

# REPORTER'S PRIVILEGE: ARKANSAS

**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](http://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 and 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 dis-

sent 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 constitu-

tional 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](http://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 sup-

porting 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

ARKANSAS

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## I. Introduction: History & Background

Arkansas has had a statute in effect since 1937 specifically shielding reporters and others involved in news gathering from being required to reveal the identities of their confidential sources. The statute is fairly broad and has been interpreted to encompass both criminal and civil proceedings. The statute has undergone few changes since Arkansas voters adopted it as an initiated act in 1936. The statute was last amended in 1949 to bring radio broadcasters within the law's protection. The statute, however, does not specifically protect television broadcasters, and the Arkansas appellate courts have not addressed this omission. Since the law's enactment, only one reported case from the Arkansas Supreme Court has addressed it. However, a federal court has held that the statute protects television broadcasters. *See Williams v. American Broadcasting Companies, Inc.*, 96 F.R.D. 658 (W.D. Ark. 1983).

## II. Authority for and source of the right

The privilege afforded to reporters under Arkansas law from having to reveal their confidential sources is a matter of statute, and, as three circuit courts have concluded, a right existing under Article 2, Section 6 of the Arkansas Constitution as well as the First Amendment to the Constitution of the United States. *See* Ark. Code Ann. § 16-85-510 (West 2004); *State v. Bernard*, No. 94-2133 (Cir. Ct. of Pulaski County, Ark. filed Feb. 21, 1995); *First Commercial Trust v. Aldridge*, No. 94-3006 (Cir. Ct. of Pulaski County, Ark. filed Dec. 12, 1994); *State v. Echols*, No. CR 93-450A (Cir. Ct. of Craighead County, Ark. filed Mar. 11, 1994); *see also* Philip S. Anderson, *The Reporter's Privilege in Arkansas: An Overview With Commentary*, 29 U. Ark. Little Rock L. Rev. 1, 7–11 (2006); *but see* Susan Webber Wright, *A Trial Judge's Ruminations on the Reporter's Privilege*, 29 U. Ark. Little Rock L. Rev. 103, 115–17 (2006).

### A. Shield law statute

Arkansas's shield law is codified at Ark. Code Ann. § 16-85-510 (West 2004). The statute states in its entirety:

Before any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he or she may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.

The law was approved by Arkansas voters as Initiated Act No. 3 of 1936. The reporters' shield provision was part of a larger criminal procedure reform package initially proposed by the Arkansas Bar Association's Committee on Law and Law Reform. *See* Robert A. Leflar, *The Criminal Procedure Reforms of 1936—Twenty Years After*, 11 Ark. L. Rev. 117 (1957). In 1934, Governor J.M. Futrell appointed a committee to study and draft proposed changes to Arkansas's criminal law. In 1935, the blue-ribbon committee proposed an amendment to the Arkansas Constitution to the General Assembly. *Id.* at 118. After the Legislature made significant changes to the proposed amendment, the bar association proposed an initiated act to be placed directly before the voters, bypassing the Legislature. This initiative included the shield law. *Id.* at 126. The reporters' shield was seen as a necessary component to the criminal law reform effort in two distinct ways. First, the blue-ribbon panel was convinced that "undercover criminal activities [that] might have political or economic protection in a community were much more likely to be brought to light, and ultimately prosecuted, if news reporters were given the freedom" to protect confidential sources. *Id.* Secondly, and in a much more politically calculating vein, the drafters may have hoped that inclusion of the reporters' shield would help to ensure the newspapers' support for the act as a whole. *See id.* at 126 n.42. Voters passed the act overwhelmingly in November, 1936 by a vote of 121,310 votes in favor of the act to only 29,181 against. The act went into effect in January, 1937. As an act adopted by the voters, it can be amended or repealed only by a two-thirds vote of all of the members elected to each house of the Arkansas General Assembly. Ark. Const. amend. 7.

While the original version of the shield law covered only the print medium, the Legislature amended the act in 1949 to include radio broadcasters. Television broadcasters are not specifically mentioned in the act, although there is no evidence that they have been specifically excluded or would not be included by the Arkansas Supreme Court in an appropriate case. *See Williams v. American Broadcasting Cos, Inc.*, 96 F.R.D. 658, 665 (W.D. Ark. 1983) (stating in dicta that there was little doubt that the privilege would be extended by the Arkansas courts to television reporters). The statute has not been amended since 1949.

The only reported Arkansas case to address § 16-85-510 is *Saxton v. Arkansas Gazette Co.*, 264 Ark. 133, 569 S.W.2d 115 (1978). In that case, the Arkansas Supreme Court made clear that, while the act specifically mentions protecting source disclosures before a grand jury in the course of a criminal proceeding, the language "or to any other authority" makes the statute applicable to civil cases as well. *Id.* at 136, 569 S.W.2d at 117. The court also stated that leading United States Supreme Court cases such as *Branzburg v. Hayes*, 408 U.S. 665 (1972), and others that have not found a constitutional right for a reporter to protect a source, are inapplicable in Arkansas courts because of the state's shield law. *Saxton*, 264 Ark. at 135-36, 569 S.W.2d at 116-17.

