REPORTER'S PRIVILEGE: ARIZONA

The Reporters Committee for Freedom of the Press

A chapter from our comprehensive compendium of information on the reporter's privilege —the right not to be compelled to testify or disclose sources and information in court — in each state and federal circuit.

The complete project can be viewed at
www.rcfp.org/privilege

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The Reporter's Privilege Compendium: An Introduction

Since the first edition of this guide was published in 2002, it would be difficult to say that things have gotten better for reporters faced with subpoenas. Judith Miller spent 85 days in jail in 2005 for refusing to disclose her sources in the controversy over the outing of CIA operative Valerie Plame. Freelance videographer Josh Wolf was released after 226 days in jail for refusing to testify about what he saw at a political protest. And at the time of this writing, former *USA Today* reporter Toni Locy is appealing her contempt conviction, which was set to cost her as much as $5,000 a day, for not revealing her sources for a story on the anthrax investigations.

This recent round of controversies underscores a problem that journalists have faced for decades: give up your source or pay the price: either jail or heavy fines. Most states and federal circuits have some sort of reporter's privilege —the right to refuse to testify —that allows journalists to keep their sources confidential. But in every jurisdiction, the parameters of that right are different. Sometimes, the privilege is based on a statute enacted by the legislature —a shield law. In others, courts have found the privilege based on a constitutional right. Some privileges cover non-confidential information, some don't. Freelancers are covered in some states, but not others.

In addition, many reporters don't work with attorneys who are familiar with this topic. Even attorneys who handle a newspaper's libel suits may not be familiar with the law on the reporter's privilege in the state. Because of these difficulties, reporters and their lawyers often don't have access to the best information on how to fight a subpoena. The Reporters Committee for Freedom of the Press decided that something could be done about this, and thus this project was born. Compiled by lawyers who have handled these cases an d helped shape the law in their states and federal circuits, this guide is meant to help both journalists who want to know more about the reporter's privilege and lawyers who need to know the ins and outs of getting a subpoena quashed.

Journalists should note that reading this guide is not meant as a substitute for working with a licensed attorney in your state when you try to have a subpoena quashed. You should always consult an attorney before trying to negotiate with a party who wants to obtain your testimony or when appearing in court to get a subpoena quashed or testifying. If your news organization does not have an attorney, or if you are not affiliated with an established organization, the Reporters Committee can help you try to find an attorney in your area.

Above the law?

Outside of journalism circles, the reporter's privilege suffers from an image problem. Critics often look at reporter's shield laws and think that journalists are declaring that they are "above the law," violating the understood standard that a court is entitled to "every man's evidence," as courts themselves often say.

But courts have always recognized the concept of "privileges," allowing certain individuals to refuse to testify, out of an acknowledgment that there are societal interests that can trump the demand for all evidence. Journalists need to emphasize to both the courts and the public that they are not above the law, but that instead they must be able to remain independent, so that they can maintain their traditional role as neutral watchdogs and objective observers. When reporters are called into court to testify for or against a party, their credibility is harmed. Potential sources come to see them as agents of the state, or supporters of criminal defendants, or as advocates for one side or the other in civil disputes.

Critics also contend that exempting journalists from the duty to testify will be detrimental to the administration of justice, and will result in criminals going free for a lack of evidence. But 35 states and the District of Columbia have shield laws, and the Department of Justice imposes restrictions on federal agents and prosecutors who wish to subpoena journalists, and yet there has been no indication that the courts have stopped working or that justice has suffered.

Courts in Maryland, in fact, have managed to function with a reporter's shield law for more than a century. In 1896, after a reporter was jailed for refusing to disclose a source, a Baltimore journalists' club persuaded the General Assembly to enact legislation that would protect them from having to reveal sources' identities in court. The statute has been amended a few times —mainly to cover more types of information and include broadcast journalists once that medium was created. But the state has never had the need to rescind the protection.

And the privilege made news internationally in December 2002 when the appeals court of the United Nations International Criminal Tribunal decided that a qualified reporter's privilege should be applied to protect war correspondents from being forced to provide evidence in prosecutions before the tribunal.

The hows & whys of the reporter's privilege

In the course of gathering news, journalists frequently rely on confidential sources. Many sources claim that they will be subject to retribution for exposing matters of public importance to the press unless their identity remains confidential.

Doctor-patient, lawyer-client and priest-penitent relationships have long been privileged, allowing recipients to withhold confidential information learned in their professional capacity. However, the reporter's privilege is much less developed, and journalists are frequently asked to reveal confidential sources and information they have obtained during newsgathering to attorneys, the government and courts. These "requests" usually come from attorneys for the government or private litigants as demands called subpoenas.

In the most recent phase of a five-year study on the incidence of subpoenas served on the news media, *Agents of Discovery*, The Reporters Committee for Freedom of the Press reported that 1,326 subpoenas were served on 440 news organizations in 1999. Forty-six percent of all news media responding said they received at least one subpoena during 1999.

In criminal cases, prosecutors argue that reporters, like other citizens, are obligated to provide relevant evidence concerning the commission of a crime. Criminal defendants argue that a journalist has information that is essential to their defense, and that the Sixth Amendment right to a fair trial outweighs any First Amendment right that the reporter may have. Civil litigants may have no constitutional interest to assert, but will argue that nevertheless they are entitled to all evidence relevant to their case.

When reporters challenge subpoenas, they argue that they must be able to promise confidentiality in order to obtain information on matters of public importance. Forced disclosure of confidential or unpublished sources and information will cause individuals to re-

fuse to talk to reporters, resulting in a "chilling effect" on the free flow of information and the public's right to know.

When asked to produce their notes, documents, or other unpublished material obtained during news gathering, journalists argue that these subpoenas intrude on the editorial process, and thus violate their First Amendment right to speak without fear of state interference. Some litigants who request information from the media are simply lazy. Rather than investigating to find appropriate witnesses, these litigants find it simpler and cheaper to compel journalists to reveal their sources or to hand over information.

But journalists also have legitimate reasons to oppose subpoenas over published, non-confidential information. Responding to such subpoenas consumes staff time and resources that should be used for reporting and editing.

If a court challenge to a subpoena is not resolved in the reporter's favor, he or she is caught between betraying a source or risking a contempt of court citation, which most likely will include a fine or jail time.

Most journalists feel an obligation to protect their confidential sources even if threatened with jail time. When appeals have been exhausted, the decision to reveal a source is a difficult question of journalism ethics, further complicated by the possibility that a confidential source whose identity is revealed may try to sue the reporter and his or her news organization under a theory of promissory estoppel, similar to breach of contract. The U.S. Supreme Court has held that such suits do not violate the First Amendment rights of the media. (*Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991))

The sources of the reporter's privilege

First Amendment protection. The U.S. Supreme Court last considered a constitutionally based reporter's privilege in 1972 in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Justice Byron White, joined by three other justices, wrote the opinion for the Court, holding that the First Amendment does not protect a journalist who has actually witnessed criminal activity from revealing his or her information to a grand jury. However a concurring opinion by Justice Lewis Powell and a dissenting opinion by Justice Potter Stewart recognized a qualified privilege for reporters. The privilege as described by Stewart weighs the First Amendment rights of reporters against the subpoenaing party's need for disclosure. When balancing these interests, courts should consider whether the information is relevant and material to the party's case, whether there is a compelling and overriding interest in obtaining the information, and whether the information could be obtained from any source other than the media. In some cases, courts require that a journalist show that he or she promised a source confidentiality.

Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dissented from the Court's opinion and said that the First Amendment provided journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority. Although the high court has not revisited the issue, almost all the federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege.

However, some courts, including the federal appeals court in New Orleans (5th Cir.), have recently interpreted *Branzburg* as holding that the First Amendment protects the media from subpoenas only when the subpoenas are being used to harass the press. (*United States v. Smith*, 135 F.3d 963 (5th Cir. 1998)).

