REPORTER'S PRIVILEGE: 9TH 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

9TH CIR.

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I. Introduction: History & Background

Relying on the United States Supreme Court's decision in *Branzburg v. Hayes*, the Ninth Circuit Court of Appeals offers reporters a relatively broad qualified privilege from compelled disclosure. It has found that in the ordinary civil case the litigant's "interest in disclosure should yield to the journalist's privilege." *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir 1995) (*Shoen I)*. The court also has interpreted the role of the media broadly, declaring that "what makes journalism journalism is not its format but its content." *Shoen v. Shoen* 5 F.3d 1289, 1293 (9th Cir. 1993) (*Shoen II*).

Ninth Circuit cases applying the reporters privilege, however, have had mixed results—protecting the journalist in some circumstances and forcing disclosure in others. Some courts in the circuit, for example, have held that an investigative author could not be required to reveal information told to him in confidence for use in his book, *id.*; non-party reporters could not be deposed or forced to produce notes or other materials, *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 489, 493 (C.D. Cal. 1981); and a non-party magazine publisher cannot be compelled to reveal unpublished information, *Carushka, Inc. v. Premiere Prods., Inc.*, 17 Med. L. Rep. 2001 (C.D. Cal. 1998). Other courts in the circuit, on the other hand, have held that a television news cameraman must testify regarding his personal observations while on assignment, *Dillon v. City of San Francisco*, 748 F. Supp. 722 (N.D. Cal. 1990); a tabloid must reveal its sources in a defamation action where the plaintiff must show "actual malice," *Star Editorial, Inc. v. United States Dist. Court*, 7 F.3d 856, 861 (9th Cir. 1993); a journalist can be jailed for refusing to identify the confidential sources who had provided him with copies of non-public court documents, *Farr v. Pritchess*, 522 F.2d 464, 468-69 (9th Cir. 1975); a blogger may be held in civil contempt where he refused to provide to a grand jury his unpublished video footage obtained in the course of newsgathering, *In re Grand Jury Subpoena, Joshua Wolf*, 201 Fed. Appx. 430 (9th Cir. 2006) (unpublished); and reporters could be forced to appear before a grand jury and to provide materials regarding their confidential source of grand jury transcripts, *In re Grand Jury Subpoenas to Wada & Williams*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

Therefore, based on these and other cases, predicting how a court in the Ninth Circuit will react to a particular set of factual circumstances can be difficult. While the reporter's privilege is relatively strong in theory, the protection offered by the Ninth Circuit in practice is at times weak and volatile.

II. Authority for and source of the right

The Ninth Circuit developed a qualified privilege protecting reporters from compelled disclosure after the Supreme Court decided *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the Supreme Court expressly rejected any privilege for reporters in the grand jury context and held that "whatever burden might result from requiring news gatherers to testify would not override the public interest in law enforcement and in ensuring effective grand jury proceedings." *Id.* at 690. A reporter's right to keep sources confidential in the Ninth Circuit is highly dependant upon whether the circumstances of a case mirror those in *Branzburg*. When the court finds that the facts are sufficiently analogous to *Branzburg*, it refuses to allow journalists to invoke the reporter's privilege. *See, e.g., In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397, 400 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994) (affirming a district court's ruling finding academic author in civil contempt for refusing to answer certain questions propounded to him by the federal grand jury); *In re Lewis*, 517 F. 2d 236 (9th Cir. 1975) (*Lewis II*) (affirming the contempt citation against a general manager of a radio station who refused to comply with a federal grand jury subpoena). When, however, the court concludes that the facts are sufficiently distinct from *Branzburg*, it is more likely to find privilege. *See, e.g., Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) (reversing a district court's contempt order against members of the Black Panther Party who refused to answer questions during a grand jury proceeding because there was no substantial connection between the information sought and the criminal conduct being investigated, the court held that the "substantial connection" test was consistent with *Branzburg*).

When cases do not involve grand jury proceedings, the Ninth Circuit relies on Justice Powell's concurrence in *Branzburg* and recognizes a qualified privilege for reporters. *See Farr v. Pritchess*, 522 F.2d 464, 468-69 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (affirming a district court's denial of reporter's habeas corpus petition, holding that the state court had a duty to enter into enforceable nondisclosure orders to protect the due process rights of accused persons). This qualified privilege requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest. *See id.* at 468; *Dillon v. City of San Francisco*, 748 F. Supp. 722 (N.D. Cal. 1990) (denying a cameraman's motion to quash because his personal observations were not privileged).

Other sources:

1. 28 C.F.R. § 50.10

28 C.F.R. § 50.10 establishes the Department of Justice's policy regarding issuance of subpoenas to members of the news media. Section 50.10 begins by declaring the overarching principle that "[b]ecause freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." Accordingly, "[t]his policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the newsgathering function." Section 50.10(a) calls on the Department to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." Under the guideline: (i) "All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media" (id. § 50.10(b) (emphasis added)); and (ii) "In criminal cases, there should be reasonable grounds to believe . . . that the information sought is essential to a successful investigation" (id. § 50.10(f)(1) (emphasis added)). Several courts have held, however, that failure to fulfill the requirements of § 50.10 is not an independent ground for quashing a journalist subpoena. *See, e.g., United States v. Schneider*, 2003 U.S. Dist. LEXIS 27324, at *11 (N.D. Cal. Nov. 18, 2003) ("The government's failure to abide by DOJ's regulations is not an independent ground for quashing a subpoena."); *see also In re Grand Jury Subpoenas to Fainaru-Wada & Williams*, 438 F. Supp. 2d 1111, 1121 n.9 (N.D. Cal. 2006) (noting that the regulations "do not provide Movants with any enforceable rights").

2. Common Law

Jaffee v. Redmond, 518 U.S. 1 (1996) arguably compels recognition of a common-law reporter's privilege under Rule 501 of the Federal Rules of Evidence. *See In re Grand Jury Subpoena to Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005), cert. denied, 125 S. Ct. 2977 (2005); *id.* at 1170-72 (Tatel, J., concurring) (applying *Jaffee* to find the existence of a common-law reporters' privilege); *see also New York Times Co. v. Gonzales*, 459 F.3d 160, 181 (2d Cir. 2006) (Sack, J., dissenting) ("I have no doubt that there has been developed in [the last] thirty-four years federal common-law protection for journalists' sources under [Rule 501] as interpreted by Jaffee."). Rule 501 expressly empowers the federal courts to recognize and elucidate privileges "in the light of reason and experience." Fed. R. Evid. 501. In *Jaffee*, the Court applied Rule 501 to recognize a psychotherapist-patient privilege, articulating three closely interrelated factors to decide whether particular privileges should be recognized: (1) whether such a privilege is widely recognized by the states, (2) whether the proposed privilege serves significant public and private interests, and (3) whether recognition of those interests outweighs the burden on truth-seeking that might be imposed by the privilege. Since *Branzburg*, an overwhelming majority of jurisdictions have adopted a reporter's privilege through statute or judicial decision (or both). Nevertheless, courts in the Ninth Circuit so far have chosen not to recognize a common law reporter's privilege. *In re Grand Jury Subpoena, Joshua Wolf*, 201 Fed. Appx. 430, 433 (9th Cir. 2006); *In re Grand Jury Subpoenas to Fainaru-Wada & Williams*, 438 F. Supp. 2d 1111, 1118 (N.D. Cal. 2006).

