press might have in obtaining news if required to identify confidential sources. *Miller v. Transamerican Press Inc.*, 621 F.2d 721, 725, *as modified*, 628 F.2d 932 (5th Cir. 1980). In *Mize v.*

McGraw-Hill Inc., 86 F.R.D. 1 (S.D. Tex. 1980), the court weighed the confidentiality of the sources against the plaintiff's interest in disclosure of the sources. *Id.* at 3. In its analysis, it determined that the "ready disclosure of confidential sources would have a chilling, perhaps freezing effect on the free flow of truthful information." *Id.* According to the *Mize* court, the interest in protecting confidential sources is greater than the interest in protecting discovery of the editorial process, which the Supreme Court allowed in *Herbert v. Lando*, 441 U.S. 153 (1979). *Mize*, 86 F.R.D. at 3.

4. Subpoena not overbroad or unduly burdensome

The Federal Rules of Civil Procedure authorizes a court to quash a subpoena if it subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3)(A)(iv). A court will find a subpoena imposes an undue burden if it makes overbroad requests. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004); *Tiberi v. Cigna Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994). Whether a subpoena is overbroad depends upon the facts in each case. *Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998). In making such a determination, courts usually examine whether the subpoena is limited by reasonable time restrictions or reasonably specific descriptions of the desired documents. *Id*. The party moving to quash bears the burden of proving that the subpoena imposes undue hardship. *Id*. Modification of an overbroad subpoena, however, is preferable to quashing it. *Id.* at 110. In *Williams*, the court found that, in light of the extensive media attention enjoyed by the plaintiff and his colleague, two well-known professional athletes, a subpoena that requested "any and all documents relating to Erik Williams [or] Michael Irvin" could include innumerable irrelevant stories published about them, and was therefore overbroad and would be modified. *Id*. at 108-10.

5. Threat to human life

No reported case in the Fifth Circuit addresses whether the court should weigh whether the matter requested in a subpoena creates a threat to human life.

6. Material is not cumulative

In civil cases, if the information sought is already available from other sources, it may not be subpoenaed under the reporter's privilege. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725, *as modified*, 628 F.2d 932 (5th Cir. 1980). If the subpoenaed material would provide new information that is necessary to the case and unobtainable from other sources, however, the reporter's privilege might be more readily overcome. *Miller*, 628 F.2d 932 (5th Cir. 1980).

In criminal cases involving non-confidential sources or information, the privilege does not apply. *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). Instead, absent the qualified privilege, the government merely needs to identify the information it seeks with sufficient specificity and show that it is relevant and admissible — that is, the general test for the sufficiency of any subpoena. *Id.* at 972. Of course, purely cumulative material may not satisfy the test for relevancy under the Federal Rules of Evidence. *See* Fed. R. Evid. 401. In *Smith*, however, the Fifth Circuit disagreed with the district court's conclusion based on its *in camera* inspection that the information sought in that case was cumulative, because "[m]ultiple contradictory stories told by a defendant can demonstrate a consciousness of guilt." *Smith*, 135 F.3d at 972-73.

7. Civil/criminal rules of procedure

In civil cases, Rule 45 authorizes a court to quash a subpoena if: (i) there is not adequate time to comply; (ii) it requires travel greater than 100 miles for trial or deposition; (iii) it seeks privileged or protected materials; or (iv) it subjects any person to undue burden. Fed. R. Civ. P. 45(c)(3). The party seeking to quash the motion bears the burden of proving any one of these factors. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004); *Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998).

