REPORTER'S PRIVILEGE: ALASKA

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

ALASKA

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I. Introduction: History & Background

There is no definitive or authoritative law in Alaska concerning a news reporter's privilege. There are no significant appellate court rulings on the issue. There is a mediocre shield law that is of little consequence. However, the privilege has been asserted in a number of trial court cases over the past 25 years. In virtually all of these, the press interests have been represented by the author of this outline, and in none of them has a reporter been compelled to testify. This is true of both state and federal courts, civil and criminal cases (as well as at least one grand jury proceeding), and in cases not involving confidential sources as well as ones that did. In a much larger number of cases subpoenas or informal demands for testimony or work product of reporters have been successfully addressed without having to present the matter to a court. In at least one case, attorney fees were awarded to the press. The author is unaware of any case in which a reporter has been jailed or fined for failing to testify or produce documents.

II. Authority for and source of the right

Alaska's appellate courts have not had occasion to rule definitively on the existence or scope of a news reporter's privilege. The privilege has been asserted, and acknowledged, in a number of trial court cases, and in virtually all of these, the press interest has been represented by the author of this outline. There is no explicit reference to a reporter's privilege in the Alaska Constitution. There are several Alaska Supreme Court opinions interpreting Alaska's analogue to the First Amendment, Article I, section 5, of the state constitution, as providing greater protection for freedom of expression than its federal counterpart, though never in this context. The state constitution, therefore, should always be cited as an alternate basis for the privilege to preserve this issue. There is a state statute that addresses a reporter's privilege, *see* AS 09.25.300 — .390, and through Evidence Rule 501, court rules recognize and implement this and other statutory privileges. The statute's substantive provisions do not provide particularly strong protection, but it contains some useful procedural provisions and should be cited for this reason. While the statute is sometimes noted, the principal source of legal authority that has been relied upon in asserting, and recognizing, a privilege in Alaska courts to date has been the qualified constitutional privilege under the First Amendment recognized by the majority in *Branzburg,* and subsequent cases.

A. Shield law statute

Alaska has a shield law, presently codified as AS 09.25.300 — .390. (The shield law, which encompasses public officials as well as reporters, was codified as AS 09.25.150 — .220 until it was re-numbered in 1994.) The shield law was enacted in 1967. There is no significant legislative history, nor have there been significant amendments to it. The text of the statute is as follows:

Alaska Statutes, Title 09, Chapter 25.

Article 3. Privilege of Public Officials and Reporters

AS 09.25.300. Claiming of Privilege By Public Official or Reporter.

Except as provided in AS 09.25.300 - 09.25.390, a public official or reporter may not be compelled to disclose the source of information procured or obtained while acting in the course of duties as a public official or reporter.

AS 09.25.310. Challenge of Privilege Before Superior or Supreme Court.

(a) When a public official or reporter claims the privilege in a cause being heard before the supreme court or a superior court of this state, a person who has the right to question the public official or reporter in that proceeding, or the court on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made instanter by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may order a special hearing for the determination of the issue of privilege.

(b) The court may deny the privilege and may order the public official or the reporter to testify, imposing whatever limits upon the testimony and upon the right of cross-examination of the witness as may be in the public interest or in the interest of a fair trial, if it finds the withholding of the testimony would

(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or

(2) be contrary to the public interest.

AS 09.25.320. Challenge of Privilege Before Other Bodies.

(a) This section is applicable to a hearing held under the laws of this state

(1) before a court other than the supreme or a superior court;

(2) before a court commissioner, referee, or other court appointee;

(3) in the course of legislative proceedings or before a commission, agency, or committee created by the legislature;

(4) before an agency or representative of an agency of the state, borough, city or other municipal corporation, or other body; or

(5) before any other forum of this state.

(b) If, in a hearing, a public official or a reporter should refuse to divulge the source of information, the agency body, person, official, or party seeking the information may apply to the superior court for an order divesting the official or reporter of the privilege. When the issue is raised before the supreme or a superior court, the application must be made to that court.

(c) Application for an order shall be made by verified petition setting out the reasons why the disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest. Upon application, the court shall determine the notice to be given to the public official or reporter and fix the time and place of hearing. The court shall make or cause to be made whatever inquiry the court thinks necessary, and make a determination of the issue as provided for in AS 09.25.310 .

AS 09.25.330. Order Subject to Review.

An order of the superior court entered under AS 09.25.300 - 09.25.390 shall be subject to review by the supreme court, by appeal or by certiorari, as the rules of that court may provide. During the pendency of the appeal, the privilege shall remain in full force and effect.

AS 09.25.340. Extent of Privilege.

When a public official or reporter claims the privilege conferred by AS 09.25.300 - 09.25.390 and the public official or reporter has not been divested of the privilege by order of the supreme or superior court, neither the public official or reporter nor the news organization with which the reporter was associated may thereafter be permitted to plead or prove the sources of information withheld, unless the informant consents in writing or in open court.

