REPORTER'S PRIVILEGE: 10TH 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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This project was initially made possible by a generous grant from the Phillip L. Graham Fund.

Published by The Reporters Committee for Freedom of the Press.

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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

10TH CIR.

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I. Introduction: History & Background

The Tenth Circuit, and the federal district courts within the circuit, have recognized a qualified reporter's privilege under the First Amendment, that extends even to published information. Although the Tenth Circuit has twice articulated a four-part test to define the contours of the reporter's privilege, it has yet to apply those factors itself to a particular set of facts.

II. Authority for and source of the right

The Tenth Circuit first formally recognized and adopted the reporter's privilege under the First Amendment following the Supreme Court's ruling in *Branzburg v. Hayes*, 408 U.S. 665 (1972). As a result of the *Branzburg* decision, the Tenth Circuit affords newsgatherers a qualified privilege under the First Amendment against revealing news sources and confidential information. *See Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977). Lower court cases within the Tenth Circuit have extended the privilege to other unpublished information, including non-confidential material, *see infra* Section III. E., and to published information. *See infra* Section III. F.

III. Scope of protection

A. Generally

The Tenth Circuit has adopted a four-part balancing test to determine when the First Amendment reporter's privilege is extant or defeated (overcome). To overcome a reporter's assertion of the privilege, a party must make a showing of strong need for the information (a showing that the information sought goes to "the heart of the matter" being litigated) and the unavailability of the information from alternative sources. *See Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977) (stating that the existence of the privilege "is no longer in doubt"). Application of the privilege varies among the district courts in the Circuit, with very few reported decisions from which to draw broader conclusions or trends.

B. Absolute or qualified privilege

The Tenth Circuit has not discussed any instances where the reporter's privilege may be absolute. *See Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977). The Circuit has only recognized a qualified reporter's privilege. *Id.*

C. Type of case

1. Civil

In civil actions, the party seeking to compel disclosure must show a particularly strong need for the privileged information (both relevancy and that the material "goes to the heart of the matter") and an inability to obtain the information from another source (a requirement on the party seeking the information to first exhaust those alternative sources). *See Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977). The court then must balance those consequences of granting disclosure against the qualified First Amendment privilege. *See id.*

In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), a documentary film maker investigating the death of Karen Silkwood was subpoenaed to give a deposition in a civil rights suit brought by Silkwood's estate against Silkwood's former employer. During pretrial proceedings the district court denied the non-party, film maker's motion for a protective order. At the deposition, the film maker refused to disclose information he felt was confidential. The *Silkwood* Court found that the documentary film maker could claim the reporter's privilege and seek protective relief, even though he was not a salaried newspaper reporter. The court remanded the case to the district court to determine whether the privilege shielded disclosure, by applying a four factor balancing test: 1) whether the party seeking information has independently attempted to obtain the information elsewhere and has

been unsuccessful; 2) whether the information goes to the heart of the matter; 3) whether the information is relevant; 4) the type of controversy. *Id.* at 438; *see also Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (discussing the four-factor balancing test in the context of a First Amendment right of assembly privilege to not disclose information).

The United States District Court for the District of Colorado applied *Silkwood*'s four-factor test in *Re/Max Int'l Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910 (D. Colo. 1994). Century 21 brought a variety of claims, including unfair competition, based upon Re/Max's nationwide advertising campaign. A local newspaper published an article discussing Re/Max's challenge to Century 21 to determine who was the best real estate company. Century 21 subpoenaed the reporter merely to authenticate statements appearing in the article. The Court quashed the subpoena because Century 21 failed to show the information sought was substantially relevant to a central issue in the case, and that the information could not be obtained from other reasonable sources. The evidence sought from the reporter — to confirm that published statements had been uttered by a previous witness in the case, to impeach his deposition testimony — was deemed not centrally relevant and was also cumulative of other evidence in the record.