Under the Federal Rules of Criminal Procedure, Rule 17 authorizes a court to quash a subpoena for documents in a criminal case "if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c); *United States v. Skilling*, 2006 WL 1006622, at *1 (S.D. Tex. 2006). Although the Fifth Circuit has not established a test for determining whether a subpoena is unreasonable or oppressive, "the law presumes, however, that, 'absent a strong showing to the contrary, . . . a grand jury acts within the legitimate scope of its authority.'" *In re Grand Jury Proceedings*, 115 F.3d 1240, 1244 (5th Cir. 1997) (alteration in original) (citation omitted). Rule 17 does not address

whether a subpoena for testimony may be quashed. Because it would preclude a grand jury from fully investigating sources related to its inquiry, the Fifth Circuit has been reluctant to grant motions to quash subpoenas for testimony, except where the grand jury has not acted in good faith. *See In re Grand Jury Subpoenas*, 2001 WL 940433, 29 Media L. Rep. 2301 (5th Cir. Aug. 17, 2001) (per curiam) (unpublished); *see also United States v. Doe*, 541 F.2d 490, 493 (5th Cir. 1976). Unless the grand jury is an "unreasonable, harassing, or oppressive instrument," it is acting in good faith. *Id.*

8. Other elements

No reported decision of the Fifth Circuit addresses any other elements that must be met before the qualified reporter's privilege can be overcome.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

At least one Fifth Circuit case implies that in some circumstances the privilege may be waived by the source. In a civil action against a police officer, the district court had upheld a reporter's invocation of the privilege against disclosing tapes of a conversation with the officer. In *dicta*, the Fifth Circuit criticized the lower court's enforcement of the privilege, because the officer was evidently not a confidential source and because he had expressly waived the privilege. *See Pressey v. Patterson*, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990). Thus, *Pressey* may indicate that, at least where the material in question relates directly to the source and is not merely the reporter's work product, the source is empowered to waive the privilege. *But see Holland v. Centennial Homes, Inc.*, 1993 WL 755590, at *6 n.4, 22 Media L. Rep. 2270 (N.D. Tex. 1993) (noting that the *Pressey* footnote did not address whether the reporter had waived the privilege).

2. Elements of waiver

a. Disclosure of confidential source's name

There is no reported decision of the Fifth Circuit addressing whether disclosure of a confidential source's name is sufficient to waive the privilege.

b. Disclosure of non-confidential source's name

A reporter's disclosure of non-confidential sources for an article does not waive his privilege to protect the confidentiality of other sources. In *Selcraig*, the reporter had identified some of the sources quoted in his article, but refused to identify the confidential sources on the grounds of the reporter's privilege. *In re Selcraig*, 705 F.2d 789, 794 (5th Cir. 1983). The court held that the reporter had not waived his privilege as a result of having disclosed the identity of some, but not all, of the sources for the article.

c. Partial disclosure of information

No reported decision of the Fifth Circuit specifically resolves whether a journalist's disclosure of some information from a source waives the privilege.

d. Other elements

No reported decision of the Fifth Circuit addresses circumstances where courts have found that a journalist, through her own actions, has waived the reporter's privilege.

3. Agreement to partially testify act as waiver?

In *Selcraig*, the Fifth Circuit considered a case in which a reporter partially testified. *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). The reporter had learned about a controversy involving the plaintiff from a confidential source. *Id.* at 792. The reporter interviewed the plaintiff's employers to confirm the information he had learned from his confidential source and thereafter published an article about the controversy involving the plaintiff. *Id.* In a subsequent civil lawsuit between the plaintiff and his employers, the reporter was subpoenaed to be deposed. *Id.* at 794. The reporter appeared at his deposition and freely admitted that he had interviewed the plaintiff's employers and had based his article in part on those interviews. *Id.* He refused, however, to identify the confidential source from whom he had learned about the controversy in the first place, claiming that the qualified reporter's privilege

protected that information. *Id.* The Fifth Circuit agreed. As such, although *Selcraig* did not involve a reporter's partial disclosure of information obtained from the confidential source, it involved the reporter's disclosure of information obtained as a result of the information provided by that confidential source. The Fifth Circuit did not indicate that this kind of partial disclosure endangered the right of the reporter to invoke the privilege to protect the identity of the confidential source.