Two federal judges have held that the statute is not controlling in a federal proceeding based solely on federal law. *See United States v. Hively*, 202 F. Supp.2d 886 (E.D. Ark. 2002) (denying a motion to limit newspaper reporter's testimony); *In re Grand Jury Subpoena Am. Broad. Co., Inc.*, 947 F. Supp. 1314 (E.D. Ark. 1996) (denying a motion to quash federal grand jury subpoena). Another federal judge in a diversity case governed by Arkansas law required a television broadcaster to turn over video outtakes to plaintiffs in a defamation and invasion of privacy lawsuit, noting that the Arkansas shield law did not apply because no *sources* of information would be revealed from that disclosure. *See Williams*, 96 F.R.D. at 658.

### **B. State constitutional provision**

The Arkansas Constitution does not contain an express reporters' shield privilege. The Declaration of Rights, Ark. const., art 2, § 6, states in part:

The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right.

The only reported case addressing the Arkansas constitutional free press provision in the context of a reporter's shield was a federal case applying federal law; the court held that Art. 2, § 6 did not shield a news organization from having to turn over video footage and transcripts to a federal grand jury. *See In re Grand Jury Subpoena Am. Broad. Co. Inc.*, 947 F. Supp. 1314 (E.D. Ark. 1996) (holding that state law privileges do not apply to a federal grand jury subpoena).

Some state trial courts have recognized, under the state and federal constitutions, a qualified privilege in favor of the media engaged in the newsgathering process, which shields materials from subpoena absent a showing by the party seeking disclosure that 1) the materials are relevant to a claim or defense in the litigation, 2) there is a compelling need for disclosure necessary to override the constitutional protection, and 3) the information is unavailable from any other source that does not place the same chill on the freedom of the press. *See Order, State v. Bernard*, No. 94-2133 (Pulaski County Cir. Ct., 2d Div., Feb. 21, 1995); *Order, First Commercial Trust v. Aldridge*, No. 94-3006 (Pulaski County Cir. Ct., 2d Div., Dec. 12, 1994); *Order, State v. Echols*, No. CR 93-450A (Craighead County Cir. Ct., Mar. 11, 1994).

### **C. Federal constitutional provision**

No reported case in Arkansas has held that the United States Constitution creates a reporter's privilege. In a concurring opinion, an Arkansas Supreme Court justice, who is now a federal district judge in Arkansas, said that such a privilege should be read into the First and Fourteenth Amendments to the Constitution. *See Saxton*, 264 Ark. at 139-41, 569 S.W.2d at 119 (Howard, J., concurring). However, the Arkansas Supreme Court has not adopted this position. Federal courts determine whether the reporter's privilege is granted under the First Amendment according to the type of case. *See, e.g., United States v. Hively*, 202 F. Supp.2d 886, 890 (E.D. Ark. 2002) (refusing to recognize First Amendment reporter's privilege in grand jury criminal proceeding); *Richardson v.*

*Sugg*, 220 F.R.D 343, 347 (E.D. Ark. 2004) (recognizing reporter's privilege in civil case under First Amendment).

#### **D. Other sources**

There are no other sources of a reporter's privilege in Arkansas, such as court rules, attorney general opinions, or administrative procedures.

### **III. Scope of protection**

#### **A. Generally**

The Arkansas shield law appears to be quite broad, based both on the language of the statute and the only Arkansas case to address the statute. The statute protects reporters from being required to divulge the names of sources in criminal proceedings, under the plain language of the statute, and in civil matters, under an interpretation by the Arkansas Supreme Court.

#### **B. Absolute or qualified privilege**

The privilege is a qualified privilege. The manner in which the statute is drafted seems to presume, by the dependent clause at the beginning of the text, that a reporter can be made to divulge a source under certain circumstances. Ark. Code Ann. § 16-85-510 (Michie 1987). However, before a reporter or others protected by the statute can be made to divulge a source of information, the party seeking such disclosure must show that the article containing the information was "written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare." Thus, the privilege applies unless an article was written, published or broadcast under the circumstances exceeding the "actual malice" standard adopted by the U.S. Supreme Court. *See New York Times v. Sullivan*, 376 U.S. 254 (1964). In routine circumstances, a local prosecutor could not require a reporter to divulge the name of a source relating to a case the prosecutor was investigating. Similarly, a civil litigant could not compel discovery of a confidential source.