III. Scope of protection

A. Generally

The Ninth Circuit offers relatively broad protection to journalists under the reporter's privilege, extending the qualified privilege to non-confidential information and investigative book authors. *See Shoen v. Shoen* 5 F.3d 1289 (9th Cir. 1993) (*Shoen I*) (reversing and remanding an order holding an investigative book author in contempt for refusing to disclose under court order information that was told for him for use in his book because the author was protected by the reporter's privilege although information was not confidential). The reporter's privilege yields to other interests in the Ninth Circuit only in the most exceptional cases. *See Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) (*Shoen II*) (reversing district court's order which held investigative book author in contempt for refusing to turn over tapes and notes of conversations with a man accused by his sons of defamation); *In re Stratosphere Corp. Securities Litigation*, 183 F.R.D. 684, 686 (D. Nev. 1999) (denying plaintiffs' motion to compel testimony of the non-party journalist because plaintiffs had not exhausted all other reasonable sources of the information sought, had not deposed all the defendants about the statements in question and had not asked any defendant specifically about the article in question). The protection offered to journalists in the Ninth Circuit is not as broad, however, as the privilege afforded under California and Nevada shield laws, which grant journalists an absolute privilege.

B. Absolute or qualified privilege

The Ninth Circuit recognizes a qualified privilege against compelled disclosure when facts acquired by a reporter in the course of gathering the news become the target of discovery. *See Shoen I*, F.3d at 1292. The same qualified privilege applies for maintaining the confidentiality of sources' identities. *See Farr v. Pritchess*, 522 F.2d 464 (9th Cir. 1975) *cert. denied* 427 U.S. 912 (1976) (affirming district court's denial of reporter's habeas corpus petition, holding that the state court had a duty to enforce nondisclosure orders to protect accused person's due process rights). In grand jury cases, the Ninth Circuit, following *Branzburg*, subordinates the journalists' right to keep secret a source of information to the more compelling requirement that a grand jury be able to secure factual data relating to its investigation of serious criminal conduct. *Id.* at 467-68; *see also United States v. Curtin*, 2007 U.S. App. LEXIS 12110, at *55 (9th Cir. May 24, 2007) (noting that *Branzburg* "refused to create a First Amendment free speech and free press privilege for news reporters to protect their sources from grand jury inquiries"). There, the court applies "a limited balancing of First Amendment interests . . . only 'where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need of law enforcement, or has only a remote and tenuous relationship to the subject of the investigation.'" *In re Grand Jury Subpoena. Joshua Wolf*, 201 Fed. Appx. 430, 432 (9th Cir. 2006) (quoting *See In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397, 401 (9th Cir. 1993)).

In non-grand jury cases, in keeping with Justice Powell's concurrence in *Branzburg*, the Ninth Circuit requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest. *Branzburg*, 408 U.S. at 468. One recent district court opinion, however, has extended *Branzburg*'s approach to criminal, non-jury matters, and thus established a different approach depending on whether the action is criminal or civil. *See United States v. Schneider*, 2003 U.S. Dist. LEXIS 27324, at *7 n.2, 10 (N.D. Cal. Nov. 18, 2003) (noting that to invoke a shield in the criminal setting "the reporter must demonstrate that the criminal investigation is proceeding in bad faith, or that the government has otherwise exhibited 'harassment of newsmen,' whereas "[i]n a civil setting, on the other hand, the press enjoys much more robust protection from compelled testimony") (quoting *Branzburg*, 408 U.S. at 709 (Powell, J., concurring)).

C. Type of case

1. Civil

In the Ninth Circuit, non-grand jury cases, both civil and criminal, arguably are subject to the *Branzburg* balancing test, which requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest. *See Farr*, 522 F.2d at 467-68; *but see Schneider*, 2003 U.S. Dist. LEXIS 27324, at *11 (noting that "courts have interpreted Branzburg to include other criminal proceedings [besides the grand jury subpoenas]"). In the or-

dinary civil case, the court states that the litigant's "interest in disclosure should yield to the journalist's privilege." *See Shoen II*, 48 F.3d at 416. In *Schoen II*, the Ninth Circuit noted that "a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege by a non-party only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." 48 F.3d at 416 (cited in *Condit v. Nat'l Enquirer, Inc.*, 289 F. Supp. 2d 1175, 1177 (E.D. Cal. 2003).

2. Criminal

Subpoenas are more likely to be enforced in criminal cases despite the court's holding that all non-grand jury cases are subject to the *Branzburg* balancing test, which requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the principal interest. *Farr*, 522 F.2d at 468. In *Farr*, the court held that in the criminal case before it, protecting the court's ability to ensure defendant's due process outweighed the First Amendment interest. *Id*. Yet in a different case, the court discussed whether journalists' work product and resources material were covered by the reporter's privilege and noted that Congress had recently enacted the Privacy Protection Act, which protects journalists' work product and, to a lesser extent, non-work product documentary materials, against seizure by the government for use in criminal cases. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 489, 493 (C.D. Cal. 1981).

3. Grand jury

Generally reporters in the Ninth Circuit are not entitled to a First Amendment privilege in refusing to testify before a federal grand jury regarding information received in confidence. *See In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397, 400 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994) (affirming a district court's judgment holding academic author in civil contempt pursuant to 28 U.S.C. § 1826 (1984) for refusing to answer certain questions asked by a federal grand jury on the ground that, under the First Amendment and the common law, he was entitled to a scholar's privilege, similar to the reporter's privilege). The United States Supreme Court, and consequently the Ninth Circuit, do not recognize the privilege in most grand jury proceedings based on the theory that whatever burden might result from requiring reporters to testify would not override the public interest in law enforcement and in ensuring effective grand jury proceedings. *See id.* at 400 (citing *Branzburg v. Hayes*, 408 U.S. 665, 690 (1971)).

