REPORTER'S PRIVILEGE: 7TH 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

7TH CIR.

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I. Introduction: History & Background

Since the 2003 decision in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), the reporter's privilege has been limited to cases involving confidential sources, although some district courts have protected non-confidential material by following a reasonableness test applicable to subpoenas generally. Relying on any case decided before *McKevitt* is problematic. Exercise caution and ensure the case is still good law. For the most part, federal courts have not adopted any special procedural rules concerning the quashing of a subpoena or the appellate process.

II. Authority for and source of the right

No reported cases discuss the reporters' privilege prior to *Branzburg*.

III. Scope of protection

A. Generally

In *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), the court rejected a reporter's privilege, at least when the source is not confidential. A terrorism defendant in Ireland sought an order under 28 U.S.C. § 1782 compelling production of tape recorded interviews for cross-examination of the chief prosecution witness. 339 F.3d at 531. The witness's identity was known and he did not object to production of the tapes, in the possession of journalists preparing a biography of the witness. *Id.* at 532. The court reviewed *Branzburg* and its progeny and rejected a special reporter's privilege. "It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances…. We do not see why there need be special criteria merely because the possessor of the documents or other evidence sought is a journalist." *Id.* at 533. The court stated that when the source is not confidential, the First Amendment does not apply. *Id.* The court suggested that cases holding that the reporter's privilege applies to cases involving non-confidential sources "may be skating on thin ice." Id at 532. And the court held that state-law privileges are not legally applicable in federal-question cases. *Id.*

In 2007, the Seventh Circuit stated explicitly what it stated in so many words in *McKevitt*: "There isn't even a reporter's privilege in federal cases." *United States Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n*, 481 F.3d 936, 938 (7th Cir. 2007). The court acknowledged that the news media's ability to conduct investigations would be enhanced if they were permitted to conceal the identity of their sources from the government. "But they are not." *Id.* at 938.

When diversity of citizenship is the basis for federal jurisdiction, courts undergo a standard *Erie* analysis and determine whether the application of state law would provide the "rule of decision." *Desai v. Hersh*, 954 F.2d 1408, 1411 (7th Cir. 1992). *See also Solaia Technology, LLC v. Rockwell Automation, Inc.*, No. 03 C 6904, 2003 WL 22597611, at *3 (N.D. Ill. Nov. 10, 2003).

B. Absolute or qualified privilege

To the extent that a privilege exists after *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), it must be considered qualified and courts follow the balancing test set forth in *McKevitt*.

However, the lower courts have continued to consider the interests of the media in deciding whether to quash subpoenas or compel disclosure. *See, e.g., Hobley v. Burge*, 223 F.R.D. 499 (N.D. Ill. 2004): "[g]iven the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private discovery agents." *Id.* at 505.

C. Type of case

1. Civil

The balancing test announced in *McKevitt* applies in civil cases. *See Bond v. Utreras*, No. 04 C 2617, 2006 WL 1806387 (N.D. Ill. June 27, 2006); *Hare v. Zitek*, No. 02 C 3973, 2006 WL 2088427 (N.D. Ill. July 24, 2006); *Patterson v. Burge*, No. 03 C 4433, 2005 WL 43240 (N.D. Ill. Jan. 6, 2005); *Hobley v. Burge*, 223 F.R.D. 499 (N.D. Ill. 2004); *Solaia Technology, LLC v. Rockwell Automation, Inc.*, No. 03 C 6904, 2003 WL 22597611 (N.D. Ill. Nov. 10, 2003).

2. Criminal

The balancing test announced in *McKevitt* applies in criminal cases. *See United States v. Hale*, No. 03 CR 11, 2004 WL 1123796 (N.D. Ind. April 14, 2004). *See also United States v. Lloyd*, 71 F.3d 1256, 1262, 1269 (7th Cir. 1995) (upholding trial court's decision to quash defendant's trial subpoena of a *Chicago Tribune* reporter); *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991) (upholding NBC's motion to quash subpoena for video outtakes but ordering NBC to produce transcripts of the outtakes); *United States v. Lopez*, No. 86 CR 513, 1987 WL 26051, at *1 (N.D. Ill. Nov. 30, 1987) (applying qualified reporters' privilege in criminal case and granting NBC's motion to quash).

In *Bingham*, the defendant sought from NBC outtakes from a videotaped interview of a key government witness. While NBC agreed to produce those portions of the tape that were previously broadcast, it refused to produce the outtakes. In balancing the parties' interests, the court considered the defendant's important Fifth Amendment right to a fair trial and his Sixth Amendment rights to compulsory process and effective confrontation of adverse witnesses. *Bingham*, 765 F. Supp. at 958. The court adopted a balancing approach used by other circuits in criminal cases. The court said that "[t]he rights of the party seeking disclosure override the reporters' First Amendment interests only upon a clear and specific showing that the information is highly relevant and material, necessary to the maintenance of a claim, and not obtainable from other available sources." The court held that the information was "highly relevant" and even "critical to the maintenance of the defense." *Id.* at 958-959. One issue not addressed by the court was whether either party had asked the court to make a transcript of the tapes. It appears the court turned the transcripts over to the defense *sua sponte* in an attempt to reach a middle ground. This should provide a note of caution to reporters producing videotapes for *in camera* inspection.

3. Grand jury

No federal cases in the Seventh Circuit discussed whether the reporters' privilege applies to grand jury subpoenas.