It should be noted that the federal judge in *Williams, supra*, a diversity case applying Arkansas law and decided five years after *Saxton*, in predicting how the Arkansas Supreme Court might construe the statute in a future libel lawsuit, stated that he was "persuaded that the Arkansas courts would be guided by precedent in which other courts have held that the newsman's privilege . . . must give way, even as to confidential sources, in a libel case where such is necessary for a plaintiff to establish actual malice or reckless disregard for the truth on a given defendant's part." *Williams*, 96 F.R.D. at 665. That prediction has yet to be put to the test before the Arkansas Supreme Court. In *Williams*, the court granted the plaintiffs' motion in a libel and invasion of privacy case against a television network to compel discovery of videotape outtakes for an investigative story on unnecessary surgery and malpractice. *Id.* at 660-61. The court held that outtakes were not protected under the Arkansas shield law because they did not involve disclosure of a source. *Id.* at 665 (emphasis supplied). The court held that disclosure was necessary to enable the plaintiffs to try to prove actual malice or reckless disregard of the truth and that a qualified privilege did not extend to the outtakes. *Id.*

#### **C. Type of case**

##### **1. Civil**

In *Saxton, supra*, the Arkansas Supreme Court interpreted the phrase "or to any other authority" to make the statute equally applicable to reporters subpoenaed in civil cases. Although the Eighth Circuit has not decided whether the qualified privilege extends to civil cases, the federal district court in Arkansas has provided guidance. U.S. District Judge Williams R. Wilson, Jr., adopted, with a minor change, the proposed findings and recommended disposition by U.S. Magistrate Judge John F. Forster, Jr., holding that the qualified reporter's privilege extended to civil cases. *See Richardson v. Sugg*, 220 F.R.D. 343 (E.D. Ark. 2004); *see also* Philip S. Anderson, *The Reporter's Privilege in Arkansas: An Overview With Commentary*, 29 U. Ark. Little Rock L. Rev. 1 (2006); *but see* Susan Webber Wright, *A Trial Judge's Ruminations on the Reporter's Privilege*, 29 U. Ark. Little Rock L. Rev. 103, 115 (2006) (questioning the wisdom of applying a constitutionally based, qualified privilege with uncertain boundaries).

## 2. Criminal

The reporter's shield statute in Arkansas had its genesis in popularly initiated criminal-law reform in the hope that increased protection for reporters' confidential sources would foster a climate of increased investigative reporting into crime and shine a light on public officials or private organizations that might turn a blind eye to these crimes. There are no appellate court cases, however, in which the statute was at issue in the criminal context.

## 3. Grand jury

Because the statute specifically mentions grand juries, it seems unlikely that there would be a different, or lower, level of protection of sources with respect to grand jury proceedings. There are no appellate court cases construing the statute in the context of a grand jury proceeding. The statute, however, does not apply to federal grand jury subpoenas. *In re Grand Jury Subpoena Am. Broad. Co.*, 947 F. Supp. 1314 (E.D. Ark. 1996).

### D. Information and/or identity of source

The statute specifically mentions that the "source of the information" is protected absent the showing of bad faith, malice, or action contrary to the interest of the public welfare. In *Saxton, supra*, the only case to come before the Arkansas Supreme Court, the issue was whether the reporter herself had to disclose the source of her information.

### E. Confidential and/or non-confidential information

The statute does not contain the word "confidential," nor does it specifically differentiate between confidential and non-confidential sources. In *Saxton*, the disclosure of the identity of a confidential source was at issue. The Arkansas Supreme Court has not announced whether the privilege applies to sources deemed non-confidential.

### F. Published and/or non-published material

The statute specifically protects sources who provide information for articles that reporters "may have written, published, or broadcast." There are no supreme court cases that discuss whether the privilege extends to articles written but not published or stories produced but not broadcast, or to stories researched but never written or produced. However, the Arkansas Supreme Court has a history of according the media a high level of free-press protections. *See, e.g., Butler v. Hearst-Argyle Television*, 345 Ark. 462, 49 S.W.3d 116 (2001); *Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 20 S.W.3d 301 (2000); *Pritchard v. Times Southwest Broadcasting*, 277 Ark. 458, 642 S.W.2d 877 (1982); *Arkansas Gazette Co. v. Lofton*, 269 Ark. 109, 598 S.W.2d 745 (1980).

### G. Reporter's personal observations

The statute does not mention whether a reporter can be compelled to testify or give information about an event to which the reporter was an eyewitness. However, when read alongside the statute requiring attendance of a subpoenaed witness until discharge or until the case is decided, Ark. Code Ann. § 16-43-204, the language of the shield statute indicates that a reporter may be compelled to testify to the extent that it would not require the disclosure of a confidential source. However, no Arkansas Supreme Court cases have addressed this specific issue. Although reporters have testified in Arkansas courts, *see Bailey v. State*, 238 Ark. 210, 381 S.W.2d 467 (1964) (where two reporters testified in a motion hearing as to whether a rape suspect could receive a fair trial), there is no indication that the reporters involved attempted to assert a privilege against being required to offer testimony.

### H. Media as a party

Neither the statute nor any Arkansas Supreme Court cases indicate whether the application of the shield law differs if a news organization is a party to the litigation. In *Saxton*, the only reported Arkansas Supreme Court case dealing specifically with the shield law, the reporter and her newspaper were named as defendants and were not required to disclose any sources. Conversely, in *Williams*, the American Broadcasting Co. was a named defendant and was required to turn over video outtakes to allow the plaintiffs to attempt to prove their claims of defamation and invasion of privacy.