The Tenth Circuit affirmed the United States District Court for the District of Colorado's ruling granting the reporters' motion to quash subpoena in *Donohue v. Hoey*, 109 Fed. Appx. 340 (10th Cir. 2004). Applying *Silkwood*, the "the district court made the express 'finding and conclusion that the plaintiffs have failed to make the showing necessary to overcome the privilege relied on by the motions.'" *Id.* at 354 (citing Mar. 19, 2002, Order). The Tenth Circuit affirmed the district court's order, finding that the plaintiffs failed to "explain how the district court's application of *Silkwood* was an abuse of discretion". *Id.*

2. Criminal

The United States District Court for the District of Kansas has applied the reporter's privilege to a criminal case. In *United States v. Foote*, 30 Media L. Rep. 2469, 2002 WL 1822407 (D. Kan. Aug. 8, 2002), the defendant was accused of trafficking and attempted trafficking in counterfeit trademark merchandise. The government issued a subpoena to a reporter who had written two articles about the seizing of the alleged counterfeit merchandise, and sales of counterfeit merchandise, in which he quoted or attributed numerous statements to the defendant. *Id.* at *1. The court stated that "[a]lthough *Silkwood* was decided in the context of civil litigation, the Court sees no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence." *Id.* at *2. Applying the *Silkwood* balancing test, the *Foote* Court denied the reporter's motion to quash subpoena. The court found that the reporter "appears to be the only person who can confirm that the statements published were made by Defendant and thus the only source of the information sought[,]" and that the "alleged admissions" made by the Defendant in the published article "are critical to the government's prosecution as they aid in establishing Defendant's knowledge and intent, which are elements that must be proven". *Id.* at *2-3.

3. Grand jury

In an unpublished decision, the United States District Court for the District of Colorado quashed a grand jury subpoena that had been issued on an UPI reporter as part of a federal investigation to determine whether a particular Secret Service agent had "leaked" a photograph obtained from the home of John Hinckley's parents to the press. *In re Grand Jury Subpoenas*, 8 Media L. Rptr. (BNA) 1418, 1419 (D. Colo. 1982). Although the District Court did not mention the *Silkwood* ruling, it found that the information sought did not go "to the heart of any pending criminal investigation," and therefore did not overcome the reporter's First Amendment privilege.

D. Information and/or identity of source

In *In re Grand Jury Subpoenas*, 8 Media L. Rptr. (BNA) 1418, 1419 (D. Colo. 1982), the United States District Court for the District of Colorado quashed a grand jury subpoena that had been issued on an UPI reporter as part of a federal investigation to determine whether a particular Secret Service agent had "leaked" a photograph obtained from the home of John Hinckley's parents to the press. *See supra* Section III. C. The subpoena in that case sought to have the reporter divulge the identity of the source of information published.

In *Bottomly v. Leucadia National Corp*., 24 Media L. Rptr. (BNA) 2118 (D. Utah 1996), the United States District Court for the District of Utah quashed a subpoena on an Associated Press reporter that sought to have her disclose whether she had obtained certain published information from two attorneys in violation of a court protective order.

E. Confidential and/or non-confidential information

In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), a documentary film maker investigating the death of Karen Silkwood was subpoenaed to give a deposition in a suit by Silkwood's estate against Silkwood's employer for civil rights violations. The district court denied the non-party, film maker's motion for protective order during pretrial proceedings. At the deposition the film maker refused to answer any questions involving the disclosure of information he felt was confidential. The Tenth Circuit's opinion reversing and remanding recognizes that confidential information is subject to a First Amendment qualified privilege.

District Courts within the Tenth Circuit have agreed that the First Amendment privilege applies as well to non-confidential information. They have disagreed over whether the burden on a party seeking to compel testimony about or production of non-confidential information is any lower than that for a party seeking to obtain confidential information.

In *United States v. Foote*, No. 00-CR-20091-01-KHV, 2002 WL 1822407 (D. Kan. Aug. 8, 2002), the United States District Court for the District of Kansas denied the non-party reporter's motion to quash subpoena. The court extended the reporter's privilege to non-confidential information. Applying the *Silkwood* balancing factors, the court found that the government "has made a sufficient showing regarding the relevancy, need and nature of the proposed testimony to defeat [the reporter's] Motion to Quash." The court noted that it was unable to apply the *Silkwood* balancing test to specific testimony from the reporter that may be privileged in nature, "[w]ithout knowing the specific information that will be sought." *Id.* at *3.