State constitutions, common law and court rules. Many states have recognized a reporter's privilege based on state law. For example, New York's highest court recognized a qualified reporter's privilege under its own state constitution, protecting both confidential and non-confidential materials. (*O'Neill v. Oakgrove Construction Inc.*, 71 N.Y.S.2d 521 (1988)). Others states base a reporter's privilege on common law. Before the state enacted a shield law in 2007, the Supreme Court in Washington state recognized a qualified reporter's privilege in civil cases, later extending it to criminal trials. (*Senear v. Daily Journal-American*, 97 Wash.2d 148, 641 P.2d 1180 (1982), *on remand*, 8 Media L. Rep. 2489 (Wash. Super. Ct. 1982)). And in a third option, courts can create their own rules of procedure. The Utah Supreme Court adopted a reporter's privilege in its court rules in 2008, as did the New Mexico high court years before.

Even in the absence of an applicable shield law or court-recognized privilege, journalists occasionally have been successful in persuading courts to quash subpoenas based on generally-applicable protections such as state and federal rules of evidence, which allow the quashing of subpoenas for information that is not relevant or where the effort to produce it would be too cumbersome.

Statutory protection. In addition to case law, 35 states and the District of Columbia have enacted statutes —shield laws —that give journalists some form of privilege against compelled production of confidential or unpublished information. The laws vary in detail and scope from state to state, but generally give greater protection to journalists than the state or federal constitution, according to many courts.

However, shield laws usually have specific limits that exclude some journalists or certain material from coverage. For instance, many of the statutes define "journalist" in a way that only protects those who work full-time for a newspaper or broadcast station. Freelance writers, book authors, Internet journalists, and many others are left in the cold, and have to rely on the First Amendment for protection. Broad exceptions for eyewitness testimony or for libel defendants also can remove protection from journalists, even though these situations often show the greatest need for a reporter's privilege.

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

A subpoena is a notice that you have been called to appear at a trial, deposition or other court proceeding to answer questions or to supply specified documents. A court may later order you to do so and impose a sanction if you fail to comply.

Do I have to respond to a subpoena?

In a word, yes.

Ignoring a subpoena is a bad idea. Failure to respond can lead to charges of contempt of court, fines, and in some cases, jail time. Even a court in another state may, under some circumstances, have authority to order you to comply with a subpoena.

What are my options?

Your first response to a subpoena should be to discuss it with an attorney if at all possible. Under no circumstances should you comply with a subpoena without first consulting a lawyer. It is imperative that your editor or your news organization's legal counsel be advised as soon as you have been served.

Sometimes the person who subpoenaed you can be persuaded to withdraw it. Some attorneys use subpoenas to conduct "fishing expeditions," broad nets cast out just to see if anything comes back. When they learn that they will have to fight a motion to quash their subpoenas, lawyers sometimes drop their demands altogether or agree to settle for less than what they originally asked for, such as an affidavit attesting to the accuracy of a story rather than in-court testimony.

Some news organizations, particularly broadcasters whose aired videotape is subpoenaed, have deflected burdensome demands by agreeing to comply, but charging the subpoenaing party an appropriate fee for research time, tape duplication and the like.

If the person who subpoenaed you won't withdraw it, you may have to fight the subpoena in court. Your lawyer will file a motion to quash, which asks the judge to rule that you don't have to comply with the subpoena.

If the court grants your motion, you're off the hook —unless that order is itself appealed. If your motion isn't granted, the court will usually order you to comply, or at the very least to disclose the demanded materials to the court so the judge may inspect them and determine whether any of the materials must be disclosed to the party seeking them. That order can itself be appealed to a higher court. If all appeals are unsuccessful, you could face sanctions if you continue to defy the court's order. Sanctions may include fines imposed on your station or newspaper or on you personally, or imprisonment.

In many cases a party may subpoena you only to intimidate you, or gamble that you will not exercise your rights. By consulting a lawyer and your editors, you can decide whether to seek to quash the subpoena or to comply with it. This decision should be made with full knowledge of your rights under the First Amendment, common law, state constitution or statute.

They won't drop it. I want to fight it. Do I have a chance?

This is a complicated question.

If your state has a shield law, your lawyer must determine whether it will apply to you, to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, or if your situation seems to fall outside its scope, the state's courts may have recognized some common law or constitutional privilege that will protect you. Each state is different, and many courts do not recognize the privilege in certain situations.

Whether or not a statutory or other privilege protects you in a particular situation may depend on a number of factors. For example, some shield laws provide absolute protection in some circumstances, but most offer only a qualified privilege. A qualified privilege generally creates a presumption that you will not have to comply with a subpoena, but it can be overcome if the subpoenaing party can show that information in your possession is essential to the case, goes to the heart of the matter before the court, and cannot be obtained from an alternative, non-journalist source.

Some shield laws protect only journalists who work full-time for a newspaper, news magazine, broadcaster or cablecaster. Freelancers, book authors, scholarly researchers and other "non-professional" journalists may not be covered by some statutes.

Other factors that may determine the scope of the privilege include whether the underlying proceeding is criminal or civil, whether the identity of a confidential source or other confidential information is involved, and whether you or your employer is already a party to the underlying case, such as a defendant in a libel suit.

The decision to fight may not be yours alone. The lawyer may have to consider your news organization's policy for complying with subpoenas and for revealing unpublished information or source names. If a subpoena requests only published or broadcast material, your newspaper or station may elect to turn over copies of these materials without dispute. If the materials sought are unpublished, such as notes or outtakes, or concern confidential sources, it is unlikely that your employer has a policy to turn over these materials —at least without first contesting the subpoena.

Every journalist should be familiar with his or her news organization's policy on retaining notes, tapes and drafts of articles. You should follow the rules and do so consistently. If your news organization has no formal policy, talk to your editors about establishing one. Never destroy notes, tapes, drafts or other documents once you have been served with a subpoena.

In some situations, your news organization may not agree that sources or materials should be withheld, and may try to persuade you to reveal the information. If the interests of the organization differ from yours, it may be appropriate for you to seek separate counsel.

Can a judge examine the information before ordering me to comply with a subpoena?

Some states require or at least allow judges to order journalists to disclose subpoenaed information to them before revealing it to the subpoenaing party. This process, called *in camera* review, allows a judge to examine all the material requested and determine whether it is sufficiently important to the case to justify compelled production. The state outlines will discuss what is required or allowed in your state.

Does federal or state law apply to my case?

A majority of the subpoenas served on reporters arise in state cases, with only eight percent coming in federal cases, according to the Reporters Committee's 1999 subpoena survey, *Agents of Discovery.*

State trial courts follow the interpretation of state constitutional, statutory or common law from the state's highest court to address the issue. When applying a First Amendment privilege, state courts may rely on the rulings of the United States Supreme Court as well as the state's highest court.

Subpoenas in cases brought in federal courts present more complicated questions. Each state has at least one federal court. When a federal district court is asked to quash a subpoena, it may apply federal law, the law of the state in which the federal court sits, or even the law of another state. For example, if a journalist from one state is subpoenaed to testify in a court in another state, the enforcing court will apply the state's "choice of law" rules to decide which law applies.

Federal precedent includes First Amendment or federal common law protection as interpreted by the United States Supreme Court, rulings of the federal circuit court of appeals for the district court's circuit, or earlier decisions by that same district court. There is no federal shield law, although as of May 2008 a bill had passed the House and was moving to the Senate floor.

The federal district court will apply the state courts' interpretation of state law in most circumstances. In the absence of precedent from the state's courts, the federal district court will follow prior federal court interpretations of the state's law. In actions involving both federal and state law, courts differ on whether federal or state law will apply.

Twelve federal circuits cover the United States. Each circuit has one circuit (appellate) court, and a number of district (trial) courts. The circuit courts must follow precedent established by the U.S. Supreme Court, but are not bound by other circuits' decisions.

Are there any limits on subpoenas from federal agents or prosecutors?