### I. Defamation actions

There are no cases in Arkansas that discuss whether failing to disclose a confidential source in the context of a defamation case subjects the non-compliant reporter or the reporter's news organization (when the organization is

a party) to a greater punishment than defamation. Failure to testify upon service of a subpoena is considered contempt of court. Ark. R. Civ. P. 45(g). Sanctions for that failure are within the discretion of the trial court.

The statute's language contemplates that the privilege will not apply in any case, defamation or otherwise, in which the party seeking disclosure makes the requisite showing that the article was written in bad faith, with malice, and not in the interest of the public welfare.

#### **IV. Who is covered**

The statute expressly covers editors, reporters, or other writers for any newspaper, periodical or radio station. Although television news organizations and their reporters and editors are not specifically mentioned, a federal court, predicting Arkansas law on this point, held that they, too, would be included as protected by the shield. *Williams*, 96 F.R.D. at 665.

##### **A. Statutory and case law definitions**

###### **1. Traditional news gatherers**

###### **a. Reporter**

The statute does not give a definition of "reporter." No other statute or case offers such a definition.

###### **b. Editor**

No statutes or cases define "editor."

###### **c. News**

The shield law does not define "news."

###### **d. Photo journalist**

No statute or case has defined "photo journalist."

###### **e. News organization / medium**

Neither the statute nor any cases define the "news media," or consider whether the term encompasses so-called emerging media, such as Internet web pages or E-zines.

In *Ragland v. K-Mart Corp.*, 274 Ark. 297, 624 S.W.2d 430 (1981), the Arkansas Supreme Court defined "newspaper" in the context of an advertising and sales tax case. The court stated that

The definition of a newspaper . . . is to be taken in its popular sense, which is one to which the general public would resort in order to be informed of the news and intelligence of the day, and which is published at stated intervals and carries reports of those happenings of general importance and interest to the ordinary individuals. "Newspaper" has also been defined as "a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest."

*Id.* at 299, 624 S.W.2d at 431 (quoting *Continental Life Ins. Co. v. Mahoney*, 185 Ark. 748, 49 S.W.2d 731 (1932)).

###### **2. Others, including non-traditional news gatherers**

No cases available have considered whether the shield law applies to non-traditional news gatherers.

##### **B. Whose privilege is it?**

The statute states that the privilege applies to "any editor, reporter, or other writer for any newspaper, periodical or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station." In *Saxton v. Arkansas Gazette Co.*, 264 Ark. 133, 569 S.W.2d 115 (1978), the Arkansas Supreme Court noted in dicta that "a number of states, including Arkansas, have provided editors and news reporters with a statutory privilege." *Id.*

at 135, 569 S.W.2d at 116. When interpreting a statute, the court will construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W.3d 14 (2002).

## V. Procedures for issuing and contesting subpoenas

### A. What subpoena server must do

#### 1. Service of subpoena, time

There are no special rules regarding the service of a subpoena that apply exclusively to service of subpoenas on members of the news media. Under the Arkansas Rules of Civil Procedure, there are two distinct deadlines under which a subpoena must be served, depending on the type of proceeding. For appearance at a deposition, the witness must be properly served at least five business days prior to the date of the deposition, unless the court grants leave for the subpoena to be issued within that period. Ark. R. Civ. P. 45(e). For appearance at a trial or hearing, the subpoena must be served at least two days prior to the trial or hearing, unless the court grants leave for the subpoena to be served within that time. Ark. R. Civ. P. 45(d).

#### 2. Deposit of security

Arkansas does not require any security deposit, *per se*, to procure the testimony of a witness, but court rules state that a subpoena must be accompanied by a tender of a witness fee of thirty dollars (\$30.00) per day for attendance at trial or a deposition, plus a travel allowance of twenty-five cents (\$0.25) per mile. Ark. R. Civ. P. 45 (d)-(e). If property is ordered to be kept with the court, the sheriff of the county where the action is pending is charged with the responsibility of safe-keeping. Ark. Code Ann. § 16-63-102 (Michie 1987).

#### 3. Filing of affidavit

Arkansas's shield law does not require that the party serving a subpoena for a reporter's testimony or materials first file an affidavit or other sworn statement indicating why the testimony or materials are needed. However, before a court will compel a reporter to disclose a confidential source, the party seeking such disclosure must make a showing that the article in which the source's information was used was written in bad faith, with malice and was not in the interest of the public welfare. *Saxton, supra*.

#### 4. Judicial approval

Under Arkansas rules, there is no requirement for judicial approval to issue a subpoena. Any party may request a subpoena for witnesses or documents to be produced at trial or for a deposition; upon such a request, the court clerk "shall issue" such a subpoena. Subpoenas may also be issued by an attorney licensed to practice in Arkansas in any case in this state in which the attorney is counsel of record. Ark. R. Civ. P. 45 (a), (d)-(e).