AS 09.25.350. Application of Privilege in Other Courts.

AS 09.25.300 - 09.25.390 also apply to proceedings held under the laws of the United States or any other state where the law of this state is being applied.

AS 09.25.360. AS 09.25.300 - 09.25.390 Do Not Abridge Other Privileges.

AS 09.25.300 - 09.25.390 may not be construed to abridge any of the privileges recognized under the laws of this state, whether at common law or by statute.

AS 09.25.390. Definitions For AS 09.25.300 - 09.25.390.

In AS 09.25.300 - 09.25.390, unless the context otherwise requires,

(1) "news organization" means

(A) an individual, partnership, corporation, or other association regularly engaged in the business of

(i) publishing a newspaper or other periodical that reports news events, is issued at regular intervals, and has a general circulation;

(ii) providing newsreels or other motion picture news for public showing; or

(iii) broadcasting news to the public by wire, radio, television, or facsimile;

(B) a press association or other association of individuals, partnerships, corporations, or other associations described in (A)(i), (ii), or (iii) of this paragraph engaged in gathering news and disseminating it to its members for publication;

(2) "privilege" means the conditional privilege granted to public officials and reporters to refuse to testify as to a source of information;

(3) "public official" means a person elected to a public office created by the Constitution or laws of this state, whether executive, legislative, or judicial, and who was holding that office at the time of the communication for which privilege is claimed;

(4) "reporter" means a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege.

B. State constitutional provision

The Alaska Constitution has no express shield law provision, and the Alaska courts have not had occasion to construe article I, section 5 of the Alaska Constitution, the state's analogue to the First Amendment, or other constitutional provisions, in light of a reporter's privilege claim.

C. Federal constitutional provision

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege (though the issue has been raised as a point on appeal once or twice). However, a number of trial courts have applied a qualified reporter's privilege based on the First Amendment to the United States Constitution. In each case where it has been addressed, the court has accepted the privilege. *See., e.g*., *Nebel v. Mapco Petroleum*, 10 BNA Media L.Rptr. 1871, 1872 (Alas. Super. Ct., 4th Jud. Dist. 1984) (recognizing reporter's privilege, and quashing subpoena pursuant thereto, based on First Amendment and state shield law, and awarding attorney's fees), *State v. Pruett*, Case No. 3AN-84-3887 Cr., 11 BNA Media L.Rptr. 1968 (Alas. Super. Ct., 3d Jud. Dist., 1984), *aff'd. Pruett v. State*, MO&J No 1474 (Alaska App., September 2, 1987)[N.B. Alaska court rules do not allow reliance on MO&Js] (court quashed subpoena issued on behalf of criminal defendant, finding that defendant had not overcome press's qualified constitutional privilege) *U.S. v. Smith*, (federal court tax evasion case with pro per defendant); *see also*, *Management Information Technologies, Inc. v. Alyeska Pipeline Services Co.*, 151 F.R.D. 471 (D.D.C. 1993) (a case brought by oil industry critic Charles Hammel against oil company consortium, security firm and others who spied on him and set up phony environmental law firm to entrap him, tried in the District of Columbia, with press interests represented by the author, after subpoena to a former Anchorage Daily News reporter in connection with reporting done while in Alaska). *Ellis v. Coleman*, Case No. 95A-0367 Civ. (personal injury suit in U.S. Dist. Ct.); *State v. Kelly*, (first reporter's privilege case in Alaska, in 1978, criminal fraud case); *Dansereau v. Coghill*, Case No. 3AN-94-10948 Civ. (election related litigation), *State v. Tetlow*, Case No. 3AN-S01-3356 Cr.; *In The Matter of the January 1996 Grand Jury*; Case No. 4FA-S96-45 Cr. (4th Jud. Dist., Fairbanks) (grand jury subpoena).

D. Other sources

Alaska Rules of Court, through Evidence Rule 501, recognize application of statutory privileges. The reporter's privilege is not expressly addressed.

III. Scope of protection

A. Generally

Since the appellate courts have yet to squarely address the existence or scope of a reporter's privilege, it is not meaningful to make generalizations about how "strong" or "weak" it is. On the one hand, it is not clearly established or accepted; on the other hand, nearly every trial court judge presented with the issue has recognized and applied the privilege, and reporters have not been compelled to testify or produce notes.

B. Absolute or qualified privilege

No Alaska statute or court decision has recognized an absolute reporter's privilege. The 40-year-old shield law suggests that the statutory privilege could be overcome by a showing that disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest. Because of the vague and broad standards qualifying the statutory privilege, the press in Alaska has principally relied instead on the qualified constitutional privilege, requiring a showing that the information sought is crucial or goes to the heart of the case and is not available from another source that does not enjoy a First Amendment privilege.