Ever since 1973, the Attorney General of the United States has followed a set of guidelines limiting the circumstances in which any agents or employees of the Department of Justice, including federal prosecutors and FBI agents, may issue subpoenas to members of the news media or subpoena journalists' telephone records from third parties. *(28 C.F.R. 50.10)*

Under the guidelines, prosecutors and agents must obtain permission from the Attorney General before subpoenaing a member of the news media. Generally, they must exhaust alternative sources for information before doing so. The guidelines encourage negotiation with the news media to avoid unnecessary conflicts, and specify that subpoenas should not be used to obtain "peripheral, nonessential or speculative" information.

In addition, journalists should not be questioned or arrested by Justice employees without the prior approval of the Attorney General (unless "exigent circumstances preclude prior approval") and agents are not allowed to seek an arrest warrant against a journalist or present evidence to a grand jury against a journalist without the same approval.

Employees who violate these guidelines may receive an administrative reprimand, but violation does not automatically render the subpoena invalid or give a journalist the right to sue the Justice Department.

The guidelines do not apply to government agencies that are not part of the federal Department of Justice. Thus agencies like the National Labor Relations Board are not required to obtain the Attorney General's permission before serving a subpoena upon a member of the news media.

Do the news media have any protection against search warrants?

Subpoenas are not the only tool used to obtain information from the news media. Sometimes police and prosecutors use search warrants, allowing investigators to enter newsrooms and search for evidence directly rather than merely demanding that journalists release it.

The U.S. Supreme Court held that such searches do not violate the First Amendment. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Congress responded by passing the federal Privacy Protection Act in 1980. *(42 U.S.C. 2000aa)*

In general, the Act prohibits both federal and state officers and employees from searching or seizing journalists' "work product" or "documentary materials" in their possession. The Act provides limited exceptions that allow the government to search for certain types of national security information, child pornography, evidence that the journalists themselves have committed a crime, or materials that must be immediately seized to prevent death or serious bodily injury. "Documentary materials" may also be seized if there is reason to believe that they would be destroyed in the time it took to obtain them using a subpoena, or if a court has ordered disclosure, the news organization has refused and all other remedies have been exhausted.

Even though the Privacy Protection Act applies to state law enforcement officers as well as federal authorities, many states, including California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas and Washington, have their own statutes providing similar or even greater protection. *(See section IX.A. in the state outlines.)* Other states, such as Wisconsin, require that search warrants for documents be directed only at parties suspected of being "concerned in the commission" of a crime, which generally exempts journalists.

If law enforcement officers appear with a warrant and threaten to search your newsroom unless you hand over specific materials to them, contact your organization's attorney *immediately*. Ask the officers to delay the search until you have had an opportunity to confer with your lawyer. If the search proceeds, staff photographers or a camera crew should record it.

Although the news organization staff may not impede the search, they are not required to assist with it. But keep in mind that the warrant will probably list specific items to be seized, and you may decide it is preferable to turn over a particular item rather than to allow police to ransack desks and file cabinets or seize computers.

After the search is over, immediately consult your attorney about filing a suit in either federal or state court. It is important to move quickly, because you may be able to obtain emergency review by a judge in a matter of hours. This could result in your seized materials being taken from the law enforcement officials and kept under seal until the dispute is resolved.

Another option allows you to assert your claim in an administrative proceeding, which may eventually lead to sanctions against the official who violated the act. You would not receive damages, however. Your attorney can help you decide which forum will offer the best remedy in your situation.

Whichever option you choose, a full hearing will vindicate your rights in nearly every case, and you will be entitled to get your materials back, and in some cases, monetary damages including your attorney's fees.

The Reporter's Privilege Compendium: A User's Guide

This project is the most detailed examination available of the reporter's privilege in every state and federal circuit. It is presented primarily as an Internet document (found at www.rcfp.org/privilege) for greater flexibility in how it can be used. Printouts of individual state and circuit chapters are made available for readers' convenience.

Every state and federal section is based on the same standard outline. The outline starts with the basics of the privilege, then the procedure and law for quashing a subpoena, and concludes with appeals and a handful of other issues.

There will be some variations on the standard outline from state to state. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

For our many readers who are not lawyers. This project is primarily here to allow lawyers to fight subpoenas issued to journalists, but it is also designed to help journalists understand the reporter's privilege. (Journalists should *not* assume that use of this book will take the place of consulting an attorney before dealing with a subpoena. You should contact a lawyer if you have been served with a subpoena.) Although the guides were written by lawyers, we hope they are useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a legal citation for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 F.2d 456 means the case could be found in the Federal Reports, second series, volume 123, starting at page 456. In most states, the cites will be to the official reporter of state court decisions or to the West Publishers regional reporter that covers that state.

Note that the complete citation for a case is often given only once, and subsequent cites look like this: "*Jackson* at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Because this outlines were written for each state, yet searches and comparisons result in various states and sections being taken out of the sequence in which they were written, it may not always be clear what these second references refer to. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively. You may have to work backwards through that state's outline to find the first reference in some cases.

We have encouraged the authors to avoid "legalese" to make this guide more accessible to everyone. But many of the issues are necessarily technical and procedural, and removing all the legalese would make the guides less useful to lawyers who are trying to get subpoenas quashed.

Updates. This project was first posted to the Web in December 2002. The last major update of all chapters was completed in September 2007. As the outlines are updated, the copyright notice on the bottom of the page will reflect the date of the update. All outlines will not be updated on the same schedule.

REPORTER'S PRIVILEGE COMPENDIUM

ARIZONA

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I. Introduction: History & Background

The Arizona legislature has enacted two statutes that protect reporters from the compelled disclosure of unpublished notes, outtakes and other journalistic work product. First, A.R.S. § 12-2237 (the "Arizona Shield Law") shields journalists from compelled disclosure of confidential sources. Illustratively, the Arizona Superior Court upheld a reporter's right not to produce to a grand jury notes and tape-recorded conversations with an at-large serial arsonist. *In re Hibberd*, 262 GJ 75, Feb. 26, 2001. While the unpublished decision enforced the Arizona Shield Law, the statute has been construed to apply to confidential information only.

Second, A.R.S. § 12-2214 (the "Arizona Media Subpoena Law") imposes a number of requirements on subpoenas directed to journalists and news organizations. Under the statute, a media subpoena is invalid unless accompanied by an affidavit setting forth six specific averments. The statute applies to civil and criminal subpoenas, but not grand jury subpoenas. A.R.S. § 12-2214(A), (D). It applies to confidential and non-confidential information. Among other things, it forces litigants to describe all efforts they have taken to secure the requested information elsewhere. There is scant case law interpreting the Arizona Shield Law and the Arizona Media Subpoena Law.

In addition to these protections, reporters in the Ninth Circuit enjoy a strong First Amendment privilege against third-party discovery of published and non-published journalistic work product. *See Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995). The First Amendment privilege applies in civil and criminal proceedings. *Id.*

II. Authority for and source of the right

A. Shield law statute

Arizona has two statutes that protect reporters from third-party discovery. The Arizona Shield Law protects against compelled disclosure of information that could identify a confidential source. Entitled "Reporter and informant," the statute states:

> A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed.

A.R.S. § 12-2237. The statute was enacted in 1937, and has remained largely unchanged. *Matera v. Superior Court*, 170 Ariz. 446, 449, 825 P.2d 971, 974 (Ct. App. 1992). It was re-codified under its own section in a 1960 amendment that broadened the scope of the privilege to cover broadcast as well as print media. *Matera*, 170 Ariz. at 449 n.2, 825 P.2d at 974 n.2.

In addition to the Arizona Shield Law, the Arizona Media Subpoena Law imposes a number of requirements on litigants seeking to compel discovery from the press. The Arizona Media Subpoena Law states:

> A. A subpoena for the attendance of a witness or for production of documentary evidence issued in a civil or criminal proceeding and directed to a person engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public, and which relates to matters within these news activities, shall have attached to it an affidavit of a person with a direct interest in the matters sought which states all of the following:
>
> 1. Each item of documentary and evidentiary information sought from the person subpoenaed.
>
> 2. That the affiant or his representative has attempted to obtain each item of information from all other available sources, specifying which items the affiant has been unable to obtain.
>
> 3. The identity of the other sources from which the affiant or his representative has attempted to obtain the information.