In *Re/Max Int'l v. Century 21 Real Estate Corp.*, 846 F. Supp. 910, 911 (D. Colo. 1994) (Babcock, J.), the United States District Court for the District of Colorado held that the First Amendment reporter's privilege extends to non-confidential information (quoting *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302-03 (M.D. Fla. 1975)). Where the non-confidential information was found not to be centrally relevant to the party's claim (because it was intended to be used only for impeachment purposes), the privilege was not overcome.

In *Weathers v. American Family Mut. Ins. Co.*, 17 Med. L. Rptr. 1534 (D. Kan. 1989) and 17 Media L. Rptr. (BNA) 1846 (D. Kan. 1990), the court denied non-party reporters' motion to quash subpoena and motion for protective order. The reporters wrote an article about charges of arson brought against Weathers, the plaintiff. Later, American Family sought the reporter's 274 photographs of the plaintiff to defend against a libel claim. In the 1989 opinion, the court decided the references to the information sought were too vague to perform the *Silkwood* four-factor balancing test. The reporters were ordered to appear at the deposition, and during their appearance the reporters' invoked their privilege. Next, the insurance company sought to compel disclosure of the photos. In the 1990 decision, the court applied *Silkwood*'s four-factor balancing test and found that the photographs were relevant to defend against the plaintiff's claim for physical and emotional injuries, somewhat necessary for a defense, and unavailable from any other sources. Finally, since the photographs were not confidential the court granted the motion to compel.

In another case, the District Court for Kansas again suggested that the reporter's privilege is easier to overcome when the subpoenaing party seeks only non-confidential information. *See Farrington v. Crupper Transp. Co.*, 17 Media L. Rptr. (BNA) 1781 (D. Kan. 1990). The defendants served a subpoena duces tecum on a non-party (*The Topeka Capital-Journal*) for production of all photographs and negatives regarding an accident reported on by the Journal. The motion to quash and motion for protective order were denied, because the defendants showed the non-confidential photographs and negatives were relevant and otherwise unavailable, and these factors outweighed the First Amendment interest of the media to refuse to release the information.

F. Published and/or non-published material

In *Re/Max Int'l v. Century 21 Real Estate Corp.*, 846 F. Supp. 910, 911 (D. Colo. 1994) (Babcock, J.), the United States District Court for the District of Colorado held that the First Amendment reporter's privilege extends to

non-confidential information (quoting *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302-03 (M.D. Fla. 1975)). Where the non-confidential information was held not to be centrally relevant to the party's claim (because it was intended to be used only for impeachment purposes), the privilege was not overcome.

Similarly, in *Artes-Roy v. City of Aspen*, 20 Media L. Rptr. (BNA) 1647 (D. Colo. 1992), a United States Magistrate quashed a subpoena duces tecum seeking production of all files and documents concerning a published article concerning the civil litigation in which the subpoena was issued; although the court did not state whether it was deciding the matter under the First Amendment or Colorado's press shield law, it ruled that the plaintiff had not exhausted alternate sources by deposing all of the parties who were identified in the published article.

G. Reporter's personal observations

There is no case law addressing this issue.

H. Media as a party

There is no case law addressing this issue. Although not a media case, in *Grandbouche v. Clancy*, 825 F.2d 1463, 1467 (10th Cir. 1987), the Tenth Circuit held that a plaintiff may invoke the First Amendment privilege in resisting discovery directed against the plaintiff's claims; "the fact that [plaintiff] has placed certain information into issue by his complaint is a factor that the trial court should consider under the *Silkwood* balancing test." (Note: In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977), the Tenth Circuit cited with approval *Cervantes v. Time, Inc.*, 464 F.2d 486 (8th Cir. 1972), which was a defamation case where the media defendant successfully asserted the reporter's privilege.)