C. Type of case

1. Civil

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, but anecdotal experience in the trial courts to date has not demonstrated that the reporter's privilege will differ if the reporter is subpoenaed in a civil case, as opposed to a criminal case. Courts still look at whether the information sought is crucial to the subpoenaing party's case, and whether alternate means of obtaining the information sought have been exhausted.

2. Criminal

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, but anecdotal experience in the trial courts to date does not indicate that courts are less willing to quash subpoenas in criminal cases than in civil cases. There is no indication that the courts give special consideration to prosecutor's subpoenas. Nor does it appear that courts are unwilling to quash subpoenas from criminal defendants out of concern for Sixth Amendment rights. In two illustrative cases, trial courts quashed subpoenas issued to news reporters by top criminal defense attorneys in the state. *See State v. Pruett*, Case No. 3AN-84-3887 Cr., 11 BNA Media L.Rptr. 1968 (Alas. Super. Ct., 3d Jud. Dist., 1984), *aff'd. Pruett v. State*, MO&J No 1474 (Alaska App., September 2, 1987)[N.B. Alaska court rules do not allow reliance on MO&Js]; *State v. Tetlow*, Case No. 3AN-S01-3356 Cr. (Alas. Super. Ct., 3d Jud. Dist., 2001); *see also, State v. Harry Neil Kelly* (Alas. Super. Ct., 3d Jud. Dist., 1978).

Pruett was a felony assault trial of a 49 year old woman who had befriended and then victimized and beat a 70 year old woman who had been taken in to live with her family as a housekeeper. The Anchorage Daily News, through the author, moved to quash a defense subpoena to its reporter, Larry Campbell, who had written news articles based on interviews he conducted with the defendant. Defense counsel had successfully argued an important Sixth Amendment Confrontation Clause case before the United States Supreme Court, *Davis v. Alaska*, 15 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). He argued to the trial court in *Pruett* that in the context of a criminal prosecution, any reporter's privilege must yield to the constitutional right to cross-examine without restriction based upon the Confrontation Clause. The author, as counsel for the newspaper, argued in response that in *Davis v. Alaska* the Confrontation Clause was balanced against a statutory prohibition against allowing juveniles to testify, whereas in the *Pruett* case, the Confrontation Clause was being balanced against a reporter's privilege that also derived from the Constitution — and specifically the First Amendment — not simply from a statute. The trial court agreed and quashed the subpoena. Pruett was convicted, and filed an appeal on numerous points. The Court of Appeals held that the trial court did not err in quashing the subpoenas, and specifically held that the

testimony sought would have been collateral, in some instances was an improper attempt to impeach by extrinsic evidence, and was not critical to ("hardly constituted the 'lynch pin' of) the case. *See* MO&J at 17.

3. Grand jury

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Given the nature of grand jury proceedings, and particularly the fact the cases consolidated in *Branzburg* all arose from a grand jury setting, it is predictable that courts might be more likely to enforce a subpoena in this context. However, anecdotal experience indicates that courts are willing to recognize a reporter's privilege, and apply the normal tests to quash a subpoena where the circumstances warrant. *See In The Matter of the January 1996 Grand Jury*; Case No. 4FA-S96-45 Cr. (4th Jud. Dist. (Fairbanks), 1996)

D. Information and/or identity of source

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Trial courts judges have recognized the privilege as protecting the identity of a source, as well as information that would identify a source. The state's shield law provides that a reporter may not be compelled to disclose the source of information procured or obtained while acting in the course of duties as a reporter, unless the subpoenaing party makes the showing required by the statute.

E. Confidential and/or non-confidential information

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Both state and federal trial courts have, however, and have recognized a qualified constitutional reporter's privilege, and quashed subpoenas, without regard to whether the information sought was confidential or non-confidential. The shield law speaks only to protection against compelled disclosure of the source of information.

F. Published and/or non-published material

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Both state and federal trial courts have, however, and have recognized a qualified constitutional reporter's privilege, and quashed subpoenas for unpublished material such as reporter's notes and film outtakes. Trial courts have also quashed subpoenas for testimony, even when unpublished material is not at issue, though as a practical matter the press does not always object to verifying the accuracy of published material.

G. Reporter's personal observations

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not specifically addressed the question of whether there is any exception to the privilege in the case of reporters who are eye witnesses to a crime that is the subject of the news article in question.

H. Media as a party

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not specifically addressed the issue of whether the privilege applies differently in cases in which the media is a party or is not.

I. Defamation actions

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not specifically addressed the issue of whether the privilege applies differently in defamation cases, and if so, how.