4. That the information sought is relevant and material to the affiant's cause of action or defense.

5. That the information sought is not protected by any lawful privilege.

6. That the subpoena is not intended to interfere with the gathering, writing, editing, publishing, broadcasting and disseminating of news to the public as protected by the first amendment, Constitution of the United States, or by article II, section 6, Constitution of Arizona.

B. A subpoena served on a person described in subsection A without the required affidavit attached to it has no effect.

C. If the affidavit is controverted or a motion to quash the subpoena or for a protective order is filed by the person subpoenaed, the command of the subpoena shall be postponed until a hearing is held and the court enters an order. After the hearing the command of the subpoena shall be carried out in accordance with the order of this court.

D. This section does not apply to a subpoena for the attendance of a witness or the production of documentary evidence issued by or on behalf of a grand jury or a magistrate during an investigative criminal proceeding.

A.R.S. § 12-2214.

When the committees of the Senate and House of Representatives were contemplating the Arizona Media Subpoena Law, the only testifying witnesses were employees of Arizona's daily newspapers and television stations. *Matera*, 170 Ariz. at 448, 825 P.2d at 973. In *Matera*, the court held that A.R.S. § 12-2214 was intended to apply to persons who gather and disseminate news on a regular basis — not to the author of a work of non-fiction.

The *Matera* court observed that "the purpose of the Media Subpoena Law is to protect members of the media from 'fishing expeditions' that would interfere with the ongoing business of gathering and reporting news to the public. The statute balances the needs of media personnel against the needs of litigants, tipping the balance in favor of interference with newsgathering only upon a showing of need, proven by affidavit." 170 Ariz. at 448, 825 P.2d at 973. The court differentiated the statute from the Arizona Shield Law, and held that "the statute was not designed to protect the information collected, but rather was designed to aid a specific class of persons — members of the news media — in performing their jobs free from the inconvenience of being used as surrogate investigators for private litigants." *Id. See also Bartlett v. Superior Court*, 150 Ariz. 178, 183, 722 P.2d 346, 351 (Ct. App. 1986) ("[I]t was the intention of the legislature in enacting A.R.S. § 12-2214 to protect the media from being turned into 'litigation consultants' by lawyers who, though the use of a subpoena, are able to enlist the aid of the media in preparing their cases.")

B. State constitutional provision

The Arizona Constitution does not have an express shield law provision, and one has not been implied from its free speech provision. That provision, Article II, § 6 of the Arizona Constitution, states: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." On occasion, the Arizona Supreme Court has given broader scope to Article II, § 6 than to the First Amendment. *See, e.g., Mountain States Telephone and Telegraph Co. v. Ariz. Corp. Commission*, 160 Ariz. 350, 354, 773 P.2d 455, 469 (1989) (striking down under Article II, § 6 an administrative order that required a telephone company to limit access to "Scooplines" — the precursor to 1-900 numbers — only to customers who had pre-subscribed for such services); *Phoenix Newspapers v. Superior Court*, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966) (Article II, § 6 protected reporters from contempt proceedings arising from their violation of a gag order in a criminal murder case; "[t]he words of the Arizona Constitution are too plain for equivocation. The right of every person to freely speak, write, and publish may not be limited."). The Court has instructed that when both the Arizona and U.S. Constitutions apply to the facts of a case, and Article II of the Arizona Constitution is sufficient to resolve the dispute, there is no need to "reach the further question presented concerning the application of the First and Fourteenth Amendments." *Phoenix Newspapers*, 101 Ariz. at 259, 418 P.2d 596.

Nevertheless, no reported decision has applied Article II to a dispute involving the reporter's privilege.

C. Federal constitutional provision

In *Bartlett*, the Arizona Court of Appeals (Arizona's intermediate appellate court) recognized a qualified First Amendment privilege for the protection of confidential information. Based on its analysis of *Branzburg v. Hayes*, 408 U.S. 665 (1972), the court wrote: "[T]he claim of privilege depends, in the first instance, upon the existence of a confidential relationship such that compliance with a subpoena would either result in disclosure of confidential information or sources or would seriously interfere with the news gathering and editorial process." 150 Ariz. at 182, 722 P.2d at 350. However, the court held that the constitutional privilege did *not* apply to a videotape copy of a news report that had been broadcast to the public and reviewed on request by counsel for the party who subpoenaed the tape. *Id.*

In *Matera*, the court agreed with *Bartlett's* "assessment of the reporter's privilege as it exists in Arizona." 170 Ariz. at 450, 825 P.2d at 975. It then held that information gathered by an author working on a book about an undercover informant who participated in a "sting" operation was *not* protected because disclosure would not have revealed confidential sources or information, or impeded the process of newsgathering. *Id.* The court wrote: "Matera has not, and cannot, claim that the subpoena in this case would cause him to reveal confidential sources or information, nor would the subpoena impede the gathering of information. It is only those limited situations that are protected by Arizona's qualified reporter's privilege as codified [in the Arizona Shield Law]." *Id.*

After *Bartlett* and *Matera* were decided, the Ninth Circuit recognized that reporters in this Circuit have a strong qualified privilege under the First Amendment that protects both confidential and non-confidential journalistic work product. In *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995), the court held that a litigant seeking unpublished information must show that the material is: "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case." *Shoen*, 48 F.3d at 416. The privilege applies in civil and criminal cases, and evidence satisfying each prong of the test is necessary to compel production. *Id.* The Ninth Circuit has stated that the journalist's privilege cannot easily be defeated: "'[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.'" *Id.* (quoting *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). Although there have been no reported Arizona cases discussing the First Amendment privilege since *Shoen* was decided, the Arizona Supreme Court suggested in dicta that the reporter's privilege applies only to confidential sources. *State v. Moody*, 208 Ariz. 424, 458, 94 P.3d 1119, 1153 (2004). However, the Court referred to the reporter's privilege only in the context of A.R.S. § 12-2237 and did not discuss a First Amendment privilege. Id. ("In Arizona, a reporter has a privilege to shield a confidential source for an article. See A.R.S. § 12-2237. We agree with Moody that the reporter's privilege is not implicated in this case because [the article] did not involve a confidential source.").

D. Other sources

We have found no other state-law based sources of the reporter's privilege in Arizona.

III. Scope of protection

A. Generally

By its terms, the Arizona Shield Law, codified in A.R.S. § 12-2237, applies to "the source of information procured or obtained . . . for publication in a newspaper or for broadcasting over a radio or television station . . . ." It applies broadly to civil, criminal and grand jury matters, legislative proceedings, "or elsewhere." A.R.S. § 12-2237. Moreover, the separate Arizona Media Subpoena Law confers a number of procedural protections on the press regarding subpoenas for confidential and non-confidential information. Finally, while no reported Arizona case has addressed the privilege in recent years, the Ninth Circuit has endorsed a strong First Amendment privilege for reporters in this Circuit.

B. Absolute or qualified privilege

The Arizona Shield Law provides an absolute privilege for confidential information or sources. *See Matera*, 170 Ariz. at 450, 825 P.2d at 975 ("application of the privilege is appropriate only when the requisite confidentiality is present").

The Arizona Media Subpoena Law provides certain procedural protections to news organizations and reporters who are the subject of subpoenas for confidential and non-confidential information. However, the Arizona Media Subpoena Law provides little substantive protection. *Matera*, 170 Ariz. at 448, 825 P.2d at 973 ("The statute is not a 'shield' law" and "was not designed to protect the information collected, but rather was to designed to aid a specific class of persons — members of the media — in performing their jobs free from the inconvenience of being used as surrogate investigators for private litigants.").

C. Type of case

1. Civil

On its face, the Arizona Shield Law makes no distinction between civil and criminal proceedings. Rather, the statute applies "in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere . . . ." A.R.S. § 12-2237.

2. Criminal

The Arizona Shield Law applies to criminal proceedings. A.R.S. § 12-2237. The Arizona Media Subpoena Law applies to criminal proceedings as well. A.R.S. § 12-2214.