I. Defamation actions

In defamation actions, a federal court is required to apply the substantive law of the forum state, including statutory privileges. *See* Fed. R. Evid. 501. Accordingly, in libel cases, media defendants can invoke any applicable state shield law. *See, e.g., Tilton v. Capital Cities/ABC, Inc.*, 95 F.3d 32, 33 (10th Cir. 1996) (affirming trial court's order denying plaintiff's motion to compel media defendants to disclose identity of confidential source) (applying Oklahoma's press shield statute); *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1173-74 (D. Colo. 1999) (granting motion to quash) (applying Colorado's press shield statute).

In defamation action where the forum state does not have a statutory shield law, media defendants must invoke the First Amendment as a basis for a claim of privilege, since the United States Constitution operates as a limitation upon the governmental actions of all courts of law, state or federal. (Note: In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977), the Tenth Circuit cited with approval *Cervantes v. Time, Inc.*, 464 F.2d 486 (8th Cir. 1972), which was a defamation case where the media defendant successfully asserted the reporter's privilege.)

In an unreported decision, the United States District Court for the District of Kansas applied the First Amendment reporter's privilege in the context of a defamation action. In *Hart v. Playboy Enter., Inc.*, 6 Media L. Rptr. (BNA) 2571 (D. Kan. 1981) *modifying* 6 Media L. Rptr. (BJNA) 2567 (D. Kan. 1980), Dennis Hart, a former drug enforcement agent, sued Playboy magazine and Frank Browning, a reporter for the magazine, for libel. After Browning conceded that certain published statements complained of by Hart were, in fact, false, the court found the identity of Browning's confidential source was central to plaintiff's libel claim (to prove actual malice) and unavailable from any other source. Accordingly, the Court granted plaintiff's motion to compel and ordered Browning to disclose his confidential source. However, the court limited the disclosure to certain individuals, and if any subpoenas were issued for the confidential source the depositions would be sealed when filed. [The plaintiff's original motion to compel had been denied until alternative sources of the information were exhausted. *See Hart v. Playboy Enter., Inc.*, 4 Media L. Rptr. (BNA) 1616 (D. Kan. 1981).]

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The term "newsperson," as defined in the Colorado shield law, was applied by the United States District Court for the District of Colorado in *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1173 (D. Colo. 1999). The Colorado statute defines newsperson as "any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit new information for dissemination to the public through mass media." Colo. Rev. Stat. § 13-90-119(3)(a). Mass media is defined in the statute as "any publisher of a newspaper or periodical . . ." Colo. Rev. Stat. § 13-90-119(1)(c). The court held that the Anti-Defamation League was a newsperson under the statute because it published numerous periodicals, books, and pamphlets and regularly engage in news gathering activities.

b. Editor

There is no case law addressing this issue.

c. News

In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977), the court held that the First Amendment reporter's privilege extended to a film maker producing a documentary. The court reasoned that the film maker's purpose was to be an investigative reporter for the documentary. To support this view, the Tenth Circuit noted that the U.S. Supreme Court has not limited the privilege to newspaper reporters. Moreover, the press includes all kinds of publications which communicate to the public information and opinion.

d. Photo journalist

There is no published case law addressing this issue. In *Weathers v. American Family Mut. Ins. Co.*, 17 Media L. Rptr. (BNA) 1846 (D. Kan. 1990), the First Amendment privilege (although overcome) was applied to a newspaper photographer.

e. News organization / medium

In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977), the court held that the First Amendment reporter's privilege extended to a film maker producing a documentary.

2. Others, including non-traditional news gatherers

In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977), the court held that the First Amendment reporter's privilege extended to a film maker producing a documentary.

The United States District Court for the District of Colorado held the Anti-Defamation League was a "newsperson," because it published numerous periodicals, books, and pamphlets and regularly engage in news gathering activities. *See Quigley v. Rosenthal*, 43 F.Supp.2d 1163, 1173 (D. Colo. 1999). The court applied Colorado's shield law, which defines "newsperson" and "mass media," in reaching its decision. *See* Colo. Rev. Stat. § 13-90-119(3)(a) and (1)(c).