#### 5. Service of police or other administrative subpoenas

Police in Arkansas generally do not have the power of subpoena. An exception to this general rule, however, permits the director of the Arkansas State Police, whose department incorporates the state fire marshal, or the director's deputy to issue a subpoena to compel the attendance of witnesses to testify at an inquiry into whether a crime or other offense has been committed in connection with any fire and for the production of books, records, papers, other writings, or things deemed material to the inquiry. Ark. Code Ann. § 12-13-112 (LEXIS Repl. 1999). If a subpoena is disobeyed, the state police director or his deputy may ask the circuit court of the jurisdiction to compel the attendance and testimony of witnesses and production of books, papers, written material, and things incident to the inquiry. The circuit court is empowered to punish as a contempt any disobedience or refusal to obey such a subpoena. *Id.* Administrative agencies also have subpoena power. *See* Ark. Code Ann. § 25-15-104 (West 2004).

### B. How to Quash

In general, a person subpoenaed may move 1) to quash or modify the subpoena if it is unreasonable or oppressive, or 2) to require that the person on whose behalf the subpoena is issued pay the reasonable cost of production of

documents or other materials. The motion must be made promptly and, in any event, before the time specified in the subpoena for compliance. Ark. R. Civ. P. 45(b).

### **1. Contact other party first**

There is no law or court rule in Arkansas that requires a party moving to quash a subpoena first notify the party issuing the subpoena of the intent to move to quash. However, in Arkansas, a spirit of professional courtesy exists within much of the legal community, and common practice is to confer with counsel who served the subpoena.

### **2. Filing an objection or a notice of intent**

If served with a subpoena *duces tecum* to produce documents or materials at a deposition, a witness may file a written objection to the inspection or copying of such documents. If an objection is made, the party issuing the subpoena may not inspect or copy the materials except upon a court order. If the party issuing the subpoena does move for such an order, that party must give notice to the objecting deponent. Ark. R. Civ. P. 45(e).

### **3. File a motion to quash**

#### **a. Which court?**

The motion to quash should be filed in the court hearing the action. Ark. R. Civ. P. 45.

#### **b. Motion to compel**

A person served with a subpoena who objects to the subpoena should promptly move to quash it and should not wait for a motion to compel. Failure to obey a subpoena can lead to a contempt citation and possibly an arrest warrant. Ark. R. Civ. P. 45(g).

#### **c. Timing**

A motion to quash a subpoena *duces tecum* should be filed within ten (10) days after receiving the subpoena or before the time stated for compliance if that time is fewer than ten days. Ark. R. Civ. P. 45(e).

#### **d. Language**

There is no stock language or preferred text for a motion to quash.

#### **e. Additional material**

In most cases, the subpoena will be attached as an exhibit to a motion to quash. Factual matters are established by an affidavit filed as an exhibit to the motion.

### **4. In camera review**

#### **a. Necessity**

There is no statute, court rule or case law that directs a court to review material *in camera* before ruling on a motion to quash.

#### **b. Consequences of consent**

If the reporter or publisher consents to *in camera* review, a stay pending appeal is not automatic in the event of an adverse ruling. The reporter and the reporter's attorneys are encouraged to be prepared to act quickly.

#### **c. Consequences of refusing**

If the court orders an *in camera* review and the reporter or publisher does not consent, it is possible that the reporter or publisher could be subject to a contempt citation, which is appealable as a final order under the Arkansas Rules of Appellate Procedure. However, a motion to quash or for a protective order usually will protect the reporter or publisher from a finding of contempt.

### **5. Briefing schedule**

The regular briefing schedule for all motions permits a response to be filed within ten (10) business days after service of the motion, and a reply to the response to be filed within five (5) business days after service of the re-

sponse. The practice, however, is to file the motion and supporting memorandum immediately upon service of the subpoena. A hearing is usually scheduled within a few days, and the response and reply are filed within the time permitted before the hearing.

## **6. Amicus briefs**

*Amicus curiae* briefs are allowed in appeals to the Arkansas Supreme Court and the Arkansas Court of Appeals with the permission of the respective court. Rules of Ark. Sup. Ct. and Ct. App. 4-6. Motions requesting permission should state the reasons why the brief is necessary. *Id.* *Amici* attorneys are not allowed to present oral arguments, nor are they allowed to petition for rehearings in their own names. *Id.* Briefs supporting the appellant's position or which are neutral are due when the appellant's brief is due; those supporting the appellee's position are due when the appellee's brief is due. It is customary to file the motion for leave to file an *amicus* brief when the *amicus* brief is filed.

## **VI. Substantive law on contesting subpoenas**

### **A. Burden, standard of proof**

The evidentiary standard for a party seeking disclosure to prove bad faith, malice, and not in the interest of the public welfare is by a preponderance of the evidence. The burden of proof is on the party seeking disclosure. *See Saxton v. Arkansas Gazette Co.*, 264 Ark. 133, 569 S.W.2d 115 (1978).