D. Information and/or identity of source

In *Solaia Technology, LLC v. Rockwell Automation, Inc.*, No. 03 C 6904, 2003 WL 22597611 (N.D. Ill. Nov. 10, 2003), the court tentatively held that a subpoena served in an antitrust case should be quashed to the extent it sought the identity of the author of an anonymous letter published in a manufacturing industry magazine. *Id.* at *2. The court reserved ruling pending a related decision in another federal district court that may have resulted in the application of the Illinois statutory reporter's privilege. *Id.* at *3.

Pre-*McKevitt* rulings also have protected the source of the information. *Neal v. City of Harvey, Illinois*, 173 F.R.D. 231, 234 (N.D. Ill. 1997) (quashing subpoena seeking undisclosed sources partially because "names of sources are covered by the privilege"); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 626 (N.D. Ill 1998) (ordering that subpoenaed videotape be produced but that cameraman's voice be redacted in the event that news-gatherer argued cameraman was the source); *Gulliver's Periodicals Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197, 1204 (N.D. Ill. 1978)* (quashing subpoena because subpoena sought identity of sources who had given information upon promise that their identities would remain secret).

E. Confidential and/or non-confidential information

McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003), the reporter's privilege was limited to cases involving confidential sources, although some district courts have protected non-confidential material by following a reasonableness test applicable to subpoenas generally. The *McKevitt* court stated when the source is not confidential, the First Amendment does not apply. *Id.* at 533. The court suggested that cases holding that the reporter's privilege applies to cases involving non-confidential sources "may be skating on thin ice." Id at 532.

Pre-*McKevitt* rulings have emphasized the importance of protecting confidential sources. *See Neal v. City of Harvey, Illinois*, 173 F.R.D. 231, 233 (N.D. Ill. 1997) (protecting names of sources); *Gulliver's Periodicals Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1204 (quashing subpoena that sought identity of sources who had given information upon promise that their identities would remain secret). Other than the *Gulliver's Periodicals, Ltd.* court, no other court has given a definition of "confidential" or distinguished between information obtained through a promise of confidentiality and information not obtained through such a promise.

Although non-confidential information, however, has receives less protection under a balancing test, lower courts continue to recognize the media's need for freedom from the harassment of subpoenas. In *Hobley v. Burge*, 223 F.R.D. 499 (N.D. Ill. 2004), a federal magistrate quashed a subpoena for reporter's notes of conversations with a civil rights plaintiff, because "[g]iven the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private discovery agents." *Id.* at 505 (internal citations omitted). The magistrate noted that "[n]othing in *McKevitt* suggests that a reporter's notes are discoverable in civil litigation simply because the reporter interviewed a party to that litigation." *Id.* The magistrate stated that research for news articles should be treated like proprietary business information that is protected by Fed. R. Civ. P. 45(c)(3)(B)(i). *Id.* The magistrate did order production of letters sent by the plaintiff to the reporter because the reporter did not establish that they were sent under an agreement to keep them confidential. *Id.* at 503-04.

Similarly in *Patterson v. Burge*, No. 03 C 4433, 2005 WL 43240 (N.D. Ill. Jan. 6, 2005), the court quashed the civil rights defendants' subpoena for videotape outtakes reflecting statements by the plaintiff because the defendants had not shown more than mere relevance. *Id.* at *3. The court held that the press would become "indentured servants" and suffer a loss of independence if forced to respond to subpoenas for non-public records without a showing materiality and that they do not have the information sought and it is not available from other sources. *Id.* at *2 - *3. The court discussed several justifications for protecting journalists from subpoenas, including time spent responding, revelation of journalistic and editorial judgments, their ability to create sources and a public interest in a robust press. *Id.* at *3. The court held that videotapes that reflect a journalist's thought processes should be protected like reporter's notes, even if the burden to produce them is not great. *Id.* at *4.

The court protected non-confidential material in *Bond v. Utreras*, No. 04 C 2617, 2006 WL 1806387 (N.D. Ill. June 27, 2006). A federal magistrate held that civil rights defendants could not force a reporter to disclose interview notes or answer questions in a deposition about interviews of residents of a public housing project he was reporting on. *Id.* at *6 - *7. However, the magistrate did order the reporter to answer questions about his interviews with the plaintiff, because the plaintiff had no legitimate expectation of privacy in those discussions. *Id.* at *7. The magistrate held that to establish a right to the notes and testimony, the defendants would have to show that the evidence is highly probative of issues relevant to the case and that they don't have or is otherwise unavailable to them. *Id.* at *6. In a later ruling on a motion for reconsideration, the magistrate held that the reporter's deep involvement in the case, including helping the plaintiff find an attorney, meant he could not expect to shield his notes of interviews with her and conversations with her. *Bond v. Utreras*, No. 04 C 2617, 2006 WL 2494759, at *2 (N.D. Ill. August 23, 2006).

In a like manner, in *Hare v. Zitek*, No. 02 C 3973, 2006 WL 2088427 (N.D. Ill. July 24, 2006), a federal magistrate held that despite the absence of a federal reporter's privilege in the 7th Circuit, civil rights defendants could not force a reporter to answer questions about her sources unless they can show a real need for the information and that it is not available from another source. *Id.* at *4.

See also the pre-*McKevitt* cases of *Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 625 (N.D. Ill 1998) (refusing to quash subpoena for videotapes, but conducting balancing test and considering non-confidential nature of information); *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991) (upholding NBC's motion to quash subpoena for video outtakes but ordering NBC to produce transcripts of non-confidential outtakes).