Two recent decisions reflect courts' reluctance to quash grand jury subpoenas issued to journalists. In *In re Grand Jury Subpoenas to Fainaru-Wada & Williams*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006), for example, the district court denied a motion to quash filed by two reporters with the *San Francisco Chronicle* who published articles and co-authored a book relating to the prosecutions of people involved with the Bay Area Laboratory Co-Operative ("BALCO") and baseball player Barry Bonds's alleged use of performance enhancing drugs. *See id.* at 1113. The articles and book reported on and quoted testimony given to the grand jury during the BALCO investigation, leading to a grand jury subpoena to determine the reporters' source for the testimony. *See id.* The court rejected a First Amendment-based qualified reporter's privilege on the basis that cases recognizing such a privilege did not involve grand jury proceedings. *Id.* at 1116. According to the court, because there was not "any abuse of the grand jury process," no balancing of interests under the First Amendment was necessary. *Id.* at 1118. The court also refused to recognize a common law reporter's privilege under Federal Rule of Evidence 501, noting that "even if a reporter's privilege exists or should be recognized under the federal common law, the Court concludes that it would be overcome on the facts of this case." *Id.* at 1119.

In *In re Grand Jury Subpoena. Joshua Wolf*, 201 Fed. Appx. 430 (9th Cir. 2006), the Ninth Circuit filed an unpublished memorandum opinion that affirmed an order by the District Court for the Northern District of California finding freelance videographer Joshua Wolf to be in civil contempt. Wolf had refused to abide by a grand jury subpoena ordering him to produce unaired video footage he shot during a 2005 demonstration in San Francisco, California. *See id.* at 431. The unpublished opinion rejected Wolf's appeal and affirmed the District Court's order, stating that the Ninth Circuit's *Scarce* decision interpreting *Branzburg* required a limited balancing of First Amendment interests only in certain circumstances, none of which it felt existed in Wolf's case. *Id.* at 432. The Ninth Circuit agreed with the district court that there was no showing that the grand jury was being conducted in

"bad faith," or that there was no legitimate law enforcement need involved or there was only a remote and tenuous relationship to the investigation. *Id.* at 432 (citing *Scarce*, 5 F.3d at 401). In any event, according to the Court of Appeal in *Wolf*, "[e]ven if we applied a balancing test, we would still affirm." 201 Fed. Appx. at 433 n.2.

The Ninth Circuit panel also noted the argument presented by Wolf and amici that the court should recognize a federal common-law reporter's privilege. Citing *Branzburg* and *Scarce v. United States*, 5 F.3d 397, 401 (9th Cir. 1993) the court stated only that "[t]his argument has been squarely rejected." *Id.* at 433. The court did not address the contention that Branzburg pre-dated Rule 501 and dealt exclusively with analytically distinct First Amendment issues, and that the District Court's interpretation of Scarce conflicted with the Supreme Court's subsequent decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

These decisions nevertheless show that at a minimum journalists are protected from grand jury inquiries where a grand jury investigation is instituted or conducted other than in good faith, where the information sought bears only a remote and tenuous relationship to the subject of the investigation or where there is some other reason to believe that the testimony implicates confidential source relationships without a legitimate need of law enforcement. In *Bursey v. United States*, the Ninth Circuit upheld a reporter's privilege in a grand jury case where there was no substantial connection between the information sought and the conduct being investigated. 466 F.2d 1059 (9th Cir. 1972).

D. Information and/or identity of source

The reporter's privilege will specifically protect the identity of a source in a non-grand jury case if the court concludes that the First Amendment consideration outweighs the plaintiff's need for the evidence. *See Farr* , 522 F.2d at 469; *Newton v. National Broadcasting Company*, 109 F.R.D. 522, 527 (D. Nev. 1985) (denying plaintiff's motion to compel disclosure of defendant journalist's confidential sources based on the Nevada shield law, N.R.S. § 49.275 (2001), but stating that if journalist's only claim had been for a qualified privilege based on the First Amendment, the privilege would have been denied since it was a libel action where plaintiff was a public figure and had to meet the "actual malice" standard); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 489 (C.D. Cal. 1981) (granting reporters' motions to quash finding that both state and federal law protected the reporters' sources and work product because plaintiffs had not shown that they had exhausted other means of obtaining the information, that the information sought went to the heart of any element of the underlying claims or that the unpublished and undocumented information they sought undermined their ability to receive a fair trial). *But see United States v. Schneider*, 2003 U.S. Dist. LEXIS 27324, at *7 n.2, 10 (N.D. Cal. Nov. 18, 2003) (granting motion to quash non-grand jury government subpoena for failure to satisfy criteria of Federal Rule of Criminal Procedure 17(c), but noting that even for non-grand jury criminal cases, under Branzburg "the reporter's privilege is presumed not to apply unless the reporter demonstrates that the criminal investigation is proceeding in bad faith").

E. Confidential and/or non-confidential information

In the Ninth Circuit both confidential and non-confidential information are privileged under certain circumstances. Confidential information in a non-grand jury case is subject to the *Branzburg* balancing test, which requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest. *But see United States v. Schneider*, 2003 U.S. Dist. LEXIS 27324, at *7 n.2, 10 (N.D. Cal. Nov. 18, 2003) (finding that in a non-grand jury criminal case, under Branzburg "the reporter's privilege is presumed not to apply unless the reporter demonstrates that the criminal investigation is proceeding in bad faith"). Although the Ninth Circuit has looked to the factors other circuits consider in determining whether confidential information should be disclosed, the Ninth Circuit has yet to articulate a formal test when the information sought to be disclosed is confidential. In *Shoen II*, for instance, the court recognized that the Second Circuit only requires a reporter to disclose confidential information if the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources. 48 F.3d 412, 416 (9th Cir. 1995) (reversing a district court's order which held investigative book author in contempt for refusing to turn over tapes and notes of conversations with a man accused by his sons of defamation because plaintiff had not exhausted other resources, the material sought

was cumulative and the material sought was not relevant); *see also Condit v. Nat'l Enquirer, Inc.*, 289 F. Supp. 2d 1175, 1178-81 (E.D. Cal. 2003) (noting similarities of *Shoen II* test and test under California state law and finding that National Enquirer could object on privilege grounds to revealing the identities of its sources for article related to the disappearance of an intern who worked for the office of Congressman Gary Condit; "Because the condition of exhaustion has not been met, the protection from disclosure remains intact.").

For non-confidential information, a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege by a non-party only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. *Id.* There must be a showing of actual relevance; a showing of potential relevance will not suffice. *Id.*

F. Published and/or non-published material

There is no published case in the Ninth Circuit applying federal law in which the court differentiates between published and unpublished information. However, in *Los Angeles Memorial Coliseum Comm'n*, a district court applied the California Constitution, Article 1, section 2(b), which provides that journalists are immune from being held in contempt for refusing to disclose either their sources or unpublished information obtained or prepared in the process of news gathering. 89 F.R.D. 489, 495 (C.D. Cal. 1981) (granting reporters' motion to quash subpoenas because the reporters' privilege protected the reporters' sources and work product).

In *In re Grand Jury Subpoena. Joshua Wolf*, 201 Fed. Appx. 430 (9th Cir. 2006), the Ninth Circuit noted in an unpublished memorandum opinion that because Wolf did not "claim that he filmed anything confidential nor that he promised anyone anonymity or confidentiality" the case "[did] not raise the usual concerns in cases involving journalists." *Id.* at 433 n.2.