Similarly, in *Brinston v. Dunn*, a district court held that it was "proper to require . . . [a reporter] to answer questions regarding the truthfulness and accuracy of the contents of the article he authored, including whether statements attributed to the plaintiff in the article were in fact made by the plaintiff" without violating the privilege. 919 F. Supp. 240, 244 (S.D. Miss. 1996). Yet the district court upheld the assertion of privilege as to questions seeking to compel disclosure of the reporter's unpublished work product. *Id.* Thus, taken together the district court's rulings implicitly recognize that the partial testimony of the reporter about the accuracy of his article does not waive his right to assert the privilege against questions seeking information the reporter wishes to protect.

Providing information in response to grand jury subpoena as waiver. A district court has suggested that providing (potentially) privileged information in response to grand jury subpoenas does not necessarily operate as a waiver of the privilege. *See United States v. Valencia*, 2006 WL 3707867, at *10 (S.D. Tex. 2006) ("The Court is unpersuaded that the limited disclosures permitted here will undermine any genuine interest the Publishers might have in protecting their data and sources in other civil proceedings.").

VII. What constitutes compliance?

A reporter complies with a subpoena for testimony in a criminal trial by appearing and giving testimony at the appointed time. Fed. R. Crim. P. 17(a). A reporter complies with a subpoena for documents or other items in a criminal proceeding by producing the subpoenaed materials at the time and in the manner appointed in the subpoena. Fed. R. Crim. P. 17(c). A reporter complies with a subpoena for documents in a civil trial by producing the documents "as they are kept in the usual course of business" or in a way "to correspond with the categories in the demand." Fed. R. Civ. P. 45(d)(1). If a subpoena commands only documents or other tangible things, and not testimony, it is not necessary to appear at the hearing or trial. Fed. R. Civ. P. 45(c)(2)(A).

A. Newspaper articles

Under the Federal Rules of Evidence, newspapers and periodicals are self-authenticating and require no extrinsic evidence of authenticity. Fed. R. Evid. 902(6). However, sometimes a court may require a reporter or a custodian of records to bring and to authenticate the material. Sometimes this is simply a matter of negotiation between the parties.

B. Broadcast materials

No reported decision of the Fifth Circuit addresses what is required when turning over tapes of material that was aired, or who must appear as a representative or custodian of the broadcaster. This is usually simply a matter of negotiation between the parties.

C. Testimony vs. affidavits

No reported decision of the Fifth Circuit addresses whether an affidavit can take the place of in-court testimony, particularly when the testimony is intended merely to confirm that an article was true and accurate as published. Depending on the nature of the testimony and the purpose for which it is sought to be introduced, the Federal Rules of Evidence addressing authentication, hearsay, and exceptions to the hearsay rule will likely determine whether live testimony subject to cross-examination is required in a particular case. This will likely vary, too, from judge to judge.

D. Non-compliance remedies

A court may hold an individual in civil or criminal contempt for refusing to comply with a subpoena. Contempt proceedings are treated as either civil or criminal, depending on their primary purpose. *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990). Generally speaking, if the court seeks to coerce compliance with a

court order or to compensate another party for the contemnor's violation, it will hold an individual in civil contempt. If a court seeks to punish a contemnor for not complying with a subpoena or to vindicate the authority of the court, it may hold an individual in criminal contempt. *Id.*

If the court decides to hold an individual in criminal contempt, it is required to notify the contemnor explicitly that the proceedings against him are criminal. *Id.* at 567; Fed. R. Crim. P. 42(a)(1). As a constitutional matter, imprisonment and a fine generally cannot be combined as a sanction for criminal contempt. *In re Bradley*, 318 U.S. 50, 63 S. Ct. 470 (1943). A finding of civil contempt, however, "permits the coercive combination of both fine and imprisonment." *In re Dinnan*, 625 F.2d 1146, 1150 (5th Cir. Unit B Aug 1980); *see also United States v. Scott*, 2004 WL 1068118, at *3 (N.D. Tex. 2004).