IV. Who is covered

The shield law provides a definition of reporter and news organization for purposes of that statute, but the courts have not had occasion to interpret these definitions, and issues that turn on definitions of news, reporter, and the like should be considered open questions at least with respect to a qualified constitutional privilege.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not had occasion to address the definition of a "reporter" for purposes of applying the privilege. The shield law defines "reporter" as "a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege." AS 09.25.390(4). It further defines "news organization," as noted in section IV.A.1.e, *infra*.

b. Editor

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not had occasion to address the definition of a "editor" for purposes of applying the privilege. The shield law does not define "editor."

c. News

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not had occasion to address the definition of "news" for purposes of applying the privilege. The shield law does not define "news."

d. Photo journalist

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not had occasion to address the definition of a "photojournalist" for purposes of applying the privilege. The shield law does not define "photojournalist."

e. News organization / medium

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not had occasion to address the definition of "media" or a "news organization" for purposes of applying the privilege. The shield law, in AS 09.25.390(1), defines "news organization" as:

> (A) an individual, partnership, corporation, or other association regularly engaged in the business of
>
> (i) publishing a newspaper or other periodical that reports news events, is issued at regular intervals, and has a general circulation;
>
> (ii) providing newsreels or other motion picture news for public showing; or
>
> (iii) broadcasting news to the public by wire, radio, television, or facsimile;
>
> (B) a press association or other association of individuals, partnerships, corporations, or other associations described in (A)(i), (ii), or (iii) of this paragraph engaged in gathering news and disseminating it to its members for publication;

2. Others, including non-traditional news gatherers

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not had occasion to address whether the qualified constitutional privilege that has been recognized and applied by various judges applies to non-traditional newsgatherers, authors, scholars, freelancers, student journalists, librarians, academic researchers, or others. Courts have had occasion to extend the privilege to former reporters with respect to stories they worked on or published while employed by a news organization, and the shield law specifically defines reporter to include this situation.

B. Whose privilege is it?

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Trial courts that have dealt with these issues have not expressed addressed whether the privilege belongs to the

source or reporter, or both, or to the reporter or employer, or both. However, trial court rulings have implicitly recognized that both could assert the privilege. Cases have involved assertions of the privilege by a press organization on behalf of a reporter or former reporter, and by a reporter and news organization represented by separate counsel, and by a reporter claiming a privilege when the source of the information is known and a party to the litigation, but none of the cases have hinged on these distinctions. The shield law provides that when a reporter claims the privilege conferred by AS 09.25.300 - 09.25.390 and the reporter has not been divested of the privilege by order of the supreme or superior court, neither the reporter nor the news organization with which the reporter was associated may thereafter be permitted to plead or prove the sources of information withheld, unless the informant consents in writing or in open court.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Court rules do not contain any special rules or procedures with respect to subpoenaing members of the news media. Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and neither they nor the trial courts have had occasion to address this issue.

2. Deposit of security

Court rules do not contain any special rules or procedures with respect to subpoenaing members of the news media. No law requires a subpoenaing party to deposit any security to procure testimony or materials from a reporter. Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and neither they nor the trial courts have had occasion to address this issue.

3. Filing of affidavit

Court rules do not contain any special rules or procedures with respect to subpoenaing members of the news media. No law specifically requires a subpoenaing party to make any special affidavit in order to seek testimony or materials from a reporter. Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and neither they nor the trial courts have had occasion to address this issue.

4. Judicial approval

Court rules do not contain any special rules or procedures with respect to subpoenaing members of the news media. No law requires a subpoenaing party to obtain prior approval of a judge or magistrate before subpoenaing a reporter. Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and neither they nor the trial courts have had occasion to address this issue.

5. Service of police or other administrative subpoenas

No special rules are known to apply to the use and service of police or fire or other administrative subpoenas.

B. How to Quash

1. Contact other party first

There is no legal requirement that the subpoenaing party be contacted prior to a motion to quash. It is good practice to do so, however, for several reasons. In most instances, the subpoenaing party will be unaware of the reporter's privilege your client will assert, and especially of tests to be met for overcoming a qualified privilege. Most subpoena issues will "go away" in the ordinary course without need for a motion to quash. If it knows it will have to fight on this issue that is collateral to its case, the subpoenaing party is often willing to defer the matter initially. Then, most often, it becomes moot because almost all cases, civil or criminal, are resolved without actually coming to trial. Even if the subpoena will not "go away," you will want to know more about the subpoenaing party's case, since by definition you will be less familiar than the parties with their litigation, and the reasons why the subpoenaed information might be sought. It is generally not a good idea for the subpoenaed reporter to com-

municate with counsel issuing the subpoena, since such communications may produce legal and/or factual waiver issues.

2. Filing an objection or a notice of intent

There is no legal requirement in Alaska that a notice of intent to quash be filed before filing a motion to quash, nor is there any practice of doing so, nor are there other procedural steps required or recommended prior to moving to quash.

3. File a motion to quash

a. Which court?