Although it concluded that no "journalistic" privilege applied, the United States District Court for the District of Kansas applied the *Silkwood* balancing test to determine whether identification of confidential sources used by two non-journalists was protected by the First Amendment. *See How v. City of Baxter Springs, Kansas*, No. 04-2256-JWL, 2005 U.S. Dist. LEXIS 8466, *18-19 (D. Kan. May 5, 2005). The plaintiffs, one of whom was self-employed, and the other a retired patent attorney, and neither of whom was a journalist by profession, filed a malicious prosecution lawsuit against defendants, the City of Baxter Springs, the City Clerk, and the City Attorney, based on criminal defamation actions filed by the defendants against the plaintiffs based on "letters to the editor" and "guest editorials" written by the plaintiffs and published in the *Baxter Springs News*. Defendants filed motions to compel the plaintiffs to disclose during their depositions certain confidential sources, and in response, plaintiffs filed motions for a protective order. The court observed that the claim of privilege was "unsupportable, factually or legally," because the plaintiffs were not journalists, but "[n]evertheless, out of an abundance of caution, applied the *Silkwood* test." Id. at *19. The court granted defendants' motions to compel and denied plaintiffs' motions, finding that the *Silkwood* factors weighed in favor of defendants because plaintiffs are the only source of the statements claimed to be false, and "the truth or veracity of plaintiffs' statements are relevant." *Id.*

B. Whose privilege is it?

There is no case law addressing this issue.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Follow Federal Rules of Civil Procedure Rule 45(c)(2)(B). The party has 14 days to respond after service of the subpoena, or the party must respond before the time specified for compliance in the subpoena if it is less than 14 days.

2. Deposit of security

None is required.

3. Filing of affidavit

None is required.

4. Judicial approval

None is required. *See* Fed. R. Civ. P. 45(a)(3).

5. Service of police or other administrative subpoenas

There is no case law addressing this issue.

B. How to Quash

See Fed. R. Civ. P. 45(c)(3):

> (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
>
> (i) fails to allow reasonable time for compliance;
>
> . . .
>
> (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
>
> (iv) subjects a person to undue burden.

See also Fed. R. Crim P. 17(c).

1. Contact other party first

It is always advisable to first notify the party serving a subpoena of your intent to quash it. In many cases, the attorney serving the subpoena is ignorant of the reporter's privilege and will decide not to pursue the matter once an objection is raised. Such contact also permits you to certify good faith consultation prior to filing a motion to quash (which several courts' local rules require), and to inform the court what information the party is seeking and for what purpose.

2. Filing an objection or a notice of intent

If the subpoena duces tecum seeks only the production of records (*e.g.*, outtakes, reporter's notes, unpublished negatives), you may serve a set of written objections, *see* Fed. R. Civ. P. 45(c)(2)(B), and thereby force the subpoenaing party to file a motion to compel. Written objections may also be served in response to a subpoena demanding both production of records and appearance for testimony. This mechanism postpones bringing the matter to the Court's attention and places the onus on the party serving the subpoena to go forward.

3. File a motion to quash

a. Which court?

File in the court from which the subpoena was issued. *See* Fed. R. Civ. P. 45(c)(3): Fed. R. Crim. P. 17(c). If the reporter or news organization is a party to the lawsuit, it will generally not be responding to a subpoena, but will contest discovery requests through motions for protective orders pursuant to Fed. R. Civ. P. 26.

b. Motion to compel

If written objections are tendered pursuant to Fed. R. Civ. P. 45(c)(2)(B) the party seeking the information may file a motion to compel compliance with the subpoena. *See* Federal Rules of Civil Procedure Rule 37(a).

c. Timing

The motion must be "timely" filed, Fed. R. Civ. P. 45(c)(3)(A), or "made promptly," Fed R. Crim. P. 17(c). The motion to quash should be filed in advance of the return date on the subpoena, to permit the Court an opportunity to adjudicate the motion before the subpoena is to be enforced.