G. Reporter's personal observations

A district court in the Ninth Circuit held that personal observations of reporters who were eyewitnesses are not protected by the First Amendment reporter's privilege. *See Dillon v. City of San Francisco*, 748 F. Supp 722, 726 (N.D. Cal. 1990) (denying cameraman's motion to quash the subpoena applying federal law because personal observations are not privileged under the First Amendment simply because the witness was a journalist). A subsequent case, however, interpreted *Dillon* more narrowly, citing it for the proposition that "the privilege does not extend to personal observations made by the reporter when those observations are made in public places." *Kaiyala v. City of Seattle*, 1992 U.S. Dist. LEXIS 15461 (W.D. Wash. 1992) (granting plaintiff's motion to quash the subpoena because plaintiff had not yet demonstrated that the burden his discovery would impose on the plaintiff was justified by the probative value of the material sought); *see also In re Grand Jury Subpoena. Joshua Wolf*, 201 Fed. Appx. 430 (9th Cir. 2006) (upholding civil contempt order against web journalist who refused to comply with a grand jury subpoena to give testimony and to produce materials related to a public protest). The *Kaiyala* court raised, but did not answer, the question of whether the personal observation exception also extends to observations made within the context of an interview. *Id.*

H. Media as a party

There is no case in the Ninth Circuit applying federal law in which the court differentiates between cases where the media is a party and where it is not. *See Condit v. Nat'l Enquirer, Inc.*, 289 F. Supp. 2d 1175, 1180 (E.D. Cal. 2003) ("The cases do not find that the [reporter's] privilege goes away merely because a publisher or a journalist is named in the civil action."). In *Rogers v. Home Shopping Network*, however, a district court applied California privilege law, which, in conjunction with four other factors, considers whether the media is a party. 73 F. Supp. 2d 1140, 1143 (C.D. Cal. 1999) (denying plaintiff's motion to compel disclosure of defendant's confidential sources because plaintiff did not prove the requisite showing of falsity, one of five factors considered under California privilege law).

I. Defamation actions

Courts applying federal law within the Ninth Circuit are more likely to compel disclosure in a defamation action when the plaintiff must prove "actual malice." The court relies on the theory that because "actual malice" is a heavy burden of proof, disclosure is necessary. The *Branzburg* balancing test, which requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest, is still used in the analysis. In *DeRoburt v. Gannett Co.*, a district court considered three factors in determining if the balance tipped in favor of administration of justice or in favor of freedom of the press: (1) whether the information sought was a "critical element" of plaintiff's cause of action or whether it went to the heart of plaintiff's case; (2) whether the plaintiff demonstrated specific need for the evidence; and (3) whether the plaintiff has made a showing that his claim is not without merit. 507 F. Supp. at 886 (D. Haw. 1981) In *Shoen II*, the Ninth Circuit held that to overcome a valid assertion of the reporter's privilege by a nonparty, a civil litigant seeking information that is *not confidential* must show that the material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. 48 F.3d at 418 (reversing district court's order holding investigative book author in contempt for refusing to turn over tapes and notes of conversations with a man accused by his sons of defamation because plaintiffs had not exhausted other resources, the material sought was cumulative and the material sought was not relevant). Many federal cases within the Ninth Circuit, however, ultimately must apply state privilege law. In *Newton v. National Broadcasting Company*, for example, a district court held that if federal law had applied, the plaintiff's motion to compel disclosure of the confidential sources would have been granted because plaintiff had a compelling need for the information in light of his heavy burden of proof as a public figure and because plaintiff had exhausted alternative means of learning the identity of the confidential sources. 109 F.R.D. 522, 527-28 (D. Nev. 1985) The court, however, went on to hold that Nevada privilege law applied. *Id.* Under the Nevada shield law, N.R.S. § 49.275 (2001), reporters receive an absolute privilege regardless of whether it is a libel action and denied plaintiff's motion to compel disclosure of the confidential sources. *Id.* Similarly, in *Rogers v. Home Shopping Network, Inc.*, a district court, applying California law, held that the five *Mitchell* factors (factors considered when analyzing California privilege law), did not support disclosure in the defamation action. 73 F. Supp. 2d 1140 (C.D. Cal. 1999).

IV. Who is covered

The Ninth Circuit applies a liberal standard when determining who has standing to invoke the reporter's privilege. Instead of focusing on the professional affiliation of the person invoking the privilege, the Ninth Circuit focuses on whether the privilege-claimer had an intent to disseminate information to the public at the time he or she was gathering the information. Hence, the critical question is whether the person seeking to invoke the privilege had the intent to use material—sought, gathered or received—to disseminate information to the public and whether such intent existed at the inception of the newsgathering process. *See Shoen v. Shoen* , 5 F.3d 1289, 1293 (9th Cir. 1993) (*Shoen I*) (reversing and remanding an order that held an investigative reporter in contempt for refusing to divulge information that was gathered for use in his book). The *Shoen I* court adopted the reasoning of the Second Circuit when fashioning the above test, stating "the journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public." *Id.* The Ninth Circuit panel addressing web journalist Josh Wolf's appeal of a civil contempt order did not explicitly address whether or not Wolf was sufficiently a "journalist" to have standing to invoke the reporter's privilege, though it did suggest that the California state law protection would not apply because "Wolf produced no evidence this videotape was made while he was" connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service. 201 Fed. Appx. at 432 n.1 (citing Cal. Const. art. I, § 2(b)).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The Ninth Circuit does not explicitly define the term "reporter" when deciding whether an individual attempting to invoke the reporter's privilege has standing. The Ninth Circuit determines standing based on the activity of the individual claiming the privilege, rather than on the professional affiliation of that person; therefore there is no need for the court to formulate a definition of such a term. *Shoen I*, 5 F.3d at 1293 (following the Second Circuit's reasoning in *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987)).

b. Editor

The Ninth Circuit does not explicitly define the term "editor" when deciding whether an individual attempting to invoke the reporter's privilege has standing. The Ninth Circuit determines standing based on the activity of the individual claiming the privilege, rather than on the professional affiliation of that person; therefore there is no need for the court to formulate a definition of such a term. *Shoen I*, 5 F.3d at 1293 (following the Second Circuit's reasoning in *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987)).

c. News

Information gathered in the pursuit of news is protected under the reporter's privilege. *Shoen I*, 5 F.3d at 1293. The Ninth Circuit has not formulated a definition of the term "news," but has recognized the importance of "newsworthy" facts on topical and controversial matters of great public interest. *Id.*

d. Photo journalist

The Ninth Circuit does not explicitly define the term "photojournalist" when deciding whether an individual attempting to invoke the reporter's privilege has standing. The Ninth Circuit determines standing based on the activity of the individual claiming the privilege, rather than on the professional affiliation of that person; therefore there is no need for the court to formulate a definition of such a term. *Shoen I*, 5 F.3d at 1293 (following the Second Circuit's reasoning in *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987)).