The motion to quash ordinarily should be filed in the same court that is hearing the case at issue.

b. Motion to compel

Because so few cases, criminal or civil, ever actually come to trial, the time and expense of filing a motion to quash can be avoided in most cases by letting the case run its course without dealing prematurely with the subpoena issue. Holding off on a motion to quash, and letting the subpoenaing party know that the reporter will not provide testimony or notes, so that a motion to compel will be necessary and the subpoenaing party will have to address these legal issues in order to obtain the desired information, in more cases than not will enable the press to defer the issue until it becomes moot. The subpoenaing party most often does not wish to "do battle with the press," and may even profess support for the First Amendment values being asserted, but in any event will generally not want the distraction and cost of dealing with this collateral issue at a time when efforts are more productively focused on other aspects of the party's case, or other cases. The reporter or media organization gets the benefit of avoiding legal fees, which it always wants and often appreciates.

c. Timing

How soon the press should file a motion to quash after receiving a subpoena is a judgment call, dictated largely by the circumstances. It is not governed by specific legal requirements, and whether and when to do it involves strategy questions discussed in subsections B.1 and B.3.b above. Most often, the whole issue can be avoided, particularly when the subpoena is issue well in advance of a trial, or before witnesses are called who may represent an alternate means of procuring essentially the same information as is sought from a reporter. In many instances, particularly pre-trial, it may be more advantageous to do nothing except discuss the matter with counsel for the subpoenaing party, and put that party in the position of having to decide whether to spend the time and effort that will be needed to make a motion to compel and fight this issue — an issue important to the press, but collateral to the party's main concerns in its litigation. If the subpoena is issued at or near the time of trial, a motion to quash is more often preferable.

d. Language

There is no stock or preferred language that should be included in a motion to quash, but it is best to refer to the motion being brought pursuant to article I, section 5, of the state constitution, and AS 09.25.300-390, as well as the First Amendment, both to preserve these issues in the event of an appeal, and because the statute may prove useful procedurally even though it is of relatively little value substantively.

e. Additional material

Because Alaska's appellate courts have yet to recognize or otherwise address in any significant way a reporter's privilege, it is important that in any case in which a motion to quash is filed, or a motion to compel is defended, the press create a record that will provide the trial judge and any reviewing court with a basis for understanding and applying the privilege sought. This can be done most effectively, in the opinion of the author, through affidavits of professional journalists, including reporters and editors or even counsel, with relevant knowledge and experience that can support the arguments being made in the accompanying legal memorandum. Make the judge understand why this privilege is important to the press, why broader public interests are being served by this seemingly parochial effort to be "treated differently," how this discrete instance should be viewed as part of an ongoing effort to involve the press in matters that reporters are supposed to be writing about and the problems this

poses for your client's news operation, public perceptions of objectivity, and so forth. Don't assume the judge (or reviewing court) is aware of the principles that you believe underlie the privilege, or understands why they are important, or understands how your news operation works, or the impact that having to constantly respond to similar subpoenas will have.

4. In camera review

a. Necessity

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the shield law does not direct a court to conduct an in camera review of materials or interview with the reporter prior to deciding a motion to quash, nor has there been a practice of doing so in the trial courts that have addressed privilege claims.

b. Consequences of consent

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the shield law does not directly require or address in camera review. Experience with trial courts addressing privilege issues does not include instances of demands for, or consent to, in camera review. The shield law provides that an order of the superior court entered under AS 09.25.300 - 09.25.390 shall be subject to review by the supreme court, by appeal or by certiorari, as the rules of that court may provide, and that during the pendency of the appeal, the privilege shall remain in full force and effect.

c. Consequences of refusing

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the shield law does not directly require or address in camera review. Experience with trial courts addressing privilege issues does not include instances of demands for, or refusal to consent to, in camera review.

5. Briefing schedule

There is no special schedule set forth in law or court rules for briefing a motion to quash. If the press is filing a motion at a time when an answer is needed immediately, or in any event before the normal time for briefing an ordinary motion and obtaining a ruling on it will have elapsed, the motion to quash should be accompanied by a motion for expedited consideration pursuant to Civil Rule 77(g).

6. Amicus briefs

Amicus briefs are routinely accepted by the courts, although they are rarely filed at the trial court level. If a subpoena issue were to be presented to an appellate court as a point on appeal, it is possible that the Alaska Press Club, the Alaska Newspaper Association, or another press organization might wish to file an amicus brief. It is very unlikely that a press organization, other than one directly involved as the recipient of a subpoena or employer of the recipient, would become involved as an amicus at the trial court level for a number of reasons, primarily including the expense of doing so, the lack of precedential value of a superior court ruling, and the multiplicity of non-related issues.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and the trial courts have not specifically addressed this issue. In those trial court proceedings where the qualified constitutional reporter's privilege has been asserted, it has been assumed that to overcome the privilege the subpoenaing party must make a showing that the information sought is crucial to, or goes to the heart of, its case, and that this information is unavailable from other sources not protected by this First Amendment privilege. The shield law, if applicable, requires the applicant for divestiture of the privilege to show, usually by verified petition, reasons why the disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest.