F. Published and/or non-published material

Information that has not been published is afforded more protection than information that has been published.

In *Bond v. Utreras*, No. 04 C 2617, 2006 WL 1806387 (N.D. Ill. June 27, 2006), a federal magistrate held that civil rights defendants could not force a reporter to disclose interview notes or answer questions in a deposition

about interviews of residents of a public housing project he was reporting on. *Id.* at *6 - *7. However, the magistrate did order the reporter to answer questions about his interviews with the plaintiff, because the plaintiff had no legitimate expectation of privacy in those discussions. *Id.* at *7. The magistrate held that to establish a right to the notes and testimony, the defendants would have to show that the evidence is highly probative of issues relevant to the case and that they don't have the evidence or is it otherwise unavailable to them. *Id.* at *6. In a later ruling on a motion for reconsideration, the magistrate held that the reporter's deep involvement in the case, including helping the plaintiff find an attorney, meant he could not expect to shield his notes of interviews with her and conversations with her. *Bond v. Utreras*, No. 04 C 2617, 2006 WL 2494759, at *2 (N.D. Ill. August 23, 2006).

In *Patterson v. Burge*, No. 03 C 4433, 2005 WL 43240 (N.D. Ill. Jan. 6, 2005), the court quashed the civil rights defendants' subpoena for videotape outtakes reflecting statements by the plaintiff because the defendants had not shown more than mere relevance. *Id.* at *3. The court held that the press would become "indentured servants" and suffer a loss of independence if forced to respond to subpoenas for non-public records without a showing materiality and that they do not have the information sought and it is not available from other sources. *Id.* at *2 - *3. The court discussed several justifications for protecting journalists from subpoenas, including time spent responding, revelation of journalistic and editorial judgments, their ability to create sources and a public interest in a robust press. *Id.* at *3. The court held that videotapes that reflect a journalist's thought processes should be protected like reporter's notes, even if the burden to produce them is not great. *Id.* at *4.

In *Hobley v. Burge*, 223 F.R.D. 499 (N.D. Ill. 2004), a federal magistrate quashed a subpoena for reporter's notes of conversations with a civil rights plaintiff, because "[g]iven the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private discovery agents." *Id.* at 505 (internal citations omitted). The magistrate noted that "[n]othing in *McKevitt* suggests that a reporter's notes are discoverable in civil litigation simply because the reporter interviewed a party to that litigation." *Id.* The magistrate stated that research for news articles should be treated like proprietary business information that is protected by Fed. R. Civ. P. 45(c)(3)(B)(i). *Id.* The magistrate did order production of letters sent by the plaintiff to the reporter because the reporter did not establish that they were sent under an agreement to keep them confidential. *Id.* at 503-04.

See also these Pre-*McKevitt* cases: *May v. Collins*, 122 F.R.D 535, 540 (S.D. Ind. 1988) ("journalists possess a qualified privilege . . . not to disclose unpublished information which was in their possession gathered as a result of the newsgathering process"); *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991) (quashing subpoena for outtakes which did not air, but providing transcript to partying seeking outtakes).

G. Reporter's personal observations

In *United States v. Hale*, No. 03 CR 11, 2004 WL 1123796 (N.D. Ind. April 14, 2004), a federal magistrate denied a motion to quash a subpoena to a reporter to appear at the trial of a criminal defendant he had interviewed. *Id.* at *2 - *3. The court rejected the argument that a videotape of the reporter interviewing the defendant was an adequate substitute for the reporter's trial testimony. The reporter "was in a unique position, as the interviewer, to observe [the defendant's] demeanor during the interview. The government is under no obligation to forego some evidence from a credible source merely because other sources also may testify to the same matters." *Id.* at *1. The magistrate held the reporter did not show the government was seeking any confidential material. *Id.* at * 2.

Similarly, a district court, in a pre-*McKevitt* case, held that the privilege does not apply to journalists' personal observations. *Alexander v. Chicago Park District*, 548 F. Supp. 277, 278 (N.D. Ill. 1982) (refusing to recognize the privilege and stating "[a] reporter's observations of a public place or event are no different that that of other individuals; and as to this, they are not entitled to constitutional protection").

H. Media as a party

No federal cases in the Seventh Circuit discussed how the reporters' privilege was affected if the media was a party to the action other than *Desai v. Hersh*, 954 F.2d 1408 (7th Cir. 1992), in which the libel plaintiff had to prove actual malice and the reporter's privilege could not be applied.

I. Defamation actions

In defamation actions in which the plaintiff must demonstrate the defendant's malice, the reporters' privilege cannot be invoked. In *Desai v. Hersh*, 954 F.2d 1408 (7th Cir. 1992), the former Prime Minister of India brought a defamation action against Seymour Hersh. During the dispute, the plaintiff sought the identities of Hersh's sources for his book. When Hersh did not respond, plaintiff sought an order precluding the author from referring to his unidentified sources. In denying the plaintiff's motion, the trial court relied on Illinois' Reporters' Privilege Law. On appeal, the Court of Appeals held that the trial court had committed error by treating the privilege as absolute. *Id.* at 1412. The court said that the district court eliminated the plaintiff's ability to test the reliability or existence of the author's unnamed sources. *See also Liebhard v. Square D Co.*, No. 91 C 1103, 1992 WL 193558, at *3 (N.D. Ill. August 4, 1992) (agreeing, in dicta, with *Desai*).

IV. Who is covered

Illinois is only the state in the Seventh Circuit to include a definitions section in its shield law. The Illinois statute defines the terms reporter, news medium and source.