1. Civil contempt

Courts may hold a person in civil contempt to coerce compliance with a subpoena or to compensate another party for the contemnor's conduct. *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990). A person may be held in contempt of court for failing to comply with a subpoena, if she does not supply an "adequate excuse." Fed. R. Civ. P. 45(e). Adequate excuse includes that the subpoena does not comply with the requirements of Rule 45 — that is, the subpoena fails to provide enough time to comply, imposes undue burden, requires travel greater than 100 miles, seeks information that is privileged, or requires disclosure of a trade secret or other confidential research.

For example, in *Selcraig*, the lower court ordered that a reporter be imprisoned for civil contempt until he testified according to the subpoena. *In re Selcraig*, 705 F.2d 789, 795 (5th Cir. 1983). Similarly, the Fifth Circuit declined to reverse the district court's civil contempt order, which had remanded freelance writer Vanessa Leggett to custody following her refusal to produce all originals and copies of her notes and tapes of interviews regarding a celebrated Houston murder. *In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. Aug. 17, 2002) (per curiam) (unpublished). Thus, Ms. Leggett remained incarcerated until January 4, 2002, when the term of the grand jury expired, or 168 days all told — the longest period of incarceration of a contemnor-journalist in the history of the United States at that time.

a. Fines

No case law indicates that the Fifth Circuit places a cap on fines assessed for civil contempt. Rather, fines levied in a civil contempt proceeding must be calculated for either of two purposes: (i) to compensate the complainant, in which case the amount must be limited to the complainant's actual damages; or (ii) "to compel the contemnor to comply with the court's order, in which case the amount must be reasonably designed to force compliance, without being punitive." *Dinnan*, 625 F.2d at 1149; *see also United States v. Cornerstone Wealth Corp., Inc.*, 2006 WL 522124, at *9 (N.D. Tex. 2006). It is not unusual for the court to impose a $500/day fine on a witness until he complies with a subpoena. *San Antonio Tel. Co. v. AT&T, 529 F.2d 694, 695* (5th Cir. 1976). In *Petroleos Mexicanos v. Crawford Enterprises*, the court held that it was reasonable and necessary for the lower court to assess fines of over $79,000 against a party that refused to comply with a subpoena. 826 F.2d 392, 408 (5th Cir. 1987). The fines were meant to cover the subpoenaing party's costs of having to prosecute the contempt proceeding. *Id.*

b. Jail

Recipients of a subpoena may be jailed for refusal to comply with the subpoena. *See, e.g., United States v. Robinson*, 2007 WL 649010, at *4 (W.D. Tex. 2007) ("A district court may enter a civil contempt order of imprisonment in order to coerce the contemnor into future performance of an affirmative act."). Federal law authorizes judges to imprison non-compliant witnesses until the term of the court proceeding or the grand jury expires, but no longer than 18 months. 28 U.S.C. § 1826(a). A judge's decision to jail for contempt is reviewed under the abuse of discretion standard. *In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. Aug. 17, 2001) (per curiam) (unpublished). Courts have jailed individuals for not producing materials subject to a subpoena until the subpoena is complied with. *Id.* In *In re Grand Jury Subpoenas*, the Fifth Circuit held that it was not an abuse of discretion to jail a reporter until she furnished all originals or copies of any tape recordings or transcripts of interviews, because reporters are not entitled to a reporter's privilege when subpoenaed before a grand jury. *Id.*

2. Criminal contempt

A court may seek to punish an individual for failing to comply with a subpoena by holding the individual in criminal contempt. Importantly, if the reporter's privilege applies to the underlying subpoena, it is not constitutional to hold a reporter in criminal contempt while the state determines whether the information it seeks may be obtained from other sources. *Lenhart v. Thomas*, 944 F. Supp. 525, 531 (S.D. Tex. 1996). In *Lenhart*, the court reversed the state court's order that a reporter be incarcerated until she was willing to testify because the subpoenaing party did not exhaust alternative means of obtaining the information. *Id*.