e. News organization / medium

The *Shoen I* court rejected the proposition that only members of specific news media have standing to assert the reporter's privilege. *Shoen I*, 5 F.3d at 1293. According to the court, "the journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public." *Id.* The court further held that "what makes journalism journalism is not its format but its content." *Id.*

2. Others, including non-traditional news gatherers

The Ninth Circuit has allowed some nontraditional news gatherers to invoke the reporter's privilege. In *Shoen I*, the court allowed an investigative book author to assert the privilege. The court found that the privilege was not limited to reporters employed by the traditional print or broadcast media because the purpose of the privilege was not solely to protect newspaper or television reporters, but to protect the activity of "investigative reporting" more generally. *Shoen I*, 5 F.3d at 1293 (adopting the Second Circuit's reasoning in *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987)). In contrast, the Ninth Circuit refused to allow an academic author to assert a scholar's privilege in *In re Grand Jury Proceedings (Scarce v. United States*). *In re Grand Jury Proceedings (Scarce v. United States*), 5 F.3d 397, 399-400 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994) (affirming a district court's ruling finding Scarce in civil contempt for refusing to answer certain questions propounded to him by the federal grand jury and held that a scholar's privilege does not exist).

B. Whose privilege is it?

The reporter's privilege belongs to the journalist alone and cannot be waived by anybody other than the journalist. *See Los Angeles Memorial Coliseum Comm'n v. NFL*, 89 F.R.D. 489, 494 (C.D. Cal. 1981).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special requirements for serving subpoenas on a member of the news media in the Ninth Circuit. Generally, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. Fed. R. Civ. P. 30(b)(1). In *In re Stratosphere Corp. Securities Litigation*, a district court in determining whether a subpoena had been timely issued looked to the California Practice Guide, Federal Civil Procedure Before Trial P 11:360 (The Rutter Group 1998), which states that "what is 'reasonable' depends on the circumstances of the case, but at least 10 days' notice is customarily expected." 183 F.R.D. 684, 687 (D. Nev. 1999). There is also no fixed time limit for service of subpoenas under Rule 45. The same "reasonable" time limit Federal applicable to the notice of deposition will no doubt be employed. California Practice Guide, Civil Procedure Before Trial P 11:403 (The Rutter Group 1998).

2. Deposit of security

There is no statutory or case law addressing this issue.

3. Filing of affidavit

There is no statutory or case law addressing this issue.

4. Judicial approval

Neither a judge nor a magistrate needs to approve a subpoena before a party can serve it. Subpoenas are issued by the clerk of the court upon the request of a party. Fed. R. Civ. P. 45 (a)(3).

5. Service of police or other administrative subpoenas

There is no statutory or case law addressing this issue.

B. How to Quash

1. Contact other party first

There is no statutory or case law addressing this issue.

2. Filing an objection or a notice of intent

There is no statutory or case law requiring a notice of intent to quash a subpoena for testimony. For documents, a non-party witness can serve the subpoenaing party or attorney written objection to inspection or copying of any or all of the designated materials or of the premises. Fed. R. Civ. P 45(c)(2)(B).

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the same court that issued the subpoena. Fed. R. Civ. P. 45(c)(3)(A).

b. Motion to compel

There is no statutory or case law addressing this issue.

c. Timing

There is no statutory or case law addressing this issue.

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

There is no statutory or case law addressing this issue.

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 is no statutory or case law addressing this issue.

6. Amicus briefs

The Ninth Circuit routinely accepts *amicus* briefs. In *In re Grand Jury Proceedings* (*Scarce v. United States*), the Ninth Circuit accepted an *amicus* brief from the American Civil Liberties Union Foundation of Washington. 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994). In *Shoen II*, briefs were accepted by the Ninth Circuit on behalf of *amici* Arizona Newspapers Association, 1001 N. Central Ave., Suite 670, Phoenix, AZ 85004. (602) 261-7655; Radio-Television News Directors Association, 1600 K Street, NW, Suite 700, Washington, DC 20006-2838, (202) 659-6510; and Association of American Publishers, 71 Fifth Avenue, New York, NY 10003-3004, (212) 255-0200. *Shoen II*, 48 F.3d at 416. Likewise, in *In re Grand Jury Subpoena. Joshua Wolf*, 201 Fed. Appx. 430 (9th Cir. 2006), the Ninth Circuit panel accepted and addressed amici's arguments in favor of applying a constitutional and common law reporter's privilege in that case. *See id.* at 433. The district court in *In re Grand Jury Subpoenas to Fainaru-Wada & Williams*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006), also considered an amicus brief filed on behalf of the journalists in that case. *Id.* at 1112 & n.1.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

When a media member properly invokes the reporter's privilege, the burden shifts to the requesting party to demonstrate a sufficiently compelling need for the journalist's materials in order to overcome the privilege. *See Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) (*Shoen I*) (reversing and remanding an order holding an investigative reporter in contempt for refusing to divulge information that was gathered for use in his book).

B. Elements

A party trying to overcome the reporter's privilege must show that the material is: (1) unavailable despite exhaustion of all reasonable sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case. *See Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir 1995) (*Shoen II*).

1. Relevance of material to case at bar

In order to overcome a valid assertion of the reporter's privilege, the subpoenaing party must show that the requested material is clearly relevant to an important issue in the case. *See Shoen II*, 48 F.3d at 416 (reversing a contempt citation against a media defendant who refused to produce materials pursuant to a discovery request in the underlying defamation lawsuit, plaintiff failed to establish clear relevance to an important issue in the case since the majority of the alleged libels were made before the interviews of the defendant commenced). The court has held that "[t]he party seeking disclosure must show actual relevance; a showing of potential relevance will not suffice." *Id.* Even if the information sought contains evidence relevant to a claim, if the evidence would not, without more, establish the claim, actual relevance does not exist. *See Wright v. Fred Hutchinson Cancer Research Ctr.*, 2002 U.S. Dist. LEXIS 6668 (W.D. Wash.) (denying the defendants' motion to compel because the defendants did not exhaust all reasonable alternative sources).

2. Material unavailable from other sources

The subpoenaing party must show that the material sought is unavailable despite the exhaustion of all reasonable alternative sources. *Shoen II*, 48 F.3d at 416. At a minimum, this requires a showing that the requested information is not available from another source. *Shoen I*, 5 F.3d at 1296.

a. How exhaustive must search be?