Reporter is defined as:

> "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained."

735 ILCS 5/8-902(a) (West 2001).

News medium is defined as:

> "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a new service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing.

735 ILCS 5/8-902(b) (West 2001).

Source is defined as the person or means from or through which the news or information was obtained. 735 ILCS 5/8-903(c) (West 2001). *See Alexander v. Chicago Park District*, 548 F. Supp. 277-78 (N.D. Ill. 1982) (finding that a reporter's personal observations is not considered "source material" for purposes of constitutional protection).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Outside of Illinois' statutory definition, there appears to be no further discussion of what qualifies a person as a reporter for purposes of invoking the reporter's privilege. However, at least one court has declined an invitation to limit the definition of reporter to that of a newspaper reporter. *See Desai v. Hersh*, 954 F.2d 1408, 1412 n. 3 (7th Cir. 1992) (finding the reporter's privilege applicable to book author under Illinois' statutory definition of reporter). Also instructive is *Builders Assoc. of Greater Chicago v. County of Cook*, No. 96 C 1121, 1998 WL 111702 (N.D. Ill. Mar. 12, 1998). In *Builders*, the Chicago Urban League moved to quash a subpoena that sought documents from one of its studies regarding racial and gender discrimination in the construction industry. The subpoenaing party argued that the Urban League was not entitled to the protections of the reporter's privilege since it was an advocacy group that conducts interviews and surveys for governmental entities in order to validate legislation. Thus, it was not a "reporter." The court disagreed and refused to apply the privilege to some groups that disseminate information but not to others. *Builders*, 1998 WL 111702, at *4-5 (holding "information gathered for political purposes is not outside the protections of the privilege if it was gathered with the intent to disseminate the information to the public").

b. Editor

There is no statutory or case law addressing this issue.

c. News

What constitutes "news" has yet to be specifically defined in the Seventh Circuit, however, it appears for purposes of invoking the reporter's privilege news can include information gathered for political purposes. *See Builders Assoc. of Greater Chicago v. County of Cook*, No. 96 C 1121, 1998 WL 111702, at *4-5 (Mar. 12, 1998).

d. Photo journalist

There is no statutory or case law addressing this issue.

e. News organization / medium

There is no statutory or case law addressing this issue.

2. Others, including non-traditional news gatherers

The Seventh Circuit, before *McKevitt*, applied the reporter's privilege for "non-traditional" news gatherers such as authors and political advocacy groups. *See Desai v. Hersh*, 954 F.2d 1408, 1412 n. 3 (7th Cir. 1992) (finding the reporter's privilege applicable to book author under Illinois' statutory definition of reporter); *Builders Assoc. of Greater Chicago v. County of Cook*, No. 96 C 1121, 1998 WL 111702 (N.D. Ill. Mar. 12, 1998) (holding advocacy group's information gathering for political purposes not outside the protections of the privilege if it was gathered with the intent to disseminate the information to the public).

B. Whose privilege is it?

There is no statutory or case law addressing this issue.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special requirements concerning a member of the news media. The normal procedures under Federal Rule of Civil Procedure 45 or Federal Rule of Criminal Procedure 17 would apply. There are no Seventh Circuit Rules or Local Rules that apply.

2. Deposit of security

There are no special requirements concerning a member of the news media and security deposits. The normal procedures under Federal Rule of Civil Procedure 45 or Federal Rule of Criminal Procedure 17 would apply. There are no Seventh Circuit Rules or Local Rules that apply.

3. Filing of affidavit

There are no special requirements concerning a member of the news media and the filing of affidavits. The normal procedures under Federal Rule of Civil Procedure 45 or Federal Rule of Criminal Procedure 17 would apply. There are no Seventh Circuit Rules or Local Rules that apply.

4. Judicial approval

There are no special requirements concerning a member of the news media and judicial approval. The normal procedures under Federal Rule of Civil Procedure 45 or Federal Rule of Criminal Procedure 17 would apply. There are no Seventh Circuit Rules or Local Rules that apply.

5. Service of police or other administrative subpoenas

There are no special requirements concerning police or administrative subpoenas.

B. How to Quash

1. Contact other party first

A motion to quash will probably be treated as any other discovery dispute. Often parties are required to first attempt to solve discovery disputes prior to filing motions. The Federal Rules of Civil Procedure (Rule 37) and local rules (Local Rule 37.2 of the Northern District of Illinois, for example) require each discovery motion to include a statement that the parties made good faith attempts reach an agreement. *See also Deitchman v. E.R. Squibb & Sons, Inc.* 740 F.2d 556, 560 (7th Cir. 1984) (discovery request constitutes "opening of discussion" between party seeking information and party with information). As a result, we recommend contacting the subpoenaing party before moving to quash.

2. Filing an objection or a notice of intent

We would recommend filing a notice of intent and appropriate notice of motion. Courts have disapproved any attempt to quash a subpoena ex parte. *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp.*, 627 F.2d 44, 51-52 (7th Cir. 1980). As reporters will often be non-parties, they should seek leave to file before actually filing their motion to quash. Some local rules require a non-party to seek leave from the court before filing a motion. Northern District of Illinois Local Rules 5.3 and 5.6.

3. File a motion to quash

a. Which court?