3. Grand jury

The Arizona Shield Law applies to proceedings "before any jury, inquisitorial body or commission . . . ." A.R.S. § 12-2237. In *In re Hibberd*, an unpublished decision, the Arizona Superior Court reaffirmed the statute's absolute protection for confidential source information in grand jury proceedings. In that case, several homes under construction in Phoenix had been destroyed by fires set by an eco-terrorist/serial arsonist. A grand jury issued a subpoena to James Hibberd, a reporter for *Phoenix New Times*, a local weekly, requiring him to produce tape-recorded conversations with the alleged arsonist, as well as unpublished notes and various electronic and computer data. The grand jury sought this information to identify the person who represented himself to the reporter to be the arsonist. The Arizona Superior Court granted the *New Times* and Hibberd's Motion to Quash.

While Hibberd had made several arguments under the First Amendment and the Arizona Constitution, the court found the Arizona Shield Law dispositive. The court rejected the assertion that the statute did not apply where the confidential source was an at-large criminal. It wrote: "This is not a close question. The state argues that sound public policy requires that this court read the legislature's plain words to exclude a person such as the arsonist from the operation of Arizona's legislatively-enacted press shield law. . . . It is not for the judicial branch to modify the plain language of a 64 year old statute because the court may believe that something else better serves the public." *In re Hibberd*, 262 GJ 75 (Feb. 26, 2001). Nevertheless, the court chastised Hibberd and *New Times* for "choos[ing] to give a public platform to a criminal, a criminal who remains on the loose and who remains a threat to the general public." *Id.* [The court's Minute Entry is posted at http://www.superiorcourt.maricopa.gov/ publicInfo/rulings/rulingsReaditem.asp?autonumb=88]

The Arizona Media Subpoena Law does not apply to grand jury proceedings. A.R.S. § 12-2214(D).

D. Information and/or identity of source

The Arizona Shield Law protects the identity of confidential sources, including information that may be used to identify such sources. *Matera*, 170 Ariz. at 450, 825 P.2d at 975 (statute applies where a subpoena would cause a journalist "to reveal confidential sources of information [or] would impede the gathering of information"); *In re Hibberd*, 262 GJ 75 (quashing subpoena for tape recordings, notes, computer and other data that could be used to identify a confidential source).

E. Confidential and/or non-confidential information

The Arizona Shield Law provides an absolute privilege for confidential information or sources. *Matera*, 170 Ariz. at 450, 825 P.2d at 975. The Arizona Supreme Court has suggested that the statute provides no protection, absolute or qualified, for non-confidential information. *Moody*, 208 Ariz. at 458, 94 P.3d at 1153.

The Arizona Media Subpoena Law provides certain procedural protections to news organizations and reporters who are the subject of subpoenas for confidential *or* non-confidential information. However, at least one court has

held that the Arizona Media Subpoena Law is not itself a substantive privilege. *Matera*, 170 Ariz. at 448, 825 P.2d at 973.

F. Published and/or non-published material

On its face, the Arizona Shield Law does not differentiate between published and non-published material. Nevertheless, in *Bartlett*, the intermediate appellate court held that a news report that had been broadcast publicly and shown to the requesting party was *not* subject to the privilege. 150 Ariz. at 182, 722 P.2d at 350.

The Arizona Media Subpoena Law applies to subpoenas both for published and unpublished material. A person seeking published information from a news organization must aver that he or she has attempted to obtain each item of information sought from "all other available sources, specifying which items the affiant has been unable to obtain." A.R.S. § 12-2214(A)(2). Moreover, the affiant must specify "the identity of the other sources from which the affiant or his representative has attempted to obtain the information." A.R.S. § 12-2214(A)(3). In Arizona, broadcast news stories are often obtainable from third-party commercial news clipping services.

G. Reporter's personal observations

The Arizona Shield Law does not expressly protect reporters who personally witness criminal activity. While this issue has not been addressed in reported Arizona cases, *Bartlett* suggests that direct, material evidence of a crime is not protected. In *Bartlett*, the court ordered production of a television news report that captured images of a car accident scene just moments after the accident had occurred, including footage of the automobile in the middle of the intersection with skid marks, and pictures of the victim being treated by paramedics. The videotape showed measurable skid marks not otherwise recorded or measured at the time of the accident. The trial court found that the videotape "would greatly aid a trier of fact . . . in assessing what the severity of the incident was." 150 Ariz. at 181, 722 P.2d at 349. The Court of Appeals agreed. 150 Ariz. at 184, 722 P.2d at 352.

In an unpublished decision, *In re Hibberd*, the Arizona Superior Court stated that a reporter's observation of a crime is not protected under the Arizona Shield Law. The court recognized that a reporter "would properly be denied the protection of § 12-2237 had he, for example, accompanied the arsonist to an arson. . . . Under those hypothetical circumstances, Hibberd would be the source of information for his reporting and no privilege would attach." *In re Hibberd*, 262 GJ 75, Feb. 26, 2001.

H. Media as a party

There is no statute or case law addressing the status of the reporter's privilege where the media is a plaintiff or defendant.

I. Defamation actions

There is no statutory or case law addressing this issue.

IV. Who is covered

In *Matera*, the Arizona Court of Appeals held that the Arizona Media Subpoena Law applies only "to persons who gather and disseminate news on an ongoing basis as part of the organized, traditional, mass media." 170 Ariz. at 448, 825 P.2d at 973. Accordingly, the court ruled that the statute did not apply to an author involved in writing a book about an undercover figure that led to criminal prosecution of several politicians, where the author was not actively and regularly engaged in gathering and reporting the news. 170 Ariz. at 448, 825 P.2d at 973.

However, the *Matera* court went on to consider the application of the Arizona Shield Law to the author, and did *not* hold the shield statute inapplicable because of the author's status. Instead, the court found that the statute did not protect the author because he failed to demonstrate that complying with the subpoena would result in the disclosure of confidential sources of information. 170 Ariz. at 450, 825 P.2d at 975.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The Arizona Shield Law expressly applies to "[a] person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station," where the person is compelled to testify or disclose "the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed." A.R.S. § 12-2237.

The statute does not define the term "reporter," and there is no statutory or case law regarding whether the statute applies to full-time reporters only, or to part-time reporters as well. A freelance journalist probably would be covered by the statute, so long as the subpoena in question requires disclosure of "the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed." *Id.*

The Arizona Media Subpoena Law covers "person[s] engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public . . . ." A.R.S. § 12-2214(A). However, under *Matera*, there is a significant risk that a freelance journalist not regularly employed by a traditional news organization might not enjoy the protection of the statute. In *Matera*, the court stated: "[T]he statute's application is limited to persons engaged in the gathering and dissemination of news to the public on a regular basis. . . . The statute balances the needs of media personnel against the needs of litigants, tipping the balance in favor of interference with the process of newsgathering only upon a showing of need, proven by affidavit. . . . [T]he statute was not designed to protect the information collected, but rather was designed to aid a specific class — members of the media — in performing their jobs free from the inconvenience of being used as surrogate investigators for private litigants." *Matera*, 170 Ariz. at 448, 825 P.2d at 974. The Arizona Supreme Court has not addressed this issue.

b. Editor

Neither the Arizona Shield Law nor the Arizona Media Subpoena Law defines the term "editor."

c. News

"News" has been defined as "a report of recent events; material reported in a newspaper or news periodical or on a newscast; matter that is newsworthy." *Matera*, 170 Ariz. at 448, 825 P.2d at 973 (citing to Webster's Ninth New Collegiate Dictionary 796 (1984)). Applying this definition to A.R.S. § 12-2214, the court determined that defendant Matera "was not actively engaged in the gathering, reporting, etc. of 'news'" when he gathered information for the sole purpose of publishing one book about an undercover "sting" participant. *Id.*

d. Photo journalist

A.R.S. §§ 12-2214 and 12-2237 do not include a definition of "photo journalist," and no reported decision addresses the issue in Arizona. In *Bartlett*, the court held that no privilege protected a television station from producing a videotape of an automobile accident victim at the accident scene. The court approved of the lower court's reasoning that "one picture is worth a thousand words." *Bartlett*, 150 Ariz. at 184, 722 P.2d at 352. If the requisite element of confidentiality had been met, however, the privilege might well have applied to protect disclosure of the videotape. *See id.* 150 Ariz. at 183, 722 P.2d at 351.

e. News organization / medium

The Arizona Shield Law expressly applies to "newspaper, radio [and] television" media. A.R.S. § 12-2237. The Arizona Media Subpoena Law includes that media, but sweeps more broadly. *See* A.R.S. § 12-2214(A) (statute applies to persons "engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public").

