REPORTER'S PRIVILEGE: COLORADO

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

Credits & Copyright

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.

Executive Director: Lucy A. Dalglish
Editors: Gregg P. Leslie, Elizabeth Soja, Wendy Tannenbaum, Monica Dias, Dan Bischof

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

COLORADO

Prepared by:

David M. Giles, Esq.
E.W. Scripps Co.
312 Walnut Street
Cincinnati, Ohio 45202-4067

Revised by:
Thomas B. Kelley (tkelley@faegre.com; (303) 607-3631)
Steven D. Zansberg (szansberg@faegre.com; (303) 607-3683)
Christopher P. Beall (cbeall@faegre.com; (303) 607-3656)
Jennifer Daniel Collins (jcollins@faegre.com; (303) 607-3611)
Adam Platt (aplatt@faegre.com; (303) 607-3810)
Faegre & Benson LLP
3200 Wells Fargo Center,
1700 Lincoln Street
Denver, Colorado 80203
www.faegre.com

I. Introduction: History & Background

In 1990 the Colorado General Assembly acknowledged that "an informed citizenry, which results from the free flow of information between citizens and the mass media, and the preservation of news information sources for the mass media is of vital concern to all the people of the state of Colorado." This acknowledgment served as a platform for adopting broad statutory protections for newspapers, magazines, television and radio broadcasters and other publishers of information. As enacted, the Colorado Press Shield Law provides a qualified privilege for materials and information obtained by a newsperson in the course of newsgathering activities. The shield laws' qualified protections extend to both confidential and non-confidential sources, and apply to civil and criminal actions as well as administrative proceedings.

II. Authority for and source of the right

The source for the Shield Law protections in Colorado are found in C.R.S. § 13-90-119, which grants a qualified privilege protecting newspersons from subpoenas in judicial proceedings. *See also*, C.R.S. §§ 24-72.5-101 through 106 (qualified privilege to newspersons in administrative proceedings), addressed more fully at <A:CO:2D>Section II D</A>. The privilege created by the Shield Law are similar to those at common law. In order to trump the privilege, the information sought must be a) integral to the case; b) not available from any alternative source; and c) the need for the information outweighs the prevailing First Amendment interest. Before the Colorado legislature's enactment of the Shield Law protections in 1990, many state trial courts had acknowledged the existence of a common law privilege. *See, e.g.*, *Jones v. Woodward*, 15 Media L. Rep. 2060 (Denver Dist. Ct. 1988) (using qualified privilege to grant reporter's motion to quash subpoena). However, the state appellate courts had weighed in on the privilege issue, asserting that there was no privilege under the Colorado constitution. *See Pankratz v. District Court*, 609 P.2d 1101 (Colo. 1980) (a reporter must testify before a grand jury because he was the only witness to criminal conduct); Gagnon v. District Court In & For Cty. of Freemont, 632 P.2d 567 (Colo. 1981) (defendant/reporter required to provide confidential source and documents in defamation action because information was "clearly relevant").

A. Shield law statute

The Colorado Press Shield Law, C.R.S. § 13-90-119 states as follows:

(1) As used in this section, unless the context otherwise requires:

(a) "Mass medium" means any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system.

(b) "News information" means any knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents and sources thereof, obtained by a newsperson while engaged as such, regardless of whether such items have been provided to or obtained by such newsperson in confidence.

(c) "Newsperson" means any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public through the mass media.

(d) "Press conference" means any meeting or event called for the purpose of issuing a public statement to members of the mass media, and to which members of the mass media are invited in advance.

(e) "Proceeding" means any civil or criminal investigation, discovery procedure, hearing, trial, or other process for obtaining information conducted by, before, or under the authority of any judicial body of the state of Colorado. Such term shall not include any investigation, hearing, or other process for obtaining information conducted by, before, or under the authority of the general assembly.

(f) "Source" means any person from whom or any means by or through which news information is received or procured by a newsperson, while engaged as such, regardless of whether such newsperson was requested to hold confidential the identity of such person or means.