The Ninth Circuit has attempted to delineate what constitutes "exhaustion" in a number of cases. A subpoenaing party who fails to take a single deposition before serving a subpoena will not meet the exhaustion requirement. *Shoen I*, 5 F.3d at 1296-98 (holding that plaintiffs who failed to take a deposition before trying to penetrate the reporter's shield did not satisfy the threshold requirement of exhaustion because they "failed to exhaust the most patently available other source"); *Wright*, 2002 U.S. Dist. LEXIS 6668 (denying the defendants' motion to compel because the defendants had not sought to depose the plaintiffs and therefore did not exhaust all reasonable alternative sources); *In re Stratosphere Corp. Securities Litigation*, 183 F.R.D. 684 (D. Nev. 1999) (denying the plaintiffs' motion to compel the deposition testimony of a nonparty journalist because they had not exhausted all other reasonable sources of information sought, had not deposed all of the defendants, and had not asked any defendant specifically about the article in question); *Carushka, Inc. v. Premiere Prods., Inc.*, 17 Med. L. Rep. 2001 (C.D. Cal. 1998) (denying the motion to compel unpublished information and refused leave to depose the editor because defendants had not exhausted all other means of obtaining the information); *see also Condit v. Nat'l Enquirer, Inc.*, 289 F. Supp. 2d 1175, 1180 (E.D. Cal. 2003) ("Plaintiff is not required to depose everyone in the Justice department to locate the source, but plaintiff must make some reasonable attempt to exhaust that alternative source.").

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On the other hand, a district court has held that exhaustion was met when numerous depositions were taken prior to the issuing of a subpoena. *See Newton v. NBC*, 109 F.R.D. 522 (D. Nev. 1985) (denying the plaintiff's motion to compel disclosure of defendant's confidential sources, even though the plaintiff effectively exhausted alternative means of learning the identity of the sources by taking numerous depositions, because Nevada law governed the dispute).

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

Before disclosure is sought, the subpoenaing party must demonstrate that he or she has exhausted all reasonable alternative means for obtaining the information. *See Shoen I*, 5 F.3d at 1296. Compelled disclosure from a journalist must be a "last resort after pursuit of other opportunities has failed." *Shoen I*, 5 F.3d at 1297 (quoting *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974)).

c. Source is an eyewitness to a crime

Courts have held that the reporter's privilege does not excuse reporters from testifying about their eyewitness observations. *See, e.g., Dillon v. City of San Francisco*, 748 F. Supp. 722, 726 (N.D. Cal. 1990) (denying a cameraman's motion to quash after finding his personal observations unprivileged). The Ninth Circuit has not considered whether a source who was an eyewitness to a crime holds information that is by definition "unavailable" from any other source since it is unique eyewitness testimony.

3. Balancing of interests

The qualified reporter's privilege developed by Powell in his *Branzburg* concurrence requires a judicial balancing of the interests at stake. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (Powell, J., concurring). If the circumstances of a case show that the privilege applies, the Ninth Circuit requires the court to determine whether, in light of the competing needs and interests of society and the opposing parties, the privilege has been overcome. *Shoen I*, 5 F.3d at 1292. The test requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest. *See Farr v. Pritchess*, 522 F.2d 464, 468-69 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (affirming a district court's denial of reporter's habeas corpus petition, holding that the state court had a duty to enter into enforceable nondisclosure orders to protect the due process rights of accused persons). The journalist's First

Amendment interests in avoiding compelled disclosure include: "the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve non-broadcast material; the burden on journalists' time and resources in responding to subpoenas;" and the possibility that frequent court-compelled disclosure will encourage the destruction of research material soon after publication. *See Wright*, 2002 U.S. Dist. LEXIS 6668 (quoting *Shoen I*, 5 F.3d at 1292-93).

When deciding whether to enforce a subpoena, courts often consider whether a litigant's constitutional rights are at issue. *See Dillon*, 748 F. Supp. at 727 (denying a cameraman's motion to quash because his personal observations were not privileged, and holding that even if they were privileged, all factors weighed in favor of enforcing the subpoena because "the federal rights sought to be enforced here are substantial ones that rise to a constitutional level."); *Farr*, 522 F.2d at 469 (affirming a district court's denial of the reporter's habeas corpus petition, holding that the state court had a duty to enter into enforceable nondisclosure orders to protect the due process rights of accused persons). Courts also weigh the public's interest in protecting a reporter's First Amendment rights against the public's interest in disclosure. *See Los Angeles Memorial Coliseum Comm'n v. NFL*, 89 F.R.D. 489, 493-94 (C.D. Cal. 1981) (granting the reporters' motion to quash because the journalist's privilege protected the reporters' sources and work product). In *Los Angeles Memorial Coliseum Comm'n*, a district court found that in civil cases, the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony. *Id.* (quoting *Altemose Construction Co. v. Building and Construction Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977)).

4. Subpoena not overbroad or unduly burdensome

Under Federal Rule of Civil Procedure 45(c), on timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3)(A); *Los Angeles Memorial Coliseum Comm'n*, 89 F.R.D. at 496 (granting the reporters' motions to quash because the NFL's subpoenas were "unreasonable and oppressive" within the meaning of Fed. R. Civ. P. 45). Undue burden can be found when a subpoena is facially overbroad. *See Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998). Whether a subpoena imposes an undue burden upon a witness is a case-specific inquiry that turns on such factors as relevance, need of party for documents, breadth of document request, time period covered by request, particularity with which documents are described, and burden imposed. *See American Elec. Power Co. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999); *National Labor Relations Board v. Bakersfield Californian*, 128 F.3d 1339, 1343 (9th Cir. 1997) (holding that the NLRB had authority to issue the subpoena because procedural requirements were followed, the subpoenaed evidence was relevant and material to the investigation, and the defendant did not show that the subpoena was unreasonable because it was overbroad or unduly burdensome). Federal Rule of Criminal Procedure 17(c) also states that the court, on motion made promptly, may quash or modify a subpoena if compliance would be unreasonable or oppressive. Fed. R. Crim. P. 17 (c). Granting a motion to quash on the ground that the subpoena would be burdensome and oppressive is within the clear intent of Rule 17. *United States v. Camp*, 285 F. Supp. 400 (N.D. Ga. 1967); *United States v. Roberts*, 852 F.2d 671 (2d Cir. 1988) (holding that a subpoena can be invalidated for a variety of reasons, as when it is unduly burdensome, when it violates the right against self-incrimination, or when it calls for privileged documents); *United States v. Schneider*, 2003 U.S. Dist. LEXIS 27324, at *21 (N.D. Cal. Nov. 18, 2003) (finding that "the government has failed to show that the materials sought by the Rule 17(c) subpoena is relevant, specific, and non-cumulative," and thus that the subpoena should be quashed because it was "unreasonable and oppressive").