2. Others, including non-traditional news gatherers

See Section IV, introductory comments, *supra*.

B. Whose privilege is it?

The plain language of A.R.S. § 12-2237 suggests that the privilege belongs the reporter, not the source. Nevertheless, there is no statutory or case law in Arizona that directly addresses this issue.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special requirements regarding the timing of a subpoena directed to a member of the news media, or the manner of service. Ariz. R. Civ. P. 45, which applies to subpoenas generally, provides that "[a] party or an attorney responsible for the service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Ariz. R. Civ. P. 45(c)(1). Moreover, Ariz. R. Civ. P. 45(c)(3)(A)(i) provides that a superior court may, upon a timely motion, quash or modify a subpoena if, *inter alia*, it "fails to allow reasonable time for compliance . . . ."

2. Deposit of security

Likewise, there are no special security requirements for media subpoenas. Instead, such subpoenas are subject to the rules regarding witness fees and mileage that apply to subpoenas generally. *See* Ariz. R. Civ. P. 45(b)(1).

3. Filing of affidavit

Except in the grand jury context, the Arizona Media Subpoena Law requires that an affidavit setting forth six specific averments must accompany the subpoena. The affidavit must identify each item of information sought, attest that the material sought is relevant and material to a legal action, and state that attempts to obtain the information from alternative sources have failed. The alternative sources must be identified. Moreover, the affidavit must attest that the information sought is not protected by any lawful privilege. Finally, the affidavit must aver that the subpoena "is not intended to interfere with the gathering, writing, editing, publishing, broadcasting and disseminating of news to the public as protected by" the First Amendment and the Arizona Constitution. A.R.S. § 12-2214(A). The affidavit does not need to be filed, but it must be served with the subpoena. A.R.S. § 12-2214(B).

4. Judicial approval

A judge or magistrate need not approve a subpoena in any particular circumstances before a party can serve it. However, if the affidavit accompanying the subpoena "is controverted or a motion to quash the subpoena or for a protective order is filed by the person subpoenaed, the command of the subpoena shall be postponed until a hearing is held and an order is entered by the court." A.R.S. § 12-2214(C).

5. Service of police or other administrative subpoenas

There are no special rules regarding the use and service of other administrative subpoenas, such as police or fire investigation subpoenas. The Arizona Media Subpoena Law does not apply to grand jury subpoenas. A.R.S. § 12-2214(D).

B. How to Quash

1. Contact other party first

While contacting the other party is not expressly required, it is certainly the better practice. Often, disputed issues can be narrowed or resolved though informal communications with the subpoenaing party. The Arizona Rules of Civil Procedure strongly favor consultation before filing discovery motions. *See, e.g.*, Ariz. R. Civ. P. 37(a)(2)(C) (no motion to compel discovery "will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.").

2. Filing an objection or a notice of intent

Ariz. R. Civ. P. 45(c)(2)(B) states that any subpoenaed person may "within 14 days after the service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection and copying of any or all of the designated materials or of the premises." Ariz. R. Civ. P. 45(c)(2)(B). If such an objection is made, "the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued," and the subpoenaing party may move at any time for an order to compel after service of the objections. *Id.* An objection under this Rule need not be filed; service is sufficient.

3. File a motion to quash

a. Which court?

Ordinarily, the motion to quash or for protective order is filed in the same court that is hearing the case at issue. If a grand jury subpoena is involved, the court may open a miscellaneous action (designated with the number of the grand jury that issued the subpoena) in connection with a motion to quash or for protective order.

b. Motion to compel

A media party can shift the burden of seeking judicial intervention onto the discovering party by serving written objections within the time specified in Ariz. R. Civ. P. 45(c)(2)(B).

c. Timing

Neither the Arizona Rules of Civil Procedure nor the Arizona Media Subpoena Law places any specific limits on the time to file a motion to quash. At a minimum, however, the motion should be filed before the compliance date listed on the subpoena. If time is short, it may be useful to contact opposing counsel and request a stipulated briefing schedule. Filing a motion within the 14 day limit for serving objections under Ariz. R. Civ. P. 45 likely will insulate the motion from any conceivable timeliness challenge.

d. Language

The language of a motion to quash or for protective order will necessarily vary from case to case. Nevertheless, if the subpoenaing party has not made any of the six averments required by the Arizona Media Subpoena Law, the motion should explain the affidavit's deficiencies.

e. Additional material

No additional materials are mandated by law.

4. In camera review

a. Necessity

No statutory or case law addresses the issue of in camera review in the context of moving to quash a media subpoena. In other contexts, Arizona courts have endorsed in camera review as an efficient means of resolving discovery and other disputes. *See, e.g., Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984) (courts may review in camera public records that government officials have refused to disclose under A.R.S. § 39-121 *et seq.* (the "Arizona Public Records Law")).

b. Consequences of consent

There is no statutory or case law addressing this issue.

c. Consequences of refusing

There is no statutory or case law addressing this issue.

5. Briefing schedule

Under the Arizona Rules of Civil Procedure, the subpoenaing party has ten judicial days to respond to a motion to quash or for protective order, plus five calendar days if the motion was served by mail. Ariz. R. Civ. P. 6(e), 7.1(a). The moving party has five judicial days to serve and file a reply (plus five calendar days, if the response was mailed).

The Arizona Rules of Criminal Procedure provide that a party has 10 judicial days to file and serve a response to a motion, and the moving party has three judicial days in which to file and serve a reply. Ariz. R. Crim. P. 35.1(a). Five calendar days may be added for service by mail. Ariz. R. Crim. P. 1.3(b).

6. Amicus briefs

Amicus briefs are commonly accepted by Arizona's appellate courts, and the procedure for seeking leave to file an amicus brief is set forth in Ariz. R. Civ. App. P. 16. No Arizona organizations regularly file amicus briefs opposing media subpoenas.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The party serving a subpoena on a newsperson has the initial burden of demonstrating compliance with requirements set forth in A.R.S. § 12-2214(A)(1)-(6), the statute governing subpoenas. The party seeking production must identify with reasonable detail in the required affidavit the information requested, the efforts made to acquire it, and from what sources. *Id.* Once a party serving a subpoena on a newsperson has complied with A.R.S. § 12-2214(a), the burden shifts to the party being served to controvert the allegations of the affidavit; it is not sufficient to claim that the same information can be obtained elsewhere. *Bartlett*, 150 Ariz. at 183, 722 P.2d at 351 (citing A.R.S. § 12-2214).

B. Elements

1. Relevance of material to case at bar

The purpose of A.R.S. § 12-2214 is to protect the media from being used as "litigation consultants" by lawyers who use subpoenas to recruit the assistance of the media in making their cases. *Bartlett*, 150 Ariz. at 183, 722 P.2d at 351. To carry out that objective, the statute compels the party seeking the information to demonstrate "[t]hat the information sought is relevant *and* material to the affiant's cause of action or defense." A.R.S. § 12-2214(A)(4) (emphasis added). Moreover, the First Amendment privilege recognized in *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995), requires an even stronger showing of need.

2. Material unavailable from other sources

See Section VI.A, *supra*. The party seeking production must identify with reasonable detail the efforts made to acquire from other sources the information sought.

a. How exhaustive must search be?

The requesting party must identify all other sources from which he or she attempted to obtain the information sought. A.R.S. § 12-2214(A)(3).