d. Language

Typical language in a motion to quash a subpoena (in a civil case) asks the court, pursuant to Fed. R. Civ. P. 45(c)(3)(A), to quash the subpoena that has been served by the [plaintiff/defendant] upon the third-party witness <U>__*[name]*__</U>, on grounds that the subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies. The motion to quash should also set forth applicable Tenth Circuit case law and should seek a protective order under Fed. R. Civ. P. 26, so that the reporter may be relieved from having to appear at the deposition, hearing, or trial, until the motion to quash is decided.

e. Additional material

It is helpful to append to the motion all articles and/or photographs that were published about the topic of the testimony sought, in order to convince the court that the material sought is not needed, does not go to the heart of the matter being litigated and can be obtained from other readily identifiable alternative sources.

4. In camera review

There is no case law addressing this issue.

5. Briefing schedule

The schedule is set by the court.

6. Amicus briefs

Amicus briefs are permitted on appeal.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The standard for the motion to quash requires the court to balance several factors including: (1) the relevance of the evidence; (2) the necessity of the information sought; (3) whether the information is available from other sources; and, (4) the nature of the proceeding. *See Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977); *see also Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987).

B. Elements

1. Relevance of material to case at bar

The party seeking the information must show a substantial need of information that goes "to the heart of the matter" being litigated. *See Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977).

2. Material unavailable from other sources

The party seeking the information must show an inability, without undue hardship, to obtain the information by other means (from alternative sources). *See Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 438 (10th Cir. 1977).

a. How exhaustive must search be?

The search should be exhaustive, compelling disclosure from the newsgatherer should be the end, not the beginning of the inquiry. *See Hart v. Playboy Enter., Inc.*, 6 Media L. Rptr. (BNA) 2571 (D. Kan. 1981).

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

There is no case law addressing this issue.

c. Source is an eyewitness to a crime

There is no case law addressing this issue.

3. Balancing of interests

The court must weigh the consequences of disclosure from denying or sustaining the subpoena with the claimed qualified First Amendment privilege. *See Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

4. Subpoena not overbroad or unduly burdensome

The Tenth Circuit has stated that overbroad subpoenas — which amount to a "fishing expedition" — will not be found to be sufficiently focused to overcome the reporter's privilege. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977). The Court has also stated that overbroad subpoenas issued under Rule 17 of the Federal Rules of Criminal Procedure will not be enforced. *See United States v. Gonzalez-Acosta*, 989 F.2d 384, 389 (10th Cir. 1993) (pre-trial subpoenas cannot amount to a "fishing expedition" and those seeking materials for production at trial must seek documents that are "relevant, admissible and specific"). Furthermore, a criminal defendants' subpoena will be denied if it seeks information that is cumulative of other available evidence. *See United States v. Hernandez-Urista*, 9 F.3d 82, 84 (10th Cir. 1993) (affirming trail court's denial of defendants' subpoena request under Fed. R. Crim P.17(b) where evidence sought had already been provided by other witnesses). When confronting a subpoena issued by a government prosecutor on a member of the news media, it is also helpful to insist that the United States Attorney comply with 28 C.F.R. 50.10 (2001).

5. Threat to human life

There is no case law addressing this issue.

6. Material is not cumulative

The United States District Court for the District of Colorado applied *Silkwood*'s four-factor test in *Re/Max Int'l Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910 (D. Colo. 1994). Century 21 brought a variety of claims, including unfair competition, based upon Re/Max's nationwide advertising campaign. A local newspaper published an article discussing Re/Max's challenge to Century 21 to determine who was the best real estate company. Century 21 subpoenaed the reporter merely to authenticate statements appearing in the article. The Court quashed the subpoena because Century 21 failed to show the information sought was substantially relevant to a central issue in the case, and that the information could not be obtained from other reasonable sources. The evidence sought from the reporter — to confirm that published statements had been uttered by a previous witness in the case, to impeach his deposition testimony — was also deemed cumulative of other evidence in the record.