A motion to quash a subpoena must be filed in the court that issued the subpoena. *Kearney for Kearney v. Jandernoa*, 172 F.R.D. 381, 383-384 n. 4 (N.D. Ill. 1997); *Lieberman v. American Dietetic Assoc.*, No. 94 C 5353, 1995 WL 250414 at *1 (N.D. Ill April 25, 1995) (denying motion to quash subpoena issued by California federal court and holding that California federal court must determine whether the subpoena should be quashed on the grounds of the California's statute on the reporters' privilege). *But see In Re Factor VIII or IX Concentrate Blood Products Litigation*, 174 F.R.D. 412 (N.D. Ill. 1997) (under rules on multi-district litigation, transferee court has power to compel compliance with a subpoena issued by transferor district court).

While a motion to quash must be filed in the issuing court, a protective order can be filed in the court hearing the underlying litigation. In *Kearney*, 172 F.R.D. at 383-384, the plaintiff in a case pending in the Western District of Michigan served a subpoena upon a non-party in Illinois. The subpoena was issued by the U.S. District Court for the Northern District of Illinois. The Illinois witness sought to quash the subpoena in the Illinois federal court and to transfer all issues related to the plaintiff's discovery request to the Michigan federal court. The Illinois federal court pointed out that the Seventh Circuit has held that motions cannot be transferred. Instead, the Illinois federal court stayed its own proceedings upon the understanding that the Illinois party would file its motion in the Michigan federal court. The Illinois federal court indicated that it would vacate its stay and issue a ruling not inconsistent with the Michigan court's rulings. While the Illinois court refused to transfer the motion back to the court overseeing the underlying litigation, it is clear that the court believed that the protective order should have been filed in the Michigan court. Furthermore, even though the court stated that motions to quash subpoenas "must be filed and decided in the court from which the subpoena issued," it stayed the motion to quash in deference to the Michigan's court's ruling on the protective over.

b. Motion to compel

A media party should consider the likelihood of a motion to compel in deciding when to move to quash. Under Fed. R. Civ. P. 37(a)(4)(A) costs, attorneys' fees and sanctions can be awarded against the losing party on a motion to compel. *See also Rickels v. City of South Bend*, 33 F.3d 785, 786-88 (7thCir. 1994) (losers in discovery disputes pay for costs and fees as a matter of course). The lack of clear precedent on the privilege in the Seventh Circuit must also be considered. *Warzon v. Drew*, 155 F.R.D. 183, 187 (E.D. Wis. 1994) (refusing to award costs to media party despite the fact that subpoena was quashed).

c. Timing

Under the rules and the general approach of the federal courts in the Seventh Circuit, the motion to quash should be filed a promptly as possible. *NLFC, Inc. v. DevCom Mid-America, Inc.*, No. 93 C 0609, 1994 WL 188478 (N.D. Ill. May 11, 1994) (pointing out that motion must be brought before time of compliance).

d. Language

There is no statutory or case law addressing this issue.

e. Additional material

There is no statutory or case law addressing this issue.

4. In camera review

a. Necessity

No cases suggest that an *in camera* review is required. Such decisions are left to the discretion of the trial court. *United States v. Phillips*, 854 F.2d 273, 277 (7th Cir. 1988). Nevertheless, many districts courts have engaged in such reviews. *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991) (in camera review of video outtakes for purposes of reporters' privilege); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 625 (N.D. Ill. 1998) (in camera review of videotape for purposes of reporters' privilege).

b. Consequences of consent

There is no statutory or case law addressing this issue.

c. Consequences of refusing

There is no statutory or case law addressing this issue.

5. Briefing schedule

There are no special rules for briefing schedules concerning motions to quash subpoenas.

6. Amicus briefs

There are no special rules regarding amicus briefs and motions to quash subpoenas.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

A subpoenaing party seeking to compel the disclosure of information from a journalist gathered in the course of newsgathering must show that the evidence is highly probative of issues relevant to the case and that it does not have the evidence or it is otherwise unavailable to them. *Bond v. Utreras*, No. 04 C 2617, 2006 WL 1806387 at *6, (N.D. Ill. June 27, 2006). In *Patterson v. Burge*, No. 03 C 4433, 2005 WL 43240 (N.D. Ill. Jan. 6, 2005), the court held the party enforcing a subpoena must showing materiality and that they do not have the information sought and it is not available from other sources. *Id.* at *2 - *3. *See also Neal v. City of Harvey, Ill.*, 173 F.R.D. 231, 233 (N.D. Ill. 1993)(subpoenaing party must show: "(1) that the information is not available from a non-journalistic source; and (2) that it is highly relevant and material to the case at bar."). *See Builders Assoc. of Greater Chicago v. County of Cook*, No. 96 C 1121, 1998 WL 111702, at *5 (N.D. Ill. Mar. 12, 1998).

B. Elements

1. Relevance of material to case at bar

A subpoenaing party seeking to compel the disclosure of information from a journalist gathered in the course of newsgathering must show that the evidence is highly probative of issues relevant to the case and that it does not have the evidence and it otherwise unavailable to them. *Bond v. Utreras*, No. 04 C 2617, 2006 WL 1806387 at *6, (N.D. Ill. June 27, 2006). In *Patterson v. Burge*, No. 03 C 4433, 2005 WL 43240 (N.D. Ill. Jan. 6, 2005), the court held the party enforcing a subpoena must showing materiality and that it does not have the information sought and it is not available from other sources. *Id.* at *2 - *3.