(2) Notwithstanding any other provision of law to the contrary and except as provided in subsection (3) of this section, no newsperson shall, without such newsperson's express consent, be compelled to disclose, be examined concerning refusal to disclose, be subjected to any legal presumption of any kind, or be cited, held in contempt, punished, or subjected to any sanction in any judicial proceedings for refusal to disclose any news information received, observed, procured, processed, prepared, written, or edited by a newsperson, while acting in the capacity of a newsperson; except that the privilege of nondisclosure shall not apply to the following:

(a) News information received at a press conference;

(b) News information which has actually been published or broadcast through a medium of mass communication;

(c) News information based on a newsperson's personal observation of the commission of a crime if substantially similar news information cannot reasonably be obtained by any other means;

(d) News information based on a newsperson's personal observation of the commission of a class 1, 2, or 3 felony.

(3) Notwithstanding the privilege of nondisclosure granted in subsection (2) of this section, any party to a proceeding who is otherwise authorized by law to issue or obtain subpoenas may subpoena a newsperson in order to obtain news information by establishing by a preponderance of the evidence, in opposition to a newsperson's motion to quash such subpoena:

(a) That the news information is directly relevant to a substantial issue involved in the proceeding;

(b) That the news information cannot be obtained by any other reasonable means; and

(c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.

(4) The privilege of nondisclosure established by subsection (2) of this section may be waived only by the voluntary testimony or disclosure of a newsperson that directly addresses the news information or identifies the source of such news information sought. A publication or broadcast of a news report through the mass media concerning the subject area of the news information sought, but which does not directly address the specific news information sought, shall not be deemed a waiver of the privilege of nondisclosure as to such specific news information.

(5) In any trial to a jury in an action in which a newsperson is a party as a result of such person's activities as a newsperson and in which the newsperson has invoked the privilege created by subsection (2) of this section, the jury shall be neither informed nor allowed to learn that such newsperson invoked such privilege or has thereby declined to disclose any news information.

(6) Nothing in this section shall preclude the issuance of a search warrant in compliance with the federal "Privacy Protection Act of 1980", 42 U.S.C. sec. 2000aa.

B. State constitutional provision

Colorado Courts have acknowledged that the Colorado constitution provides more protection for free speech rights than the First Amendment to the U.S. Constitution. *See, e.g.*, *Brock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985).

Article II, Section 10 of the Colorado constitution provides that "[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty . . . "

The expanded free speech rights of the Colorado constitution, however, did not yield additional shield law privileges for the media. *See* Colorado Criminal Practice and Procedure, Vol. 15 (1996), Dieter, § 19.25. Prior to enactment of the Shield Law, the Colorado Supreme Court declined to recognize a privilege implicit in the constitution. *Gagnon v. District Court In & For Cty. Of Fremont*, 632 P.2d 567, 569 (Colo. 1981): *Pankratz v. District Court In & For City & Cty. Of Denver*, 609 P.2d 1101, 1103 (Colo. 1980) ("We also decline to create such a testimonial privilege for news reporters" under the Colorado constitution).

C. Federal constitutional provision

In *Gagnon* and *Pankratz*, *supra*, the Colorado Supreme Court declined to find the existence of a First Amendment reporter's privilege. In Pankratz, for example, the court stated, "Pankratz asserts that such a [reporter's] privilege exists under the First Amendment to the United States Constitution and under Article II, Section 10 of the Colorado Constitution. We do not agree that Pankratz had such a privilege under the circumstances of this case." *Pankratz*, 609 P.2d at 1102.

In *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000), however, the Colorado Supreme Court acknowledged that First Amendment interests are implicated "when a newsperson is compelled to disclose confidential news information." *Id.*, 9 P.3d at 1116. The *Boyles* court cited significant portions of Justice Stewart's dissent in *Branzburg v. Hayes*, 408 U.S. 665 (1972), (Stewart, J. dissenting) (the ability of the press to gather information by promising to keep the identities of their sources confidential is a crucial tool for the media).