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

A.R.S. § 12-2214 does not require the presentation to the court for review of every source investigated. *Bartlett*, 150 Ariz. at 183, 722 P.2d at 351. For example, in *Bartlett*, the Court of Appeals explained that the party seeking enforcement of a subpoena served on a television station for production of a videotaped recording was not required to submit for court inspection every deposition obtained from other sources. *Id.* Under A.R.S. § 12-2214, the court determined that it was sufficient for counsel to avow that the witnesses had actually been deposed and the videotapes reviewed and that neither offered the same information contained on the videotape at issue. *Id.* If the television station, the party being served, was unconvinced by that avowal, it had the burden to review the depositions and videotapes for purposes of controverting the allegations set forth in the supporting subpoena. *Id.*

c. Source is an eyewitness to a crime

There is no statutory or case law addressing this issue directly. However, *Bartlett* suggests that direct, material evidence of a crime, if not available elsewhere, can be a unique source of evidence subject to subpoena. In *Bartlett*, the court ordered production of a television news report that captured images of a car accident scene just

moments after the accident had occurred, including footage of the automobile in the middle of the intersection with skid marks, and pictures of the victim being treated by paramedics. The videotape showed measurable skid marks not otherwise recorded or measured at the time of the accident. The trial court found that the videotape "would greatly aid a trier of fact . . . in assessing what the severity of the incident was." 150 Ariz. at 181, 722 P.2d at 349. The Court of Appeals agreed. 150 Ariz. at 184, 722 P.2d at 352.

The Arizona Superior Court has stated that a reporter's direct observation of a crime is not protected under the Arizona Shield Law. *In re Hibberd*, 262 GJ 75, Feb. 26, 2001.

3. Balancing of interests

The Arizona Shield Law does not require a judicial balancing of interests to determine whether it applies to protect information sought by a subpoena. Rather, if the subpoena would require disclosure of a confidential source or confidential information, the privilege applies and the subpoena must be quashed. A.R.S. § 12-2237; *In re Hibberd*, 262 GJ 75, Feb. 26, 2001.

In contrast, the Arizona Media Subpoena Law balances the needs of newspersons against the needs of litigants in obtaining information vital to the presentation or defense of their case. *Matera*, 170 Ariz. at 448, 825 P.2d at 973. "The statute balances the needs of media personnel against the needs of litigants, tipping the balance in favor of interference with the process of newsgathering only upon a showing of need, proven by affidavit." *Id.* In *Bartlett*, the court balanced the need in favor of the requesting party, which could not obtain elsewhere evidence relating to the condition of a car accident victim and scene just moments after the accident. *Bartlett*, 150 Ariz. at 183, 722 P.2d at 351.

4. Subpoena not overbroad or unduly burdensome

Arizona law provides that third-party subpoenas cannot be overbroad or unduly burdensome. Under Rule 45 of the Arizona Rules of Civil Procedure, a party or an attorney serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Ariz. R. Civ. P. 45(c)(1). The Arizona Media Subpoena Law goes further, and imposes several requirements on the subpoenaing party designed to narrow the scope of the material sought.A.R.S. § 12-2214. The purpose of the statute is to protect members of the media from onerous subpoenas and "broad discovery 'fishing expeditions'" that would unduly interfere with the continuing process of collecting and reporting news to the public. *Matera*, 170 Ariz. at 448, 825 P.2d at 973.

In addition to other remedies available for improper subpoenas, A.R.S. § 12-349(A) states that the court "shall assess reasonable attorney fees, expenses, and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party [who] . . . [e]ngages in abuse of discovery."

5. Threat to human life

There is no statutory or reported case law addressing this issue. However, in *In re Hibberd*, the Arizona Superior Court granted a motion to quash a subpoena even though the subpoenaed materials arguably would have enabled law enforcement to identify an at-large serial arsonist posing a threat to human life. *In re Hibberd*, 262 GJ 75, Feb. 26, 2001.

6. Material is not cumulative

The Arizona Media Subpoena Law requires the subpoenaing party to attest that "the information sought is not protected by any lawful privilege." A.R.S. § 12-2214(A)(5). Under the First Amendment privilege recognized in *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995), the evidence must show that the requested material is "(1) unavailable despite exhaustion of all reasonable alternatives sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case." *Shoen*, 48 F.3d at 416. The privilege cannot be easily defeated: "[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished." *Id.* Accordingly, a request for merely cumulatively material cannot trump the First Amendment.

7. Civil/criminal rules of procedure

a. Arizona Rules of Civil Procedure

Rule 45 of the Arizona Rules of Civil Procedure provides several means for contesting frivolous or unduly burdensome subpoenas. If the party or attorney serving the subpoena fails to take reasonable steps to avoid imposing an undue burden or expense on the subpoenaed party, the court may impose sanctions on the serving party or attorney. *See* Ariz. R. Civ. P. 45(c)(1). If the subpoenaed person is not a party to the litigation, the court may issue an order to protect such person from any significant expense resulting from the mandated copying and inspection. *See* Rule 45(c)(2)(B). The subpoenaed party may also file a motion in the superior court of the county in which the case is pending to quash or modify the subpoena, if the subpoena:

(i) does not provide a reasonable time for compliance;

(ii) requires a non-party or officer of a party to travel to a county different from the county where the person resides or does business in person; or to travel to a county different from where the subpoena was served; or to travel to a place farther than 40 miles from the place of service; or to travel to a place different from any other convenient place fixed by an order of a court, except that a subpoena for you to appear and testify at trial can command you to travel from any place within the state;

(iii) requires the disclosure of privileged or protected information and no waiver or exception applies; or

(iv) subjects the responding party to an undue burden.

See Ariz. R. Civ. P. 45(c)(3)(A).

The court may protect a subpoenaed party by quashing or modifying the subpoena. *See* Ariz. R. Civ. P. 45(c)(3)(B). If the demanding party shows a substantial need for the testimony or material that cannot otherwise be obtained without undue hardship, and assures that the subpoenaed person will be reasonably compensated, the court may order an appearance or production of the requested materials subject to specified conditions. *See* Ariz. R. Civ. P. 45(c)(3)(B).

b. Arizona Rules of Criminal Procedure

Rule 15.5(a) of the Arizona Rule of Criminal Procedure states that the court may order, upon a showing of good cause, that disclosure of the identity of any witness be deferred, denied, or otherwise regulated when it finds:

(1)That the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(2)That the risk cannot be eliminated by a less substantial restriction of discovery rights.

Ariz. R. Crim. P. 15.5(a).

8. Other elements

Under *Matera*, if the subpoenaed party raises the Arizona Shield Law in opposition to a subpoena, it bears the burden of demonstrating that the subpoena would require the disclosure of a confidential source of information. 170 Ariz. at 450, 825 P.2d at 975. However, no statutory or case law specifically addresses how a party would, or could, meet that burden.

C. Waiver or limits to testimony

There is no statutory or case law addressing this issue.

1. Is the privilege waivable at all?

There is no statutory or case law addressing this issue.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no statutory or case law addressing this issue.

b. Disclosure of non-confidential source's name

The Arizona Supreme Court has suggested that the Arizona Shield Law does not apply to non-confidential sources. *Moody*, 208 Ariz. at 458, 94 P.3d at 1153; *see also Matera*, 170 Ariz. at 450, 825 P.2d at 975.

c. Partial disclosure of information

There is no statutory or case law addressing this issue.

d. Other elements

There is no statutory or case law addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law addressing this issue.

VII. What constitutes compliance?

A. Newspaper articles

Ariz. R. Evid. 902(6) provides that newspaper articles are self-authenticating.

B. Broadcast materials

There is no statutory or case law addressing this issue. Parties often stipulate to the authenticity of news reports that actually aired. If stipulation is not possible, the broadcaster's custodian of records could provide an authenticating declaration or affidavit. Live testimony on such issues is extremely rare.

C. Testimony vs. affidavits

See Section VII.B, *supra*. Parties often stipulate to the authenticity of news reports. If stipulation is not possible, a custodian of records can provide an authenticating declaration or affidavit.