The subpoenaing party must show that the material sought is "highly relevant" and be specific in its demonstration. "Highly relevant" means that the information sought goes to the heart or is crucial to the claims made by the discovering party. *See Neal v. City of Harvey, Ill.*, 173 F.R.D. 231, 233-34 (N.D. Ill. 1993). Additionally, it is in-

sufficient to merely allege potential relevance. Rather, there must be a showing of actual relevance. *Id.*; *see e.g. U.S. v. Jennings*, No. 97 CR 765, 1999 WL 438984 (N.D. Ill. June 21, 1999) (finding writer's non-confidential information surrounding interview of defendant's co-defendant discoverable where the information sought was relevant to establishing co-defendant's motive to testify); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624 (N.D. Ill. 1998) (qualified reporter's privilege would not prohibit the discovery of NBC videotape where videotape was relevant to plaintiffs' claims); compare *U.S. v. Lloyd*, 71 F.3d 1256, 1268-69 (7th Cir. 1995) (finding that newspaper article in which an unnamed officer stated a "lottery" existed on how long defendant would live was collateral to defendant's defense of police bias when defendant could not establish that the arresting officer was the officer quoted in the article). *U.S. v. Lopez*, No. 86 CR 513, 1987 WL 26051 (N.D. Ill. Nov. 30, 1987) (criminal defendant denied outtakes of a television interview when there was no showing of why the outtakes were relevant in helping the defendant explain the previously aired interview).

2. Material unavailable from other sources

A subpoenaing party must show that that it down have the information and it is otherwise unavailable to them. *Bond v. Utreras*, No. 04 C 2617, 2006 WL 1806387 at *6, (N.D. Ill. June 27, 2006). In *Patterson v. Burge*, No. 03 C 4433, 2005 WL 43240 (N.D. Ill. Jan. 6, 2005), the court held the party enforcing a subpoena must show it does not have the information sought and it is not available from other sources. *Id.* at *2 - *3. The subpoenaing party must demonstrate that the information sought is not available from a non-journalistic source. *See Neal v. City of Harvey, Ill.*, 173 F.R.D. 231, 233 (N.D. Ill. 1993). Therefore, court will order the disclosure of the reporter's source only when the subpoenaing party shows that every reasonable alternative source for that information has been exhausted. *See Warzon v. Drew*, 155 F.R.D. 183, 187 (E.D. Wis. 1994).

a. How exhaustive must search be?

Without ever defining what constitutes an "exhaustive" search, the court will generally not compel discovery unless it has been shown the information sought is unavailable from a non- journalistic source. For example, in *Neal v. City of Harvey, Ill.*, 173 F.R.D. 231, 233-34 (N.D. Ill. 1993), plaintiff filed a Section 1983 civil rights lawsuit against various public officials for his arrest in connection with the shooting of a police officer. Defendant David Johnson sought to depose a television reporter to explore his knowledge of the statements made by Johnson and his co-defendant. In quashing the subpoena the court found that Johnson failed to satisfy his burden to show the information he sought was unavailable from a non-journalistic source. Specifically, the court found that Johnson knew or should have known what he had or had not said to the press. If Johnson was concerned about the statements of his co-defendant or the plaintiff, Johnson was free to depose either of them. Therefore, Johnson's subpoena was quashed. *See also Warzon v. Drew*, 155 F.R.D. 183, 187 (E.D. Wis. 1994) (subpoena to newspaper reporter quashed when plaintiff in wrongful termination suit over her firing following her adverse commentary on county health plan could have discovered same information from a consultant to county or through public records; thus, plaintiff had not exhausted all non-journalistic sources); *U.S. v. Lopez*, No. 86 CR 513, 1987 WL 26051 (N.D. Ill. Nov. 30, 1987) (subpoenaing party failed to exhaust alternative non-journalistic sources where interview outtakes were sought from NBC interview where subpoenaing party was one of the interviewees).

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

There is no statutory or case law addressing this issue.

c. Source is an eyewitness to a crime

There is no statutory or case law addressing this issue.

3. Balancing of interests

Some of the considerations that should be considered in assessing a newsgatherer's claim of privilege include: the nature of the case, the relevance and materiality of the information sought, whether the information sought lies at the heart of the pending case or is critical to the claims made by the discovering party, and the availability of information from alternative sources. *See Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., Inc.*, 455 F. Supp. 1197, 1202-03 (N.D. Ill. 1978). In *U.S. v. Jennings*, No. 97 CR 765, 1999 WL 438984 (N.D. Ill. June 29, 1999), the court held that the First Amendment does not protect journalists from disclosure of non-confidential relevant information that is sought in good faith. In *Jennings*, the court held that a reporter must produce his notes

of a pre-trial interview of a co-defendant of the subpoenaing party. The purpose of the subpoena was to determine whether being interviewed impacted the testimony of the co-defendant. The court also found that because the source of this information was not confidential there was no chilling effect on the press, nor would it be an excessive burden to the press or alter the way the press conducted its methods of pursuing information. *Id.* at *4; *see also Warnell v. Ford Motor Co.*, 183 F.R.D. 624 (N.D. Ill. 1998) (granting plaintiff's motion to compel NBC videotape where source of videotape remained confidential and was highly relevant and otherwise unavailable to plaintiffs); *U.S. v. Bingham*, 765 F. Supp. 954, 959-60 (N.D. Ill. 1991) (holding that defendant's subpoena duces tecum seeking NBC interview outtakes would be quashed; however, defendant was entitled to transcripts of such outtakes).