> The *Gagnon* and *Pankratz* decisions run contrary to the U.S. District Court of Colorado's holding in *Re/Max International, Inc. v. Century 21 Real Estate Corporation*, 846 F. Supp. 910 (D. Colo. 1994). Although this decision was issued after the state Shield Law had been enacted, there is no indication in the court's ruling that it had taken the law into consideration in its opinion. Without relying upon the Colorado Press Shield Law, a federal judge held that the First Amendment provides a qualified protection for newspersons from disclosure of information gathered in the course of reporting. To overcome the newsperson's privilege in federal court under the First Amendment, the party seeking information from a reporter must show that (1) the information sought is centrally relevant, and (2) the information is unavailable from other sources. *Re/Max*, 846 F *Re/Max*, 846 P. Supp. 910. Supp. 910. The court quashed a subpoena to take the deposition of a reporter where the reporter's testimony had only *de minimis* impeachment value. *Id.*; *see also Artes-Roy v. City of Aspen*, 20 Media L. Rep. 1647 (D. Colo. 1992) (declining to rule whether Colorado Press Shield Law applies in federal civil rights action in federal court, but granting motion to quash subpoena on news persons where information sought could be obtained from parties associated with case).

D. Other sources

In 1991, during the same legislative session in which the Colorado General Assembly enacted the Press Shield Law, it also adopted a statute addressing the newsperson's privilege in administrative proceedings. The preamble provides ample evidence of the importance the Assembly placed on a free press and an informed citizenry.

C.R.S. 24-72.5-101 —106 states as follows:

> *C.R.S. § 24-72.5-101*
>
> The general assembly finds that an informed citizenry, which results from the free flow of information between citizens and the mass media, and the preservation of news information sources for the mass media is of vital concern to all people of the state of Colorado and that the interest of the state in such area is so great that the state shall retain jurisdiction over the use of any subpoena power or the exercise of any other authority by any governmental entity to obtain news information or the identification of the source of such information within the knowledge or possession of newspersons, which is hereby declared to be a matter of statewide concern.
>
> *C.R.S. § 24-72.5-102*
>
> As used in this article, unless the context otherwise requires:

(1) "Governmental entity" means the state and any state agency or institution, county, city and county, incorporated city or town, school district, special improvement district, authority, and every other kind of district, instrumentality, or political subdivision of the state organized pursuant to law. "Governmental entity" shall include entities governed by home rule charters.

(2) "Mass medium" means any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system.

(3) "News information" means any knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents and sources thereof, obtained by a newsperson while engaged as such, regardless of whether such items have been provided to or obtained by such newsperson in confidence.

(4) "Newsperson" means any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public through the mass media.

(5) "Press conference" means any meeting or event called for the purpose of issuing a public statement to members of the mass media, and to which members of the mass media are invited in advance.

(6) "Proceeding" means any investigation, hearing, or other process for obtaining information conducted by, before, or under the authority of any executive or administrative body, panel, or officer of the state of Colorado or any city, county, city and county, or other political subdivision of the state. Such term shall not include any investigation, hearing, or other process for obtaining information conducted by, before, or under the authority of the general assembly.

(7) "Source" means any person from whom or any means by or through which news information is received or procured by a newsperson, regardless of whether such newsperson was requested to hold confidential the identity of such person or means.

C.R.S. § 24-72.5-103

(1) Notwithstanding any other provision of law to the contrary, and except as otherwise provided by section 24-72.5-104, no newsperson shall, without the express consent of such newsperson, be compelled to disclose, be examined concerning refusal to disclose, or be subject to any process to compel disclosure or to impose any sanction for nondisclosure in connection with any proceeding of a governmental entity for refusal to disclose any news information received, observed, procured, processed, prepared, written, or edited by a newsperson, while acting in the capacity of a newsperson; except that the privilege of nondisclosure shall not apply to the following:

(a) News information received at a press conference;

(b) News information that has actually been published or broadcasted through the mass media;

(c) News information based on a newsperson's personal observation of the commission of an act which, under any statute, law, or ordinance, is deemed to be a criminal offense if substantially similar news information cannot reasonably be obtained by any other means;

(d) News information based on a newsperson's personal observation of the commission of a class 1, 2, or 3 felony.

C.R.S. § 24-72.5-104

(1) Notwithstanding the privilege of nondisclosure established in section 24-72.5-103, a governmental entity otherwise authorized by law to issue or obtain subpoenas may subpoena a newsperson in order to obtain news information by establishing, by a preponderance of the evidence:

(a) That the news information is directly relevant to a substantial issue involved in the proceeding;

(b) That the news information cannot be obtained by any other reasonable means; and

(c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.