3. Other remedies

No reported decision of the Fifth Circuit addresses whether additional remedies are applicable against the media, such as default judgment or imposition of presumptions of actual malice or the absence of an actual source.

VIII. Appealing

A. Timing

1. Interlocutory appeals

An order denying a motion to quash is not a final decision under 28 U.S.C. § 1291 for purposes of appeal. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1429 (5th Cir. 1991). Rather, the Fifth Circuit will "require the party to resist the subpoena and appeal from the order citing the party for contempt." *Id.*; *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1405 n.16 (5th Cir. 1993).

Even if a party obtains a ruling either granting or denying a motion for contempt, however, that order will not necessarily be considered final under 28 U.S.C. § 1291 and subject to direct appeal. *See Lamar Financial Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990). Rather, an order either denying or granting a motion for contempt will be considered final only if it is not part of "continuing litigation." *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d at 1429. A contempt order is not part of continuing litigation if, for example, it is directed at a non-party, or if the motion for contempt is denied after the entry of the judgment which was the subject of the contempt. *Sanders v. Monsanto*, 574 F.2d 198, 199 (5th Cir. 1978). Such a denial is final and reviewable under Section 1291 because "no further district court action is necessary to give life to the denial." *Id.; see also In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d at 1429 (indicating that an order is final when "no underlying case awaits final resolution").

Another line of cases puts the question of a contempt order's finality slightly differently: an order of civil or criminal contempt "is not 'final' for purposes of appeal unless two actions occur: (1) a finding of contempt is issued, and (2) an appropriate sanction is imposed." *United States Abatement Corp. v. Mobile Exploration & Producing U.S., Inc.*, 39 F.3d 563, 567 (5th Cir. 1994) (civil contempt); *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 398-99 (5th Cir. 1987) (civil and criminal contempt).

If the Fifth Circuit determines that an order granting or denying a contempt motion is not final, then the court will have jurisdiction to consider an appeal only if: (i) the district court certifies the order for interlocutory appeal under 28 U.S.C. § 1292(b) or (ii) another statute grants appellate jurisdiction, such as 28 U.S.C. § 1826(b) or 18 U.S.C. § 3731.

Section 1292(b) permits the court of appeals, in its discretion, to accept an appeal if the district court certifies that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" and the appellant applies to the court of appeals for interlocutory review within 10 days after entry of the challenged order. 28 U.S.C. § 1292(b).

Pursuant to 28 U.S.C. § 1826, a recalcitrant witness may be summarily confined until such time as the contemnor is willing to submit to an order of the court to testify or provide other information. The statute affords a witness so confined a right of expedited appeal, *In re Dinnan*, 652 F.2d 1146, 1150 (5th Cir. Unit B Aug. 1980), which "shall

be disposed of as soon as practicable, but not later than 30 days from the filing of such appeal." 28 U.S.C. § 1826(b). Thus, the court of appeals has jurisdiction to review such an order.

Under 18 U.S.C. § 3731, the government is entitled to appeal from a district court order suppressing or excluding evidence in a criminal case. For instance, in *United States v. Smith*, the Fifth Circuit heard a direct appeal by the government from the district court's grant of a journalist's motion to quash a grand jury subpoena based on the journalist's successful assertion of the qualified reporter's privilege. 135 F.3d 963 (5th Cir. 1998).