In *Liebhard v. Square D Co.*, No. 91 C 1103, 1992 WL 19358 (N.D. Ill. Aug. 4, 1992), a defendant in a securities lawsuit subpoenaed information from a Reuters' reporter regarding the accuracy of a quote. In weighing the importance of the reporter's privilege against the need for discovery, the court permitted the discovery of the reporter's notes regarding his conversation with the defendant. Additionally, the court allowed the reporter to be deposed for the limited purpose of testing his memory regarding his conversation with the defendant. The court refused to allow the reporter to be questioned on the collateral issue of whether he had heard any rumors regarding the takeover of defendant's company. The court also rejected the defendant's attempt to probe into the editorial process surrounding the reporter's story. The court held that allowing an inquiry into this aspect of the reporter's story was an impermissible invasion of the internal operations of the press. *Id.* at *3.

4. Subpoena not overbroad or unduly burdensome

Even within the criminal context, the court may quash a subpoena which is overbroad or simply fishing for evidence. In *U.S. v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995), the court quashed a subpoena served by a criminal defense attorney who sought information from a newspaper reporter regarding his article in which a quote appeared from an unnamed police officer alleging there was a lottery on the life of defendant. Defense counsel argued the information was critical to the defendant because it established bias on behalf of the investigating officers. The court characterized this argument as an attempted fishing expedition. Defense counsel failed to establish any nexus between police officer bias and an infirmity in the defendant's arrest, nor was there any evidence that it was the arresting officer who was the source of the reporter's quote. *Id.* at 1268-69 (finding no relevance to the existence of an alleged lottery where the only issue before the jury was whether defendant possessed a firearm).

In *Liebhard v. Square D. Co.*, No. 91 C 1103, 1992 WL 19358 (N.D. Ill. Aug. 4, 1992), a defendant in a securities lawsuit subpoenaed a Reuters' reporter for notes regarding an interview in which he allegedly misquoted the defendant. The court permitted the reporter to be deposed and to have his notes surrounding the interview to be disclosed. The court however, refused to allow the defendant any latitude in exploring two conversations the reporter had with third-parties regarding his interview given the consistent position he maintained during his deposition. The court found that allowing questioning of this sort amounted to no more than an evidentiary fishing expedition. *Id.* at *3-4.

5. Threat to human life

There is no statutory or case law addressing this issue.

6. Material is not cumulative

There is no statutory or case law addressing this issue.

7. Civil/criminal rules of procedure

Subpoenas in criminal cases may not be overbroad or frivolous and must represent a good faith effort to identify evidence. Fed. R. Crim. P. 17(c). In civil cases, the subpoenaing party must avoid imposing undue burden or expense. Fed. R. Civ. P. 45(c)(1).

8. Other elements

There is no statutory or case law addressing this issue.

C. Waiver or limits to testimony

There is no federal statutory or federal case law on this issue in the Seventh Circuit.

1. Is the privilege waivable at all?

There is no federal statutory or federal case law on this issue in the Seventh Circuit.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no federal statutory or federal case law on this issue in the Seventh Circuit.

b. Disclosure of non-confidential source's name

There is no federal statutory or federal case law on this issue in the Seventh Circuit.

c. Partial disclosure of information

There is no federal statutory or federal case law on this issue in the Seventh Circuit.

d. Other elements

There is no federal statutory or federal case law on this issue in the Seventh Circuit.

3. Agreement to partially testify act as waiver?

No case has addressed the situation where a reporter agrees to partially testify. It appears a reporter can be ordered to partially testify without waiving the privilege as to other aspects of his or her information. *See Liebhard v. Square D Co.*, No. 91 C 1103, 1992 WL 193558, at *3 (N.D. Ill. Aug. 4, 1992) (instructing reporter to testify on some issues and not on issues such as the editorial process); *see also United States v. Hale*, No. 03 CR 11, 2004 WL 1123796 at *1 - *3, (N.D. Ind. April 14, 2004; *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991) (transcript of outtakes of videotape given to party seeking tapes *sua sponte*, but no waiver of privilege).

VII. What constitutes compliance?

A. Newspaper articles

There is no statutory or case law addressing this issue.

B. Broadcast materials

There is no statutory or case law addressing this issue.

C. Testimony vs. affidavits

There is no statutory or case law addressing this issue

D. Non-compliance remedies

There is no statutory or case law addressing this issue.

1. Civil contempt

a. Fines

There is no statutory or case law addressing this issue.

b. Jail

There is no statutory or case law addressing this issue.

2. Criminal contempt

There is no statutory or case law addressing this issue.

3. Other remedies

There is no statutory or case law addressing this issue.

VIII. Appealing

A. Timing

1. Interlocutory appeals

No cases discuss this in the context of the reporter's privilege. Generally the quashing of subpoenas is treated as a discovery ruling that is not appealable because it is not a final order under 28 U.S.C. § 1291. In order to get an appeal from a decision on a motion to quash, the subpoenaed party must disobey the subpoena and be held in contempt. *In re Grand Jury Subpoena Duces Tecum appeal of Anonymous Corp.*, 725 F.2d 1110 (7th Cir. 1984). For the most part, only criminal contempt is appealable as a final order. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F.3d 755, 764 (7th Cir. 1994). *But see Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1232 (7th Cir. 1993) (decision on motion to quash was appealable as final order because the subpoena was the only action pending in the court). The decision in *Commodity Futures* suggests that a media party could appeal the decision of a court refusing to quash a subpoena when the only issue pending in *that* court is the subpoena. *See also McKevitt v. Pallasch*, 339 F.3d 530, 531 (7th Cir. 2003) (7th Circuit considered stay of order to produce tapes, only issue in lower court under 28 U.S.C. §1782).