B. Elements

1. Relevance of material to case at bar

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. In those trial court proceedings where the qualified constitutional reporter's privilege has been asserted, it has been assumed that to overcome the privilege the subpoenaing party must make a showing that the information sought is crucial to, or goes to the heart of, its case. The shield law, if applicable, likewise requires the applicant for divestiture of the privilege to show why the disclosure is "essential" to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest.

2. Material unavailable from other sources

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. In those trial court proceedings where the qualified constitutional reporter's privilege has been asserted, it has been assumed that to overcome the privilege the subpoenaing party must make a showing that it has exhausted other means of obtaining the information sought, and that this information is unavailable from other sources not protected by this First Amendment privilege. The shield law does not expressly address this issue.

a. How exhaustive must search be?

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. In those trial court proceedings where the qualified constitutional reporter's privilege has been asserted, courts have recognized and applied this privilege without articulating a standard for what constitutes exhaustion.

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

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. In a number of trial court proceedings, the qualified constitutional privilege has been recognized and applied to quash a subpoena, implicitly accepting arguments that the subpoenaing party failed to demonstrate that it had sufficiently searched for the material outside of subpoenaing the reporter.

c. Source is an eyewitness to a crime

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Those trial court that have recognized and applied the qualified constitutional reporter's privilege have not to date specifically decided that information obtained from a source who witnessed or participated in a crime is by definition "unavailable" from any other source, or is unique as eyewitness evidence, and in fact in some cases quashed subpoenas involving eyewitness or participant sources. *See, e.g.*, *State v. Pruett*, Case No. 3AN-84-3887 Cr., 11 BNA Media L.Rptr. 1968 (Alas. Super. Ct., 3d Jud. Dist., 1984).

3. Balancing of interests

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. The qualified constitutional reporter's privilege has been recognized to date by a number of trial courts, and while the basis for the courts' rulings do not clearly articulate that they have balanced competing interests, or the weight given to competing interests, they have generally been presented with arguments that the First Amendment interests of the press must be weighed against whatever interests are being asserted by the subpoenaing party, and that where the countervailing interests are not constitutional in nature, the First Amendment interests must prevail. *See, e.g.*, *State v. Pruett*, Case No. 3AN-84-3887 Cr., 11 BNA Media L.Rptr. 1968 (Alas. Super. Ct., 3d Jud. Dist., 1984). Defense counsel in *Pruett*, which was a felony prosecution, had successfully argued an important Sixth Amendment Confrontation Clause case before the United States Supreme Court, *Davis v. Alaska*, 15 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). He argued to the trial court in *Pruett* that in the context of a criminal prosecution, any reporter's privilege must yield to the constitutional right to cross-examine without restriction based upon the Confrontation Clause. The author, as counsel for the newspaper, argued in response that in *Davis v. Alaska* the Confrontation Clause was balanced against a statutory prohibition against allowing juveniles to testify, whereas in the *Pruett* case, the Confrontation Clause was being balanced against a reporter's privilege that also derived from the Constitution — and specifically the First Amendment — not simply from a statute. The trial court agreed and quashed the subpoena. In cases where the state shield law is being applied, the statute directs that

the court take into account whether disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest

4. Subpoena not overbroad or unduly burdensome

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. The same rules of criminal or civil procedure protecting third parties from overly broad or unduly burdensome subpoenas in other contexts would apply to press subpoenas as well.

5. Threat to human life

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, and trial courts applying the privilege have not had occasion to do so in the context of a claim that the matter subpoenaed involves a threat to human life.

6. Material is not cumulative

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. The same rules of evidence precluding submission of evidence that would be cumulative provide an additional or alternate grounds for quashing a subpoena, and an argument that dovetails with the constitutional requirement that the information sought not unavailable from other sources.

7. Civil/criminal rules of procedure

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. The same rules of criminal or civil procedure protecting third parties from frivolous, overly broad or unduly burdensome subpoenas in other contexts would apply to press subpoenas as well, and should be asserted along with the claim of a constitutional privilege as additional and alternate grounds for quashing a subpoena.

8. Other elements

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not listed any other elements that must be met before the privilege can be overcome.

C. Waiver or limits to testimony

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not articulated circumstances constituting waiver of the privilege or standards for determining that the privilege has been deemed waived.

1. Is the privilege waivable at all?

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not articulated circumstances constituting waiver of the privilege or standards for determining that the privilege has been deemed waived. The subpoenaing party in *Management Information Technologies, Inc. v. Alyeska Pipeline Services Co.*, 151 F.R.D. 471 (D.D.C. 1993) tried to argue that any privilege had been waived, in part because the source of the information was already known and had talked about the documents at issue, but the court did not accept this argument.