C.R.S. § 24-72.5-105

The privilege of nondisclosure established in section 24-72.5-103 may be waived only by the voluntary testimony or disclosure of a newsperson that directly addresses the news information or identifies the source of such news information sought by a governmental entity. A publication or broadcast of a news report through the mass media concerning the subject area of the news information sought, but which does not directly address the news information sought by such governmental entity, shall not be deemed a waiver of the privilege of nondisclosure as to such specific news information.

C.R.S. § 24-72.5-106

Nothing in this article shall preclude the issuance of a search warrant pursuant to the federal "Privacy Protection Act of 1980", 42 U.S.C. sec. 2000aa.

III. Scope of protection

A. Generally

The Colorado Press Shield Law provides broad protection for newgatherers. Although not absolute, the language in the statute broadly defines the kinds of information protected ("any knowledge, observations, notes," etc.) and the individuals and organizations who can assert the privilege ("any member of the mass media"). This broad language has permitted varied groups from the helicopter pilot of a local television station to the publisher of an Anti Defamation League newsletter to successfully assert the privilege.

B. Absolute or qualified privilege

The Colorado Press Shield Law is a qualified privilege. *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000). The law states that "no newsperson shall, without such newsperson's express consent, be compelled to disclose, be examined concerning refusal to disclose, be subject to any legal presumption of any kind, or be cited, held in contempt punished, or subjected to any sanction" for refusing to disclose information obtained while "acting in the capacity of a newsperson." C.R.S. § 13-90-119(2). The Shield Law does not apply where the news information: a) was received at a press conference; (b) has actually been published or broadcast through a medium of mass communication; (c) was based on a news person's personal observation of the commission of a crime if substantially similar news information cannot reasonably be obtained by any other means; and (d) was based on a news person's personal observation of the commission of a class 1, 2, or 3 felony. *Id.*

The qualified privilege can be defeated where the person seeking the information can prove by a preponderance of the evidence: "(a) That the news information is directly relevant to a substantial issue involved in the proceedings; (b) That the news information cannot be obtained by any other reasonable means; and (c) That a strong interest of the party seeking to subpoena the news person outweighs the interests under the first amendment to the United States Constitution of such news person in not responding to a subpoena and of the general public in receiving news information." C.R.S. § 13-90-119(3).

The privilege can be asserted regarding both confidential and non-confidential information in both civil and criminal cases. C.R.S. § 13-90-119(1)(b), (e). The corollary statute addressing governmental and administrative proceedings also applies to both confidential and non-confidential information. See generally, C.R.S. § 24-72.5-101, *et seq*.

C. Type of case

1. Civil

The privilege was intended to apply to all civil judicial proceedings, including civil discovery procedures, hearings or trials. C.R.S. § 13-90-119 (1)(e); *see also, e.g., Quigley v. Rosenthal*, 43 F. Supp. 2d 1163 (D. Colo. 1999)

(Colorado Shield Law privilege may be asserted by Jewish rights organization that publishes periodicals, books and pamphlets); *Gordon v. Boyles*, supra.

Administrative Proceedings. During the same legislative session in which it adopted the Shield Law, the Colorado General Assembly also adopted a law addressing testimonial privileges for the media in administrative proceedings. *See*, C.R.S. 24-72.5-101, *et seq*., discussed in Section II D, supra. There is no case law that has interpreted C.R.S. 24-72.5-101, *et seq*. Although it is numbered differently, the language in the statute essentially mirrors the language in the Shield Law. *Compare*, C.R.S. 13-90-119 to C.R.S. 24-72.5-101, *et seq*. Other than the numbering, the only substantive differences between the statutes is the addition in C.R.S. 24-72.5-101, of a preamble, and the addition of a definition of a "government entity" in C.R.S. 24-72.5-102(1). Because of their similarities, the courts are likely to apply the statutes similarly.