5. Threat to human life

There is very little law in the Ninth Circuit that specifically addresses whether a threat to human life should be weighed in determining whether or not to quash a subpoena. The court in *Star Editorial, Inc. v. United States Dist. Court*, however, did take concerns of retaliation and fear of exposure to harm into account when interpreting California case law. *See Star Editorial, Inc. v. United States Dist. Court*, 7 F.3d 856, 861 (9th Cir. 1993) (denying defendant tabloid's request for a writ of mandamus because California law controlled under Federal Rule of Evidence 501, therefore the court applied the *Mitchell* balancing test); *Mitchell v. Superior Court*, 37 Cal. 3d 268 (1984). The *Star Editorial, Inc.* court stated, "in some cases, concerns of retaliation or fear of exposure may justify refusing disclosure, even if the party has no other avenue to obtain the information." *Id.* at 861. The court lim-

ited this exception to cases where "the information relates to matters of great public importance and the risk of harm to the source is substantial." *Star Editorial, Inc.*, 7 F.3d at 861 (citing *Mitchell*, 37 Cal. 3d at 634).

6. Material is not cumulative

In order to overcome a valid assertion of the reporter's privilege, the subpoenaing party must request material that is non-cumulative. *See Shoen II*, 48 F.3d at 416 (reversing a contempt citation against a defendant who refused to produce materials pursuant to a discovery request in the underlying defamation lawsuit, finding that the requested material was cumulative because there had been considerable litigation over the alleged statements); *Wright*, 2002 U.S. Dist. LEXIS 6668 (denying the defendants' motion to compel because the defendants' discovery requests sought documents that had already been provided by the plaintiffs and were therefore cumulative); *Carushka, Inc. v. Premiere Prods., Inc.*, 17 Med. L. Rep. 2001 (C.D. Cal. 1998) (denying the motion to compel unpublished information and refusing leave to depose the editor because the testimony sought might prove cumulative in light of the plaintiff's deposition and trial testimony); *United States v. Schneider*, 2003 U.S. Dist. LEXIS 27324, at *19 (N.D. Cal. Nov. 18, 2003) (granting motion to quash where information sought from journalists was cumulative, noting that "[t]he government fails to demonstrate that this information is unavailable elsewhere, or that the experience of the reporters was somehow unique to that of hundreds of other non-media conference goers and clients, including the IRS agents").

7. Civil/criminal rules of procedure

Federal Rule of Procedure 45(c) states that a party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. Fed. R. Civ. P. 45(c)(1). Accordingly, the court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee. *Id.*

8. Other elements

The Ninth Circuit does not require that any other elements be met in order to overcome a valid assertion of the reporter's privilege. *See Shoen II*, 48 F.3d at 416 (reversing a contempt citation against a defendant who refused to produce materials pursuant to a discovery request in the underlying defamation lawsuit, the court held that a party trying to overcome the reporter's privilege must show that the material is: (1) unavailable despite exhaustion of all reasonable sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case). Some district courts, however, have applied a slightly different test when deciding whether the privilege can be overcome. This test requires: (1) that the information is of certain relevance; (2) that there is a compelling reason for the disclosure; (3) that other means of obtaining information have been exhausted; and (4) that the information sought goes to the heart of the seeker's case. *See Los Angeles Memorial Coliseum Comm'n*, 89 F.R.D. at 494; *see also In re Christian Life Ctr. v. United States Bankr. Court*, 23 B.R. 770, 771 (9th Cir. 1982) (reversing and remanding the case to the trial court with instructions to vacate the contempt citation against the plaintiff because the defendant had not satisfied the standards set forth in *Los Angeles Memorial Coliseum Comm'n).*

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

In the Ninth Circuit, the reporter's privilege belongs to the journalist alone and cannot be waived by anybody other than the journalist. *See Los Angeles Memorial Coliseum Comm'n*, 89 F.R.D. at 494 (granting the reporters' motion to quash because the journalist's privilege protected the reporters' sources and work product despite the fact that the sources voluntarily disclosed their identities). There is no case or statutory law addressing how reporters can disclose certain information without waiving their rights under the reporter's privilege.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no statutory or case law addressing this issue.

b. Disclosure of non-confidential source's name

There is no statutory or case law addressing this issue.

c. Partial disclosure of information

There is no statutory or case law addressing this issue.

d. Other elements

There is no statutory or case law addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law addressing this issue.

VII. What constitutes compliance?

A. Newspaper articles

There is no statutory or case law addressing whether newspapers or newspaper articles are self authenticating. In *In re Stratosphere Corp. Securities Litigation*, however, a district court noted that an author and publisher of a magazine article had refused to voluntarily authenticate the contents of the article. 183 F.R.D. 684 (D. Nev. 1999) (denying the plaintiffs' motion to compel the testimony of the magazine author and publisher).

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

1. Civil contempt

a. Fines

There is no statutory or case law addressing this issue.

b. Jail

Jail sentences are limited for civil contempt. Under 28 U.S.C. § 1826, a recalcitrant witness can be confined for the life of the court proceeding or the life of the term of the grand jury including extensions, before which such refusal to comply with the court order occurred, but under no circumstances shall the confinement exceed eighteen months.

Ronald Watkins, an investigative book author, went to jail rather than produce material obtained in the course of interviews for a book he was writing pursuant to 28 U.S.C. § 1826 (1984). *Shoen v. Shoen*, 48 F.3d 412, 414 (9th Cir. 1995) (*Shoen II*) (reversing district court's order holding investigative book author in contempt for refusing to turn over tapes and notes of conversations with a man accused by his sons of defamation because plaintiff had not exhausted other resources, the material sought was cumulative and the material sought was not relevant). Likewise, Josh Wolf went to prison rather than testify and produce, among other things, unpublished portions of his videotape of a demonstration in which an alleged federal crime took place. *See In re Grand Jury Subpoena, Joshua Wolf*, 201 Fed. Appx. 430 (9th Cir. 2006).

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

In order for the Ninth Circuit to have jurisdiction to entertain an appeal, a final district court judgment or appealable interlocutory decision must be rendered. *See* Goelz & Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice 1:108 (The Rutter Group 2002) (hereinafter "Rutter"). Generally, a judgment or order is appealable if it represents a district court's final disposition of either a collateral issue or all issues in the proceedings. Rutter 2:10. An interlocutory order deciding a critical legal issue is reviewable if the order has been certified for appeal by the district court and the appellate court has accepted jurisdiction. Rutter 2:156. According to 28 U.S.C. § 1292(b), "when a district judge . . . shall be of the opinion that [an]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 . . . .[t]he Court of Appeals may permit an appeal to be taken from such an order, if application is made to it within ten days after the entry of the order." 28 U.S.C. § 1292(b). Reporters who are defendants in civil actions have had some success in obtaining relief under this statute. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974).