2. Elements of waiver

a. Disclosure of confidential source's name

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not articulated circumstances constituting waiver of the privilege or standards for determining that the privilege has been deemed waived.

b. Disclosure of non-confidential source's name

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not articulated circumstances constituting waiver of the privilege or standards for determining that the privilege has been deemed waived. However, trial courts have quashed subpoenas in a number of cases not involving confidential sources, implicitly rejecting the notion that the privilege is waived when the source's identity is known.

c. Partial disclosure of information

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not articulated circumstances constituting waiver of the privilege or standards for determining that the privilege has been deemed waived.

d. Other elements

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not articulated circumstances constituting waiver of the privilege or standards for determining that the privilege has been deemed waived.

3. Agreement to partially testify act as waiver?

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege, and in doing so have not articulated circumstances constituting waiver of the privilege or standards for determining that the privilege has been deemed waived. In some instances, by agreement of the parties and counsel for the subpoenaed reporter, a reporter has confirmed that the story as published is accurate. The agreement assumes that the reporter will not be subject to cross-examination going beyond this confirmation. Further, we would agree only to have the reporter confirm accuracy, rather than truth, since the latter is likely to be outside his or her personal knowledge. Courts have not had occasion to rule on whether partial testimony to confirm accuracy or truth of a story, in the absence of such agreement, would constitute a waiver of the privilege.

VII. What constitutes compliance?

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled.

A. Newspaper articles

Under federal and state evidence rules, newspapers are generally considered self-authenticating, and in any event, if all that is sought is confirmation that a particular article actually appeared in the newspaper, a reporter is not needed — and generally should not be produced. In such instances, if the parties are not relying on self-authentication, a simple affidavit from the newspaper's librarian will ordinarily suffice. If the parties are not willing to settle for this, it is a sign that what they really want is more than authentication.

B. Broadcast materials

If all that is sought is confirmation that a particular new story actually aired on a broadcast station, a reporter or other news person is not needed — and generally should not be produced. In such instances, if the parties are not relying on self-authentication, a simple affidavit from the record custodian, or one who logs traffic for the station, will ordinarily suffice. If the parties are not willing to settle for this, it is a sign that what they really want is more than authentication.

C. Testimony vs. affidavits

In some instances, by agreement of the parties and counsel for the subpoenaed reporter, a reporter has confirmed through an affidavit that the story as published is accurate. The agreement assumes that the reporter will not be

subject to cross-examination going beyond this confirmation, and for this reason it is important that the agreement involve all counsel, not only counsel for the subpoenaing party. It is usually best to have the reporter confirm only accuracy, rather than truth, since the latter is likely to be outside his or her personal knowledge. Such an affidavit is occasionally used for trial, to avoid calling a witness, and more often used during the discovery phases off a case to resolve a potential dispute over reporter's privilege.

D. Non-compliance remedies

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled.

1. Civil contempt

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled.

a. Fines

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled.

b. Jail

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled.

2. Criminal contempt

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled.

3. Other remedies

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled.

VIII. Appealing

A. Timing

Perhaps the most useful section of the state's shield law is AS 09.25.330, which provides in pertinent part that during the pendency of an appeal concerning an order entered upholding or denying a claim of reporter's privilege, the privilege shall remain in full force and effect. For this reason, there is little urgency on the part of the press to appeal.

1. Interlocutory appeals

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled. The shield law provides, in AS 09.25.330, that an order of the superior court entered under AS 09.25.300 - 09.25.390 shall be subject to review by the supreme court, by appeal or by certiorari, as the rules of that court may provide. This law was enacted when the supreme court was the state's only appellate court. It may well provide a basis for a press appeal directly to the supreme court, even though there is now an intermediate court of appeals for criminal cases only. In prac-

tice, in the isolated case where a subpoena has been quashed by the trial court in a criminal case, the issue has been raised as part of a post-trial appeal to the court of appeals, as one of the points on appeal filed by the convicted defendant, rather than through direct resort to the supreme court. The court of appeals has not addressed the effect, if any, of the shield law's language on its jurisdiction over this matter.

2. Expedited appeals

Alaska's appellate court rules establish procedures for expedited appeals, but set forth no special considerations that affect news media subpoenas. Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled, so the issue of expedited review for the press has not arisen. Parties to litigation whose subpoenas have been quashed have not to date sought expedited review of these rulings.