2. Expedited appeals

A civil contempt order confining a recalcitrant witness that is issued in accordance with 28 U.S.C. § 1826(a) is entitled to expedited review pursuant to 28 U.S.C. § 1657. An appellate court must resolve such an appeal not more than 30 days from the filing of the appeal. *Id.* § 1826(b). The 30 day provision is not considered jurisdictional, however, and the Fifth Circuit regularly extends the date for resolving the appeal as needed to allow the appeal to be handled in an efficient, expedited fashion. *See, e.g., In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301, 2303 (5th Cir. Aug. 17, 2001) (per curiam) (unpublished) (affording expedited treatment to Vanessa Leggett's appeal of an order holding her in civil contempt and confining her pursuant to Section 1826 for refusing to submit to a grand jury subpoena); *see also In re Grand Jury Proceedings*, 605 F.2d 750, 752 n.1 (5th Cir. 1979) (noting that court may extend the date for resolving the appeal). Further, if the contemnor is released from confinement, the 30 day period does not apply. *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1405 n.17 (5th Cir. 1993). Finally, failure to adhere to the 30-day period does not entitle an incarcerated contemnor to be released from custody. *In re Dinnan*, 625 F.2d 1146, 1150 (5th Cir. Unit B Aug. 28, 1980).

As a general matter, motions for expedited appeal in civil and criminal cases made to the Fifth Circuit require a showing of "good cause." 5th Cir. R. 27.5. Only the court (as opposed to the clerk of the court) may grant such a motion. *Id.* A single judge of the circuit is authorized to rule on a motion to expedite the appeal. *Id.* 27.2.8. If the motion is granted, the clerk will fix an appropriate briefing schedule unless a judge of the circuit sets a date certain for its resolution. *Id.* 27.5.

B. Procedure

1. To whom is the appeal made?

In the federal system, assuming the jurisdictional prerequisites for taking an appeal are met (that is, the order or judgment is final or another statutory grant of appellate jurisdiction exists), an appeal from an order or judgment of a district court in Texas, Louisiana, or Mississippi is made directly to the Fifth Circuit. A dispositive order of a federal magistrate judge is first challenged before the assigned district court, which will review the order *de novo*. Fed. R. Civ. P. 72(b). If a matter was tried before a magistrate judge with consent of the parties, appeal of a judgment is directly to the court of appeals. Fed. R. Civ. P. 73(c); 28 U.S.C. § 636(c)(3).

Also, depending on the circumstances of the case, a reporter may be entitled to seek a writ of mandamus or *habeas corpus* from a court of superior jurisdiction. *See, e.g., Lenhart v. Thomas*, 944 F. Supp. 525 (S.D. Tex. 1996) (granting writ of *habeas corpus* following state court's order holding reporter in criminal contempt); *Cinel v. Connick*, 792 F. Supp. 492 (E.D. La. 1992) (recognizing All-Writs Act and "in aid of" exception to Anti-Injunction Act entitled court to stay state criminal court's order requiring media to surrender information related to both federal civil and state criminal court cases); *Campbell v. Klevenhagen*, 760 F. Supp. 1206 (S.D. Tex. 1991) (granting writ of *habeas corpus* following state criminal court's order holding two reporters in contempt); *Karem v. Priest*, 744 F. Supp. 136 (W.D. Tex. 1990) (hearing writ of *habeas corpus* petition from state criminal court's order holding reporter in civil contempt, but denying writ). A party seeking the protection of the qualified privilege should therefore consider whether the posture and circumstances of the case merit taking such action.

In cases brought on writ of *habeas corpus* from one of the state court systems within the Fifth Circuit, the petitioner must generally first exhaust any rights of appeal or mandamus at the state court level. 28 U.S.C. § 2254(b)(1)(A). Following exhaustion of state remedies, the writ may be brought in federal court. *Id.* § 2254(a). Appeal may be taken from a federal district court to the court of appeals for the circuit in which the proceeding is held according to the guidelines established in 28 U.S.C. § 2253.

2. Stays pending appeal

Ordinarily, if a party wishes to obtain a stay of a judgment or order of a district court pending appeal, the party must first make the motion in the district court that issued the challenged judgment or order. Fed. R. App. P. 8(a)(1)(A). However, if the district court denies the motion, or if making it first in the district court would be impracticable, the party may move the court of appeals for a stay pending appeal. *Id.* 8(a)(2). Such a motion should be made to the clerk of the court of appeals, who will present it to a panel for decision, unless exigent circumstances make that procedure impracticable, in which case the motion may be presented to a single judge of the circuit. *Id.* 8(a)(2)(D).