Generally, no immediate appeal lies from the entry of discovery orders or issuance of subpoenas. *See In re Grand Jury Witness*, 695 F.2d 359, 361 (9th Cir. 1982) (stating that orders denying motion to quash subpoena are not appealable by party from whom documents or testimony is sought; party subpoenaed must be held in contempt before issue is ripe for appellate review); Rutter 2:404. Instead, the right of appeal lies from a contempt adjudication. *Id.* Discovery orders and subpoenas are unripe for review because the resisting party has the option of refusing to comply. Rutter 2:404. If the resisting party does refuse to comply and is held in contempt, he or she can challenge the validity of the discovery order or subpoena by seeking appellate review of the contempt order. *Id.*

2. Expedited appeals

Because the cycle for civil appeals in the Ninth Circuit can be as long as two years, parties needing a faster decision should consider making a motion to expedite the proceedings. Rutter 6:148. In order to expedite a proceeding, the requesting party must make a showing of "good cause." Rutter 6:149. "Good cause" includes, but is not limited to, situations where, absent expedited treatment, irreparable harm may occur or the appeal may become moot. *Id.* In addition to demonstrating good cause, a motion to expedite must set forth the status of the transcript preparation and opposing counsel's position with respect to the motion. Rutter 6:149.1. The motion may also include a proposed briefing schedule and a date for argument and submission. *Id.* Because the court's ability to expedite an appeal is limited, parties needing prompt court action should consider filing a motion for a stay or an injunction pending appeal to preserve the status quo in the district court. Rutter 6:149.2. An attorney should also consider filing both a motion for stay or injunction pending appeal, and, in the alternative, a motion to expedite the proceedings. *Id.*

B. Procedure

1. To whom is the appeal made?

A circuit court of appeals has appellate jurisdiction over appeals from district courts within its geographical area. Rutter 2:29. The Ninth Circuit is the federal court of review for California, Alaska, Washington, Oregon, Hawaii, Idaho, Montana, Nevada, and Arizona. Rutter 1:17. The court of appeals' decision is subject to further challenge by a petition for rehearing or rehearing en banc, or by petition for writ of certiorari to the U.S. Supreme Court. Rutter 1:10.

Once a contempt citation is levied by a district court, a final judgment has been made and the reporter can appeal directly to the Ninth Circuit Court of Appeals. Rutter 2:404; *See In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994); *In re Lewis*, 517 F. 2d 236 (9th Cir. 1975) (*Lewis II*); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). When the appeal process is completed, the lower court's jurisdiction is restored. Rutter 1:11. The case returns to the district court and the court of appeals' decision governs any subsequent proceedings. *Id.*

2. Stays pending appeal

A party may seek a stay pending appeal in order to preserve the status quo or obtain injunctive relief. Rutter 6:260. A stay pending appeal effectively nullifies the district court's order until the appeal's disposition. Rutter 6:261. The Ninth Circuit applies equitable criteria when ruling on motions for stays. Rutter 6:267. The court employs a balancing test, considering: (1) the moving party's probability of success on appeal; (2) the relative hardships to the parties (whether the moving party would suffer irreparable injury absent a stay vs. whether opposing parties would suffer substantial injury were a stay to be granted); and (3) the public interest. Rutter 6:268. The procedural requirements for seeking a stay pending appeal are more arduous than those required for an expedited appeal, which only focus on irreparable harm.

A party seeking a stay pending appeal must ordinarily file the motion in the district court. Rutter 6:301. A party who elects to file directly to the Ninth Circuit will have to explain why application to the district court was not practicable. *Id.* A party should always file in the district court first, even if he or she is certain that the district court will deny the motion. Rutter 6:303. A party seeking a stay pending appeal in the appellate court will have to meet the above requirements and, additionally, will have to show that an application for such relief was made and the district court either denied the application or failed to grant the requested relief, or that an application to the district court was not practicable. *Id.*

3. Nature of appeal

Parties may be able to obtain review of nonappealable orders and judgments by filing a writ of mandamus. Rutter 1:78. A writ of mandamus is an extraordinary remedy that is used sparingly because it entails interference with the district court's control of the litigation before it. *See Star Editorial, Inc. v. United States Dist. Court*, 7 F.3d 856, 859 (9th Cir. 1993). The guidelines courts apply when considering a writ of mandamus include whether: (1) the party seeking the writ has no other adequate means, such as direct appeal, to attain relief; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or issues of law of first impression. *Id.*

Review of a district court decision, however, is most commonly obtained by direct appeal from a final judgment or appealable order. Rutter 1:76. Under certain circumstances, parties may be permitted to obtain review of an otherwise nonappealable order if they are able to secure the permission of both the district and appellate courts. *Id.*

4. Standard of review

The Ninth Circuit applies *de novo* review when considering a district court's conclusions regarding the interpretation and application of federal law. Rutter 7:253. Since reporter's privilege cases center around the First Amendment, appellate courts review these cases *de novo*. *Id.* When conducting a *de novo* review, the Ninth Circuit does not defer to the lower court's ruling, but rather, independently considers the matter anew as if no decision had been rendered on the matter below. Rutter 7:225.

5. Addressing mootness questions

In cases that present federal constitutional questions affecting fundamental personal liberties, adjudication of those issues should not be thwarted by resort to narrow interpretations of the doctrines of mootness and justiciability. *Bursey v. United States*, 466 F.2d 1059, 1088-89 (9th Cir. 1972) (reversing a district court's contempt order against members of the Black Panther Party who refused to answer questions during a grand jury proceeding, holding that the reporter's privilege issues were not moot even though the term of the grand jury had expired dur-

ing the pendency of the appeal). It is not in the interests of the public, the Government, or the witnesses to postpone the decision of important constitutional issues. *Id.*

In addition to the above considerations, the *Bursey* court found that a reporter's privilege appeal was not moot, despite the fact that the grand jury session had concluded, because "the history of this case . . . strongly suggests that the Government will renew its efforts before another grand jury to obtain the information it sought to compel in the case before us." *Id.*

6. Relief

The Ninth Circuit has the power to vacate a contempt citation. *See Shoen v. Shoen*, 48 F.3d 412, 418 (9th Cir 1995) (*Shoen II*) (vacating a contempt citation against a defendant who refused to produce materials pursuant to a discovery request in the underlying defamation lawsuit); *Shoen v. Shoen* , 5 F.3d 1289, 1298 (9th Cir. 1993) (*Shoen I*) (reversing and remanding an order that held an investigative reporter in contempt for refusing to divulge information that was gathered for use in his book). When the Ninth Circuit finds that a contempt citation was improperly levied by the district court, it typically reverses the order granting the contempt citation and remands the case back to the district court for consideration of the remaining issues. *Id.*

IX. Other issues

A. Newsroom searches

There has been little discussion by the Ninth Circuit regarding the Privacy Protection Act, 42 U.S.C. 2000aa. In *Los Angeles Memorial Coliseum Comm'n v. National Football League*, however, the court discussed whether journalists' work product and resources material were covered by the reporter's privilege and noted that Congress had recently enacted the Privacy Protection Act. 89 F.R.D. 489, 493 (C.D. Cal. 1981).

B. Separation orders

There is no statutory or case law addressing this issue.

C. Third-party subpoenas

There is no statutory or case law addressing this issue.

D. The source's rights and interests

There is no statutory or case law addressing this issue.