### **B. Elements**

#### **1. Relevance of material to case at bar**

Several trial courts in Arkansas have held, in orders quashing subpoenas, that the United States and Arkansas constitutions create a qualified privilege in favor of the media, and have applied a three-part test that a party seeking disclosure must meet: 1) the materials must be relevant to a claim or defense in the underlying litigation; 2) the information must be unavailable from any other source less chilling of the free-press provisions; and 3) there is a compelling need for disclosure sufficient to override the privilege. *See Order, State v. Bernard*, No. 94-2133 (Pulaski County Cir. Ct., 2d Div., Feb. 21, 1995); *Order, First Commercial Trust v. Aldridge*, No. 94-3006 (Pulaski County Cir. Ct., 2d Div., Dec. 12, 1994); *Order, State v. Echols*, No. CR 93-450A (Craighead County Cir. Ct., Mar. 11, 1994).

#### **2. Material unavailable from other sources**

Under the *Saxton* rule, the party seeking disclosure is required to demonstrate a reasonable effort to discover the information from other sources before asserting the need to breach the privilege. In *Saxton*, the court noted that the trial court properly denied the plaintiff's motion to compel discovery in part because he failed "to make a reasonable effort to determine the informant's identity" on his own. *Saxton*, 246 Ark. at 136, 569 S.W.2d at 117.

##### **a. How exhaustive must search be?**

The Arkansas Supreme Court has required a "reasonable effort" to discover the conditionally privileged information from other sources. It has not addressed the issue of an exhaustive search.

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

There is no precedent stating what evidence a party must show to prove a "reasonable effort" to determine a source's identity prior to issuing a subpoena to a reporter.

##### **c. Source is an eyewitness to a crime**

The Arkansas Supreme Court has not addressed whether the information obtained from a source who was an eyewitness or participant in a crime is by definition "unavailable" from any other source because it is unique eyewitness evidence.

### **3. Balancing of interests**

No case has expressly articulated a balancing of interests test. However, the shield statute seems to indicate a balancing of interests between the confidentiality of the reporter's sources and the other party's interest in disclosure, particularly in the context of a defamation lawsuit. *See Williams*, 96 F.R.D. at 665.

#### **4. Subpoena not overbroad or unduly burdensome**

There is no specific requirement that a court look to whether the subpoena is overly broad or unduly burdensome, but such a determination is within the court's discretion and may be raised by the reporter or publisher. In *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979), the Supreme Court affirmed the trial court's quashing a subpoena *duces tecum* issued to the Associated Press, in the course of a change of venue motion in a capital murder case, to produce articles its reporters had written. The Court stated that the evidence showed that the AP had published between 250 and 300 stories on the case that went to all of its subscribers in the state. The court ruled that requiring the AP to accumulate all of those stories, which the AP claimed would take more than 40 hours, would be overly burdensome, particularly in light of the fact that the stories would have been repetitive and of no real value to the jury. *Id.* at 888-89, 582 S.W.2d at 921.

#### **5. Threat to human life**

The Arkansas Supreme Court has not addressed whether the courts must weigh whether the matter subpoenaed involves a threat to human life.

#### **6. Material is not cumulative**

A subpoena is more likely to be quashed if the material or information sought would be merely repetitive or cumulative. *See Ruiz, supra.*

#### **7. Civil/criminal rules of procedure**

The rules for challenging a subpoena are the same regardless of the ground on which it is challenged, including the grounds that it is overbroad, unduly burdensome or frivolous. A motion to quash a subpoena *duces tecum* should be filed within ten (10) days after receiving the subpoena or at any time before the time stated for compliance if that time is fewer than ten days. Ark. R. Civ. P. 45(e). A motion to quash a subpoena to compel testimony also should be filed in a timely manner. The same applies whether the matter is a civil case or a criminal case.

#### **8. Other elements**

The Arkansas Supreme Court has not enunciated any other elements that must be met before the privilege can be overcome.

### **C. Waiver or limits to testimony**

#### **1. Is the privilege waivable at all?**

No cases specifically address whether the privilege is waivable. However, an inference that the reporter may waive it can be drawn from *Saxton v. Arkansas Gazette Co.*, 264 Ark. 133, 569 S.W.2d 155 (1978). There, the court ruled that the reporter had not waived the privilege when she voluntarily disclosed the identity of someone she thought was her anonymous source, which later was found to be incorrect, to her editor and a deputy prosecuting attorney on the condition that the name be kept under the strictest confidence.

#### **2. Elements of waiver**

##### **a. Disclosure of confidential source's name**

The statute clearly extends the privilege to editors, *see* Ark. Code Ann. § 16-85-510 (Michie 1987), and *Saxton* indicates that a reporter who reveals the name of a confidential source to her editor has not by that act waived the privilege. *See Saxton*, 264 Ark. at 136-37, 569 S.W.2d at 117. Indeed, revealing the name of a confidential source to one's editor can be seen as a duty to one's employer imposed on the reporter. *See generally Manson v. Little Rock Newspapers, Inc.*, 42 F. Supp. 2d 856 (E.D. Ark. 1999) (an employment-discrimination case).

##### **b. Disclosure of non-confidential source's name**

No cases state whether the disclosure of non-confidential sources is sufficient to waive the privilege. Moreover, it seems unlikely that the court would construe such an act to constitute a waiver in light of the plain language of the statute and the court's reasoning in *Saxton*.