B. Procedure

1. To whom is the appeal made?

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, or matters pertaining thereto such as appropriate procedures for appeals. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled. The shield law provides, in AS 09.25.330, that an order of the superior court entered under AS 09.25.300 - 09.25.390 shall be subject to review by the supreme court, by appeal or by certiorari, as the rules of that court may provide. This law was enacted when the supreme court was the state's only appellate court. It may well provide a basis for a press appeal directly to the supreme court, even though there is now an intermediate court of appeals for criminal cases only. In practice, in the isolated case where a subpoena has been quashed by the trial court in a criminal case, the issue has been raised as part of a post-trial appeal to the court of appeals, as one of the points on appeal filed by the convicted defendant, rather than through direct resort to the supreme court. The court of appeals has not addressed the effect, if any, of the shield law's language on its jurisdiction over this matter. AS 09.25.320 provides that if a reporter should refuse to divulge the source of information in a hearing before a court other than the supreme or a superior court, or before a court appointee, in the course of a legislative hearing, before an agency or representative of an agency of the state, borough, city or other municipal corporation, or other body, or before any other forum of the state, the party seeking divestiture of the privilege should apply for an order to this effect from the superior court.

2. Stays pending appeal

Perhaps the most useful section of the state's shield law is AS 09.25.330, which provides in pertinent part that during the pendency of an appeal concerning an order entered upholding or denying a claim of reporter's privilege, the privilege shall remain in full force and effect. Should the press for some reason be seeking prompt review, the Supreme Court has recognized that compelling reasons exist for accepting review in cases posing the danger of immediate encroachment on First Amendment rights. *Hanby v. State*, 479 P.2d 486 (Alaska 1970). Extraordinary legal remedies to protect First Amendment rights are frequently employed and are constitutionally mandated. *Id*. at 490.

3. Nature of appeal

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, or matters pertaining thereto such as appropriate procedures for appeals, or the nature of means for obtaining review of trial court rulings concerning the privilege.

4. Standard of review

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, or matters pertaining thereto such as appropriate procedures for appeals, or the standards for reviewing trial court rulings concerning the privilege. As a general rule, however, the court will review de novo trial court rulings concerning what this law is, including rulings concerning the existence or scope of a privilege.

5. Addressing mootness questions

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, or matters pertaining thereto such as appropriate procedures for appeals, or the standards for reviewing trial court rulings that are arguably moot, such as rulings on subpoenas to a reporter after the trial or grand jury session for which the reporter was subpoenaed have concluded.

6. Relief

Alaska appellate courts have not had occasion to squarely address the existence or scope of a reporter's privilege, or matters pertaining thereto such as appropriate procedures for appeals, or the standards for reviewing trial court rulings. Various trial courts have recognized and applied the qualified constitutional privilege in a number of cases, and in none of these has testimony or production of documents been compelled. Therefore, issues concerning what relief might be sought from appellate courts from an adverse ruling, or sanction imposed, in connection with assertion of a reporter's privilege, have not been addressed.

IX. Other issues

A. Newsroom searches

The federal Privacy Protection Act (42 U.S.C. 2000aa) has not been used in Alaska courts, to the knowledge of this author. It has been successfully asserted by the author on a couple occasions in telephonic negotiations to get authorities to withdraw improperly is-sued search warrants. In 2006, Anchorage police investigating a shooting in a public park used search warrants, in violation of 42 U.S.C. 2000aa, to obtain photos and videotape from a newspaper and television station in Anchorage. After a call from the author to the issuing magistrate and police, the search warrants were withdrawn and the documents were re-turned, unused, to the news organizations. In addition, after a meeting between public offi-cials and the press, officials agreed to cover this issue in training for judges and police to avoid future violations arising from ignorance of the law, and agreed to pay attorney fees incurred by the press. See, http://www.rcfp.org/news/2006/0713-con-police.html or http://www.nppa.org/news_and_events/news/2006/07/anchorage.html. Similarly, in the 1980s, the author spoke with a magistrate that had issued a search warrant for premises of a television station to obtain tapes of a fire that was suspected of being caused by arson, while state troopers attempted to execute the warrant. After the magistrate was advised of the applica-ble federal law, he communicated to the troopers he was withdrawing the warrant and that they should desist from further efforts to serve it. There is no provision under state law similar to the federal Privacy Protection Act.

B. Separation orders

There is no statute or case law in Alaska concerning "separation orders" issued against reporters who are both trying to cover a trial and are on a witness list for it, but the specter of this problem, particularly in the numerous communities around the state that are served by a small newspaper or public radio station that often has only one or two reporters, is routinely cited as one of the reasons underlying the need to recognize and apply the qualified constitutional reporter's privilege.

C. Third-party subpoenas

The issue of subpoenas to third parties, such as credit card companies, telephone companies, or Internet service providers, in an attempt to discover a reporter's source, has not been addressed by the courts or legislature in Alaska.

D. The source's rights and interests

The issue of sources seeking to intervene anonymously to halt disclosure of their identities, or suing over disclosure after the fact, has not arisen to date and has not been addressed by the courts or legislature in Alaska. AS 09.25.340 provides that when a reporter claims the privilege conferred by AS 09.25.300 - 09.25.390 and has not been divested of the privilege by order of the supreme or superior court, neither the reporter nor the news organization with which the reporter was associated may thereafter be permitted to plead or prove the sources of information withheld, unless the informant consents in writing or in open court.