7. Civil/criminal rules of procedure

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

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Yes, a reporter should never volunteer any information to anyone, beyond what appears in the published article, after a story has been published. Any voluntary disclosure of information beyond what was published may be deemed a waiver of the privilege under the First Amendment. *Cf. United States v. Bahe*, 128 F.3d 1440, 1442 (10th Cir. 1997) (discussing in general waiver of testimonial privileges through voluntary disclosure).

2. Elements of waiver

There is no case law discussing the elements of waiver.

3. Agreement to partially testify act as waiver?

There is no case law discussing the contours of waiver of the reporters privilege.

VII. What constitutes compliance?

Ordinarily a person must first appear for his deposition and then raise any objection to the particular testimony or documentation sought. *See Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977). An alternative approach is to request of demand that a deposition be conducted through written interrogatories. *See* Fed. R. Civ. P. 31. This procedure, which was ordered to be employed by the United States District Court for the District of Colorado in *Donohue v. Hoey*, Civil Action No. 97-M-2595, allows the reporter's counsel to assert the privilege on a question-by-question basis and permits the Court to determine whether the privilege applies and/or is overcome prior to ordering any response be given.

A. Newspaper articles

Newspaper articles are self-authenticating. *See* Fed. R. Evid. 902(6). Thus, if a party seeks to introduce articles for purposes of demonstrating that there has been significant publicity about a case (*e.g.*, in support of motion to change venue), there is no need to have any witness authenticate that such newspaper article actually appeared in the paper.

B. Broadcast materials

There is no case law addressing this issue.

C. Testimony vs. affidavits

There is no case law addressing this issue.

D. Non-compliance remedies

There is no case law addressing these specific issues in the context of a reporter's assertion of privilege. However, the federal rules of criminal and civil procedure expressly provide for contempt sanctions to be entered against any person who refuses to comply with a court order, including a subpoena. *See* Fed. R. Civ. P. 45(e); Fed. R. Crim. P. 17(g).

VIII. Appealing

There is no case law discussing any of these points in the context of an assertion of reporter's privilege; *see generally* Fed. R. App. P. 8. Generally, a non-party witness may not appeal an order denying a motion to quash or compelling production of records; an entry of an order holding the witness in contempt of court is deemed a "final" (appealable) order. Of course, counsel should seek to obtain a stay of any contempt sanctions pending the appeal (which is not a foregone conclusion).

A. Timing

1. Interlocutory appeals

When the media is a party in the district court action, 28 U.S.C. § 1292(b) grants discretion in the Court of Appeals to hear an interlocutory appeal based upon a finding that the decision below involves a controlling point of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may advance the termination of the litigation. (There is case law in other Circuits granting such interlocutory appeals in reporter's privilege cases).

2. Expedited appeals

Appeals can be expedited under 28 U.S.C. 1657 for "good cause."

B. Procedure

1. To whom is the appeal made?

To the United States Court of Appeals for the Tenth Circuit.

2. Stays pending appeal

Rule 8 of the Federal Rules of Appellate Procedure allows a party to move for a stay pending appeal and outlines the procedures that must be followed in requesting a stay.

3. Nature of appeal

Before a holding of contempt, an interlocutory appeal under 28 U.S.C. 1657 may be available but is discretionary. After a contempt holding, the appeal is by right.

4. Standard of review

The Tenth Circuit reviews questions involving the interpretation and application of constitutional (First Amendment) provisions by applying the doctrine of "independent appellate review." *See, e.g.*, *Melton v. City of Oklahoma City*, 928 F.2d 920, 927-28 (10th Cir. 1991)

5. Addressing mootness questions

There is no case law addressing this issue.

6. Relief

An appeals court may affirm, dissolve or remand a finding of contempt and may affirm, deny or remand an order compelling disclosure.

IX. Other issues

A. Newsroom searches

The Tenth Circuit has held that the Privacy Protection Act, 42 U.S.C. § 2000aa, does not provide a cause of action against municipal employees in their individual capacities. *Davis v. Gracey*, 111 F.3d 1472, 1482 (10th Cir. 1997).

B. Separation orders

There is no case law addressing this issue.

C. Third-party subpoenas

There is no case law addressing this issue.

D. The source's rights and interests

There is no case law addressing this issue.