### **c. Partial disclosure of information**

There are no cases addressing whether a reporter who has partially disclosed confidential information has waived the privilege as to the remaining, undisclosed information.

### **d. Other elements**

There are no cases in which the court has addressed any other circumstances by which the reporter will be deemed to have waived the privilege through the reporter's own actions.

## **3. Agreement to partially testify act as waiver?**

There are no cases in which the Arkansas Supreme Court has addressed whether a reporter's agreement to provide limited testimony is deemed a waiver of the privilege. Trial court judges usually require a subpoenaed reporter to confirm that the reporter's article is true and accurate as published but will not permit any party to question the reporter beyond that point, and the testimony required by the trial judge is not deemed to be a waiver of the privilege.

## **VII. What constitutes compliance?**

### **A. Newspaper articles**

Under the Arkansas Rules of Evidence, newspaper articles are deemed to be self-authenticated so that no extrinsic evidence of authenticity is necessary to prove that the article is what it purports to be. Ark. R. Evid. 902(6).

### **B. Broadcast materials**

There are no cases or court rules that set out special requirements regarding the use or authentication of broadcast materials at trial. In the absence of special requirements, the use of the materials should be governed by general evidentiary rules and standards for admissibility.

### **C. Testimony vs. affidavits**

There are no cases stating whether there must be direct witness testimony or whether a sworn affidavit will suffice to confirm that a published article is accurate and true as published.

### **D. Non-compliance remedies**

#### **1. Civil contempt**

The Arkansas Legislature rewrote ARK. CODE ANN. § 16-43-206 and removed the punishments for a civil contempt citation. See Acts of 2005, Act 1994, § 315. The statute now states:

A witness imprisoned or fined for contempt by an officer before whom his or her deposition is being taken may apply to the circuit judge, who shall have power to discharge the witness if it appears that the imprisonment is illegal.

The amended statute creates uncertainty as to the current punishments for a civil contempt citation.

#### **a. Fines**

Fines for civil contempt under the statute are capped at thirty dollars.

#### **b. Jail**

Persons imprisoned for failure to testify can remain there for as long as they refuse to comply with the subpoena or until there is a final disposition of the case in which testimony was sought.

#### **2. Criminal contempt**

The purpose of criminal contempt is to preserve the power of the court and vindicate its dignity, and punish a person for disobeying a court order. *See Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000). The criminal contempt statute, Ark. Code Ann. § 16-10-108, states that the punishments for a criminal contempt citation "may be by fine or imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of the court. However, the fines shall in no case exceed the sum of fifty dollars (\$50.00) nor the imprisonment ten (10) days." There are no reported cases where a reporter has been subject to a criminal contempt citation in Arkansas.

### 3. Other remedies

There are no reported cases in Arkansas where a court has imposed an alternative remedy, such as default judgments against the media, presumptions of malice or bad faith, or presumptions that there is no source.

## VIII. Appealing

### A. Timing

#### 1. Interlocutory appeals

Generally, an order denying a protective order or motion to quash a subpoena is not a final order for appeal purposes. *See Ark. R. App. P. 2(a)*; *see also Matter of Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992) (stating that the denial of the executive director of state Judicial Discipline and Disability Commission for a protective order prohibiting disclosure of confidential documents to the prosecuting attorney was not a final order from which an appeal could be taken). However, the court also has allowed an interlocutory appeal of an order compelling the discovery of a church's financial data. *See Gipson v. Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986) (stating that if the appellants had complied with the order, and then the order was overturned on a later appeal, the appellants could not have been put back in their former condition). "[A] final judgment or decision is one that finally adjudicated the rights of the parties, putting it beyond the power of the court which made it to place the parties in their original positions." *Estate of Hastings v. Planters & Stockmen Bank*, 296 Ark. 409, 412, 757 S.W.2d 546, 548 (1988).

#### 2. Expedited appeals

Under Arkansas procedure, when a judge enters an order to disclose protected information, the objecting party may petition the Arkansas Supreme Court for a writ of certiorari to correct the proceeding in the lower court where it is apparent from the face of the record that there has been a plain, clear and gross abuse of discretion by the trial court and an appeal would not provide an adequate remedy. *See, e.g., Zimmerman, supra*, at 777, 20 S.W.3d at 304; *Lupo v. Lineberger*, 313 Ark. 315, 318, 855 S.W.2d 293, 295 (1993). A party served with a subpoena also may petition the Court for a writ of prohibition if the lower court is wholly without jurisdiction. *See Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 22, 931 S.W.2d 426, 429 (1996).

### B. Procedure

#### 1. To whom is the appeal made?

Rule 1-2 of the Rules of the Arkansas Supreme Court and Court of Appeals states that all appeals shall be filed first with the Court of Appeals, with certain exceptions which include all appeals involving the interpretation and construction of the Arkansas Constitution. The Arkansas Supreme Court also may, in its discretion, reassign a case to itself from the Arkansas Court of Appeals. Most appeals involving media parties are heard by the Supreme Court because they involve issues under the Arkansas Constitution. Media cases can also reach the Supreme Court by petitions for extraordinary writs, which must be filed in the Supreme Court. *See Ark. Sup. Ct. R. 1-2*; Ark. const. art 7, § 4.