The Fifth Circuit has not adopted any special rule or practice with regard to stays pending appeal for journalists seeking to appeal district court contempt orders or rulings on motions to quash. However, the right of release from confinement on bail is addressed in 28 U.S.C. § 1286. That statute provides that bail will not be available if "it appears that the appeal is frivolous or taken for delay." 28 U.S.C. § 1286(b). The Fifth Circuit has indicated that the standard for a district court deciding a request for bail in a civil contempt proceeding involves the same attempt to evaluate the likelihood of the district court's own error as in other civil proceedings in which the court is asked to stay its orders or judgments pending appellate review. *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972). For instance, a district court in the Fifth Circuit refused to admit contemnor on bail pending appeal in a case where reversal was unlikely, appeal was a valuable tool for delay, the subject investigation involved terrorist activity, and the contemnors were British subjects who might leave the country, or be intimidated into disappearing or providing false testimony. *In re Morahan*, 359 F. Supp. 858 (N.D. Tex.), *aff'd*, 465 F.2d 806 (5th Cir. 1972).

Like any party held as a contemnor, however, a journalist adjudged in contempt of court is free to seek from the district court a stay of a contempt order pending an appeal of the decision. *In re Selcraig*, 705 F.2d 789, 795 (5th Cir. 1983). In *Selcraig*, the trial court ordered the imprisonment of a reporter for refusing to identify confidential sources. *Id.* The order for imprisonment was stayed pending the reporter's appeal of the trial judge's contempt determination. *Id.*

3. Nature of appeal

The writ of *habeas corpus* is the appropriate federal remedy for a state prisoner, including an imprisoned state contemnor, challenging the fact of confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S. Ct. 1827, 1833 (1973). When a party appeals from a final federal order or judgment, the appeal is one of right pursuant to 28 U.S.C. § 1291. If the challenged order or judgment is not final, the Fifth Circuit may consider an appeal under § 1292(b) or pursuant to a statute granting the right of immediate appeal (for example, 28 U.S.C. § 1826 or 3137).

4. Standard of review

The Fifth Circuit will review a district court's order finding a recalcitrant witness in contempt under 28 U.S.C § 1826 as well as its decision on a motion to quash for abuse of discretion. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Reguena*, 926 F.2d 1423, 1431 n.6 (5th Cir. 1991) (section 1826 contempt order); *In re Grand Jury Proceedings*, 115 F.3d 1240, 1243 (5th Cir. 1997) (order denying motion to quash).

5. Addressing mootness questions

The Fifth Circuit is obligated to address issues of jurisdiction, including mootness, prior to addressing the merits of an appeal. *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998).

The Fifth Circuit has held that a contemnor's release from incarceration does not moot his appeal, because that release did not vitiate the district court's contempt order. *United States v. Brumfield*, 188 F.3d 303, 305 (5th Cir. 1999). The contempt order continued to limit the contemnor's activities: it restricted his movements and required him to surrender his passport. *Id.*

In a case in which an attorney and, as an intervenor, his client asserted that the attorney-client privilege precluded the attorney's testimony in response to a grand jury subpoena, the Fifth Circuit ruled the appeal was moot where the district court had denied the attorney and his intervenor-client's motions to quash, but later refused to hold the attorney in contempt, despite the district court's prior orders on the motions to quash. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423 (5th Cir. 1991). The