D. Non-compliance remedies

Typically, an order to compel production is available to force a journalist to comply with a valid, upheld subpoena. There are no reported cases concerning the kinds of contempt remedies that may be imposed for a journalist's failure to comply. Nevertheless, Arizona cases discussing contempt proceedings generally indicate that civil, not criminal, contempt proceedings could be initiated against a reporter who fails to comply with an order enforcing a valid subpoena. *See, e.g., State v. Cohen*, 15 Ariz. App. 436, 489 P.2d 283 (1971) ("civil contempt" consist of failing to do something which the party has been ordered to do for the benefit of another party; civil contempt describes the situation where the parties held in contempt "carry the keys of their prison in their own pockets").

1. Civil contempt

a. Fines

There is no statutory or case law addressing this issue. There are no recent examples of reporters being fined for refusing to comply with subpoenas.

b. Jail

There is no statutory or case law addressing this issue. There are no recent examples of reporters who went to jail rather than disclose the names of confidential sources or information.

2. Criminal contempt

The authors of this outline are aware of no instance in which any criminal contempt sanctions have been imposed on reporters in Arizona for failing to comply with a valid, upheld subpoena.

3. Other remedies

There is no statutory or case law addressing this issue.

VIII. Appealing

A. Timing

1. Interlocutory appeals

In Arizona, discretionary interlocutory appeals are called "special actions." Special actions are extraordinary remedy proceedings previously termed certiorari, mandamus and prohibition. Rule 1(a), Rules of Procedure for Special Actions (R.P.S.A.). No strict time limits govern the time for initiating special actions. A special action brought in an appellate court is initiated by filing a petition similar in form to an appellate brief. R.P.S.A. 7. Upon receipt of a petition, the appellate court may set a time for oral argument and/or a time for the filing of a response.

Special actions are different than direct appeals, which may be brought only from final, appealable orders and judgments. Discovery rulings, including orders granting or denying a motion to quash, are generally not considered final, appealable orders. *See, e.g., Carpenter v. Superior Court (Phoenix Police Dep't)*, 176 Ariz. 486, 487, 862 P.2d 246, 247 (Ct. App. 1993) (accepting special action jurisdiction over an order quashing a subpoena directed to the Phoenix Police Department where the trial court's order was not appealable and the discovery procedure used raised an issue of statewide importance).

Special action relief may be sought where a trial court orders a party to divulge privileged material, or refuses to protect allegedly confidential or privileged information. *See, e.g., Arizona Portland Cement Co. v. Arizona State Tax Court*, 185 Ariz. 354, 357, 916 P.2d 1070, 1073 (Ct. App. 1995) (granting special action relief where the trial court compelled a cement company to produce private business records and financial information without granting the company's corresponding motion for protective order); *Blazek v. Superior Court (Segrave)*, 177 Ariz. 535, 536, 869 P.2d 509, 510 (Ct. App. 1994) ("a special action is the appropriate means of relief when a party is ordered to disclose what she believes is privileged material"). *Cf. Scottsdale Publ'g, Inc. v. Superior Court*, 159 Ariz. 72, 74, 764 P.2d 1131, 1133 (Ct. App. 1988) (exercising special action jurisdiction "in furtherance of the public's significant first amendment rights in protecting the press from the chill of meritless libel actions").

Civil contempt citations can be appealed by special action only. *See, e.g.*, 1 Hon. Sheldon H. Weisberg and Paul G. Ulrich, eds., *Arizona Appellate Handbook* § 3.3.1.12.2.4, at 3-21 (4th ed. 2000) (citing *Pace v. Pace*, 128 Ariz. 455, 456-57, 626 P.2d 619, 620-21 (Ct. App. 1981)).

2. Expedited appeals

Special actions are, by their nature, expedited proceedings. Nevertheless, "for cause shown," the appellate may order acceleration of any special action procedures. R.P.S.A. 7(d).

B. Procedure

1. To whom is the appeal made?

For orders granted by a superior court, a special action should be filed in the intermediate appellate court for the division in which the superior court is located. R.P.S.A. 4(b).

In rare cases, the special action may be filed directly in the Arizona Supreme Court. The Court generally will not exercise jurisdiction over such special actions absent "extremely unusual circumstances," 1 *Arizona Appellate Handbook* § 7.3.1, at 7-18, such as where the issues raised are "of sufficient and extraordinary importance to justify the review requested." *Jolly v. Superior Court of Pinal County (Southern Pacific Transportation Co.)*, 112 Ariz. 185, 188, 540 P.2d 658, 660 (1975). *See KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431 (1984) (accepting petition for special action where the trial court had imposed an unconstitutional prior restraint on the broadcast of courtroom sketches in a criminal trial of widespread public interest).

Final orders and judgments granted by municipal or justice of the peace courts are generally appealable to the Arizona Superior Court, which serves as the appellate court for these tribunals. *See* A.R.S. § 22-261. Presumably, discretionary interlocutory appeals in the form of special actions may be filed in the superior court from orders rendered by municipal or justice of the peace courts. *See* R.P.S.A. 4(a) (special actions may be brought in superior court); R.P.S.A. 7(a) (special actions may be brought "in any appellate court").

2. Stays pending appeal

The petitioner should file a separate application for a stay. In the first instance, the application should be filed in the court that issued the ruling that is being appealed from. 1 *Arizona Appellate Handbook* § 7.8, at 7-29. Division One of the Arizona Court of Appeals (located in Phoenix) will not consider a stay application unless and until an application has been heard and denied by the lower court. *Id.* § 7.16, at 7-41.

If a stay from the Court of Appeals is necessary, the petitioner can seek a stay under R.P.S.A. 5 and 7(c). These rules provide that the appellate court may grant an interlocutory stay, either ex parte or after notice and hearing, in the same manner and subject to the same limitations that govern the issuance of temporary restraining orders and preliminary injunctions under Ariz. R. Civ. P. 65 — including the rule's security bond provisions.

There is no statutory or case law addressing whether the standard applied to a stay application is different in media cases, or whether a stay is more likely to be granted in such matters.

3. Nature of appeal

See Section VIII.A.1, *supra*. The appeal is a "special action."

4. Standard of review

The application of a privilege is a question of law, subject to *de novo* review. *See, e.g., Blazek*, 177 Ariz. at 536, 869 P.2d at 510.

5. Addressing mootness questions

No statutory or case law addresses this issue in the context of cases involving the reporter's privilege. Nevertheless, Arizona recognizes the exception to mootness for cases capable of repetition but evading review. *See, e.g., KPNX Broadcasting*, 139 Ariz. at 250, 678 P.2d at 435.

6. Relief

The Rules of Procedure for Special Actions do not appear to impose any limits on the scope of relief that may be afforded in special action proceedings.

IX. Other issues

A. Newsroom searches

The authors of this outline are unaware of any instances in which the federal Privacy Protection Act, 42 U.S.C. §§ 2001aa — 2000aa-12, has been used in this state in connection with searches of newsrooms or seizures of journalistic materials. The Act, passed in 1980, makes illegal the search and seizure of items in a newsroom, except in limited circumstances. 42 U.S.C. §§ 2001aa — 2000aa-12. While it does not provide an absolute privilege from subpoenas, it indicates an effort on the part of Congress to protect the confidentiality of newsworthy information gathered for publication. Indeed, Congress enacted the law to require "law enforcement authorities to proceed by request or subpoena first in obtaining such materials," in order to "lessen greatly the threat … to the vigorous exercise of First Amendment rights." S. Rep. No. 96-874, at 1879 (1980), reprinted in U.S.C.C.A.N. 3950. The Act "recognizes . . . the importance of First Amendment values, plac[ing] a heavy burden on law enforcement officers . . . ." 1980 U.S.C.C.A.N. at 3957.

B. Separation orders

There is no statutory or case law addressing this issue.

C. Third-party subpoenas

There are no statutory provisions and no reported cases that address the media's recourse when third-party subpoenas are used in an attempt by others to discover a reporter's source.

D. The source's rights and interests

There is no statutory or case law addressing this issue.