In November 2000, Arkansas voters approved Amendment 80 to the Arkansas Constitution, which revised the judicial article. One significant change in the amendment was the abolition of separate courts of law and equity. Under Amendment 80, circuit courts are the basic trial courts of original jurisdiction. Matters decided in the circuit courts are appealable as a matter of right to either the Court of Appeals or the Supreme Court, pursuant to Rule 1-2. District courts are inferior trial courts with limited jurisdiction. Cases heard by district courts are appealable by right to the circuit courts for a trial *de novo*.

## 2. Stays pending appeal

Rule 8 of the Arkansas Rules of Appellate Procedure—Civil requires that a party seeking a stay pending appeal attach a *supersedeas* bond, which requires the appellant pay to the appellee all the costs and damages if the court affirms against the appellant. The *supersedeas* bond must be of sufficient amount as to cover all of the costs and damages, including interest, that may result from the appeal. See *Jameson v. Johnson*, 343 Ark. 272, 33 S.W.3d 140 (2000). Failure to submit the *supersedeas* bond with the motion seeking a stay pending appeal will result in the motion's being denied without consideration of its merits. See *Wayne Alexander Trust v. City of Bentonville*, 345 Ark. 577, 47 S.W.3d 262 (2001).

## 3. Nature of appeal

Appeals to the appellate courts in Arkansas from a final order in a lower court are permitted as a matter of right. Petitions for extraordinary writs are to be made to the Arkansas Supreme Court. The petitioner may also request an expedited review of the matter, but it is uncommon except in election cases for the court to grant an expedited review.

## 4. Standard of review

Typically, an appellate court will not reverse a lower court's finding of *fact* unless that finding was clearly erroneous. The Court reviews a lower court's ruling of law *de novo*.

Issues of statutory construction are reviewed by the Arkansas Supreme Court *de novo*, as it is the court's function to interpret statutes. *Ghegan & Ghegan, Inc. v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001). While the court is not bound by a lower court's ruling on a statute's meaning, in the absence of a showing that the trial court erred, the lower court's interpretation will be accepted as correct on appeal. *Mayberry v. Flowers*, 2002 WL 122746 (Jan. 31, 2002).

Where a party is punished for civil contempt, the appellate court will not reverse unless the trial court's order is arbitrary or against the weight of the evidence. *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001). However, where a person is held in contempt for failure or refusal to abide by a judge's order, a reviewing court is not obliged to look behind the order to determine whether it is valid. *Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000). In the case of criminal contempt, the standard of review requires the appellate court to view the record in the light most favorable to the trial judge's decision and to sustain that decision if it is supported by substantial evidence and reasonable inferences. *Etoch v. Simes*, 340 Ark. 449, 10 S.W.3d 866 (2000).

## 5. Addressing mootness questions

The Arkansas Supreme Court has stated numerous times that it will not address moot issues except under limited circumstances. The Court has stated that its duty is to decide actual controversies and that an issue is moot when it has no legal effect on an existing controversy. *Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990). The Court will accept an appeal of a moot issue if the issues raised are likely to recur. See *Camden Community Dev. Corp. v. Sutton*, 339 Ark. 368, 5 S.W.3d 439 (1999). The instances in which the Court has accepted such cases, however, are rare. There are no reported cases specifically addressing a reporter's privilege once the matter in which the privilege was asserted is concluded.

## 6. Relief

An appellate court can dismiss a contempt citation outright if it finds a lack of evidence to support the trial court's finding of contempt. *Atkinson v. Lofton*, 311 Ark. 56, 842 S.W.2d 425 (1992). The Court also can modify the punishment aspect of the contempt order. *Hart v. McChristian*, 71 Ark. App. 178, 36 S.W.3d 357 (2000).

## IX. Other issues

### A. Newsroom searches

There are no reported Arkansas cases addressing the federal Privacy Protection Act, 42 U.S.C. § 2000aa (1994), in the context of a newsroom search or the seizure of film or videotapes.

## **B. Separation orders**

There is no Arkansas case law, statute or court rule that allows for a "separation order" or any other procedural device to allow a reporter who also will be a witness to remain in the courtroom to cover a proceeding once "the rule" ordering witnesses out of the courtroom has been invoked. Some news organizations have internal rules prohibiting a reporter from covering a proceeding at which he may be called as a witness.

## **C. Third-party subpoenas**

Part of the burden on a party seeking disclosure of a source is that he must demonstrate that he has made a reasonable effort to determine the identity of a source prior to seeking to disclosure from the reporter. *Saxton, supra*. There are no reported cases in Arkansas that have dealt with any attempt by a government official or party opponent to subpoena the telephone records or other records of a news organization.

## **D. The source's rights and interests**

There are no reported cases in Arkansas in which a source has attempted to intervene anonymously to prevent disclosure of his identity. Nor are there any reported cases in which a source has sued a media defendant once the source's identity has been revealed.