government, the attorney, and the intervenor-client all appealed from the court's orders denying the motions to quash and for contempt. The Fifth Circuit held that it possessed appellate jurisdiction over all three appeals because the denial of the motion for contempt constituted a final, appealable order. *Id.* at 1429-30. However, the attorney and intervenor-client's appeals were moot, because the contempt order granted them the relief they sought: that is, the denial of the contempt motion "had the same effect as granting [the attorney and intervenor-client's] motions to quash." *Id.* at 1430. Essentially, the attorney and intervenor-client sought to obtain a ruling that the relief they obtained in the contempt hearing should have been provided at an earlier date — during the hearings on their motions to quash. The Fifth Circuit held that such an appeal would call for the court to issue "an advisory opinion, after the conflict has been resolved in their favor, stating that a district court must provide such a hearing prior to an attorney being required to appear before a grand jury." *Id.* Thus, the favorable ruling on the contempt motion mooted their appeal, because it prevented the court of appeals from providing the attorney or the intervenor-client with any further relief. *Id.*

6. Relief

Depending on the particular circumstances of the case, the Fifth Circuit can dissolve a contempt order, can remand with instructions to consider further evidence or issues, or can remand with instructions on the treatment of any testimony or materials that a journalist may be compelled to produce. For example, in *Miller*, after deciding that the reporter enjoyed a qualified privilege, but that the privilege was overcome under the facts of the case, the Fifth Circuit remanded to the district court with instructions that the information the reporter would provide must be limited strictly for use in the pending litigation and be disclosed only to the counsel involved in the case. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 727, *as modified*, 628 F.2d 932 (5th Cir. 1980). Similarly, the Fifth Circuit in *Selcraig* dissolved the contempt order, held that the reporter enjoyed a qualified privilege, and remanded with specific instructions that the reporter's privilege could only be overcome if the district court first determined that the plaintiff had established a *prima facie* case for liability. *In re Selcraig*, 705 F.2d 789, 799-800 (5th Cir. 1983).

IX. Other issues

A. Newsroom searches

No reported decision of the Fifth Circuit has addressed the application of the Privacy Protection Act (42 U.S.C. § 2000aa) to searches of newsrooms or seizures of cameras or film. Two district courts have addressed the Act in other contexts, however. One court found that a school instructor employed by the Department of Defense did not state a claim under the Privacy Protection Act where he alleged that the government had obtained his bank records, which were not allegedly intended to be disseminated publicly. *Nwangoro v. Department of the Army*, 952 F. Supp. 394, 398 (N.D. Tex. 1996). Another district court found that the Secret Service violated the plaintiff's rights under the Privacy Protection Act and awarded damages for the plaintiff's expenses and lost profits caused by the violation. *Steve Jackson Games, Inc. v. United States Secret Service*, 816 F. Supp. 432 (W.D. Tex. 1993). An agent of the Secret Service had seized, pursuant to a search warrant, files from the plaintiff's computer bulletin board system, including a book the plaintiff intended to publish. The court found that the Secret Service did not initially "reasonably believe" the materials they seized violated the Act. *Id.* at 440-41 & 440 n.8. However, once the plaintiff had explained to the Secret Service the nature of the seized materials and the Act's requirements and had requested their return, the Secret Service reasonably believed the plaintiff had a purpose to communicate the material to the public. *Id.* at 440-41. Although the Fifth Circuit affirmed the judgment of the district court, the parties did not raise any issue regarding the district court's treatment of the Privacy Protection Act on appeal of the judgment. *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994).

B. Separation orders

No reported decision of the Fifth Circuit has addressed the scope of separation orders issued against reporters who are both trying to cover the trial and are on a witness list.

C. Third-party subpoenas

No reported decision of the Fifth Circuit has addressed media efforts to quash subpoenas issued to third parties in an effort to discover a reporter's source.

D. The source's rights and interests

No reported decision of the Fifth Circuit has addressed efforts of sources to intervene anonymously to halt disclosure of their identities. In a case involving the attorney-client analog to the qualified reporter's privilege, however, the Fifth Circuit permitted the client of an attorney to intervene anonymously to protect his identity when the client's identity was inextricably intertwined with the subject of the allegedly privileged communication. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423 (5th Cir. 1991).