If a reporter refuses to provide information to a grand jury he can be immediately held in contempt and even confined. 28 U.S.C § 1826 (a). In such a case, a reporter may appeal the decision of the court to the Court of Appeals. *In re Matter of a Witness Before the Special October 1981 Grand Jury*, 722 F.2d 349, 352 (7th Cir. 1983).

Decisions can also be appealed under 28 U.S.C 1292(b). This rule provides that an interlocutory order in a civil action may be appealed if the district court certifies that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion, that that an immediate appeal from the order may materially advance the ultimate determination of the litigation."

2. Expedited appeals

Appeals can be expedited under 28 U.S.C. § 1657 for "good cause." Specifically, appeals may be expedited that relate to 28 U.S.C. § 1826, concerning recalcitrant witnesses, and any injunction action. There are no special considerations that affect news media subpoenas; however, journalists found in contempt under § 1826 should move for an expedited appeal under § 1657 or possibly seek an injunction against the subpoenaing party at an earlier point so that they may use the expedited appeal process.

B. Procedure

1. To whom is the appeal made?

Generally speaking, it appears that the invocation of the reporter's privilege and the legal proceedings arising from the invocation of this qualified privilege begin in the federal district court. *See e.g. U.S. v. Jennings*, No. 97 CR 765, 1999 WL 438984 (N.D. Ill. June 21, 1999); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624 (N.D. Ill. 1998); *Builders Assoc. of Greater Chicago v. County of Cook*, No. 96 C 1121, 1998 WL 111702 (N.D. Ill. Mar. 12, 1998); *Neal v. City of Harvey, Ill.*, 173 F.R.D. 231 (N.D. Ill. 1997). Once the district court has rendered a final judgment the parties may appeal to United States Court of Appeals for the Seventh Circuit under 28 U.S.C. §1291.

If the parties have consented to a determination of a case on the merits by a magistrate, this decision may be reviewed directly by the court of appeals via 28 U.S.C. §636(c)(3). The parties may also agree that the magistrate's decision be reviewed by the district court. In this event, review by the court of appeals is only on a petition for leave to appeal. *See* 28 U.S.C. §636(3)-(5).

2. Stays pending appeal

In the Seventh Circuit, a party interested in moving for an expedited appeal should move simultaneously for an advancement of hearing and a stay of the judgment or order appealed from if that is necessary. *See* Fed. R. App.

P. 8, 18. The procedural requirements for seeking a stay pending appeal mirror those for securing a preliminary injunction. *U.S. EEOC v. Laidlaw Waste, Inc.*, 934 F. Supp. 286, 288 n.2 (N.D. Ill. 1996). Factors controlling whether a stay will be granted are:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 288.

There is no statutory or case law that discusses whether a reporter's refusal to comply with a subpoena that also touches upon a constitutional right alters the analysis of when a stay should be granted. However, *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001), suggest that the analysis will not change even when the issuance of stay may also involve issues of constitutional import. In *Linnemeir*, the Seventh Circuit denied state residents a stay that they sought after the district court refused to grant a preliminary injunction in their favor. At issue was whether Purdue University's presentation of a play violated the First Amendment when the play endorsed anti-Christian beliefs. The court explored the merits of this appeal under a First Amendment analysis, however, the constitutional nature of the issue did not give rise to an alternate set of criteria for granting or denying the stay itself. *See also McKevitt v. Pallasch*, 339 F.3d 530, 531 (7th Cir. 2003) (7th Circuit considered stay of order to produce tapes under 28 U.S.C. §1782).

3. Nature of appeal

A reporter can appeal directly after being held in contempt by the court. No cases have treated the appeals any differently than "*expedited*" or "*interlocutory*" appeals as described above.

4. Standard of review

In *United States v. Lloyd*, 71 F.3d 1256, 1262, 1269 (7th Cir. 1995), the Court of Appeals reviewed under an abuse of discretion standard the trial court's decision to quash a subpoena seeking information from a reporter. *See also Deitchman v. E.R. Squibb & Sons*, 740 F.2d 556, 565 (7th Cir. 1984) (appellate court will reverse trial court's ruling on quashing a subpoena only upon an abuse of discretion by the trial court).

5. Addressing mootness questions

Generally, courts have found that appeals concerning motions to quash subpoenas are not moot. *Socialist Workers Party v. Grubisic*, 604 F.2d 1005, 1008 (7th Cir. 1979) (holding that appeal of trial court's denial motion to quash subpoena is not moot when trial court can release documents to parties at any time). *Matter of Special April 1977 Grand Jury*, 581 F.2d 589, 591 (7th Cir. 1978) (appeal not moot if the issue could not be fully litigated and is such that the party seeking to quash the motion would be subject to the same action again).

6. Relief

Those courts that have accepted appeals on this issue have simply reversed the trial court's decision or upheld it. *Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1232 (7th Cir. 1993).

IX. Other issues

A. Newsroom searches

No reported federal cases in the Seventh Circuit have discussed 42 U.S.C. 2000aa or searches of journalists' offices.

B. Separation orders

No reported federal cases in the Seventh Circuit have discussed separation orders.

C. Third-party subpoenas

No reported federal cases in the Seventh Circuit have discussed subpoenas from non-parties such as telephone companies or credit card companies.

D. The source's rights and interests

No reported federal cases in the Seventh Circuit have discussed a source's right to intervene anonymously. *But see Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 626 (N.D. Ill 1998) (considering interests of source to remain confidential).