2. Criminal

The privilege was intended to apply to all criminal judicial proceedings, including criminal investigations, discovery procedures, hearings or trials. C.R.S. § 13-90-119 (1)(e). Since its enactment, courts have applied the same balancing of interest test irrespective of whether it is a criminal or civil case. For example, the privilege has been applied in criminal cases to provide immunity from testimony for a newsperson who piloted a helicopter in which police officers observed illegal drug activity. *Henderson v. People*, 879 P.2d 383 (Colo, 1994). The helicopter pilot was not required to testify because the criminal defendant failed to show that he "could not obtain the evidence requested from some other reasonable means." *Id*. at 393

3. Grand jury

While there has been no case law in Colorado testing the Shield Law in the context of a grand jury proceeding, the statute is written broadly enough to be applicable to such proceedings. The statute clearly states that the privilege attaches in any "criminal investigation, discovery procedure, hearing, trial or other process for obtaining information conducted by, before, or under the authority of any judicial body of the state of Colorado." C.R.S.(1)(e).

D. Information and/or identity of source

The Colorado Press Shield law protects journalists from compelled disclosure of "[n]ews information," C.R.S. § 13-90-119(2), defined as any "knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents *and sources thereof* . . . ." C.R.S. § 13-90-119(1)(b). The statute defines "[s]ource" as "any person from whom or any means by or through which news information is received or procured by a newsperson, while engaged as such, regardless of whether such newsperson was requested to hold confidential the identity of such person or means." C.R.S. § 13-90-119(1)(f).

E. Confidential and/or non-confidential information

The Colorado Press Shield Law applies to all information, "regardless of whether [the information has] been provided to or obtained by such newsperson in confidence." C.R.S. § 13-90-119(1)(b). The information covered by the statute is defined as any "knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes and reports." C.R.S. §13-90-119(1)(b). This standard was applied before the statute was enacted. *See Jones v. Woodward*, 15 Med. L. Rptr. At 2061 ("the qualified reporter's privilege applies whether or not the source of the reporter's information is confidential")

F. Published and/or non-published material

The Colorado Press Shield Law protects non-published information, but does not provide a privilege regarding information that has been published. "[T]he privilege of nondisclosure shall not apply to … (b) News information which has actually been published or broadcast through a medium of mass communication." C.R.S. § 13-90-119(2)(b).

The issue of published information was addressed in *People v. Morise*, 859 P.2d 247 (Colo. App. 1993), although the court did not determine whether the subpoenas had been properly quashed under the Shield Law. In *Morise*, the Colorado Court of Appeals reversed a criminal conviction based on the admission into evidence of the defendant's statements contained in newspaper articles about the defendant. The trial court had previously quashed

subpoenas served on reporters who wrote the articles in question. The court held that the articles themselves were inadmissible hearsay. Under this ruling, it is possible that a reporter may not be permitted to assert the privilege if their testimony is necessary to establish that a statement reported in an article was actually made or that the article accurately reflected a source's specific statement.

G. Reporter's personal observations

The statute does not permit a newsperson to assert the privilege regarding certain personal observations. "[T]he privilege of nondisclosure shall not apply to … (c) News information based on a newsperson's personal observation of the commission of a crime if substantially similar news information cannot reasonably be obtained by any other means; (d) News information based on a newsperson's personal observation of the commission of a class 1, 2 or 3 felony." C.R.S. § 13-90-119(2)(c)-(d).

In a pre-statute decision, the Colorado Supreme Court found that a reporter was required to testify because he was the only witness to a criminal act. *Pankratz v. District Court*, 609 P.2d at 1103. In *Pankratz*, a reporter interviewed the Director of the Medicaid Fraud Unit of the State of Colorado. During the interview and after the reporter agreed to keep his identity confidential, the director gave the reporter a list of indictments and the names of the persons to be indicted by the 1978 Statutory Grand Jury. The director's actions were in violation of C.R.C.P 62 and Rule 41(e) of the Local Rules of Practice. Since the reporter was a witness to the crime, the court "found no case to support the proposition that a news reporter who actually witnesses the criminal act" can assert a privilege. *Id*.

In *Henderson v. People*, the television station's employee, who was flying a helicopter with passengers that included a police officer, was not required to testify about his observations of an alleged crime scene because the information was reasonably available from another source — the police officer. *Henderson v. People*, 879 P.2d at 393.

H. Media as a party

The Shield Law provides some distinction between instances where the media is a party and where the media is not a party. Section 13-90-119(5) states that "[i]n any trial to a jury in an action in which a newsperson is a party as a result of such person's activities as a newsperson and in which the newsperson has invoked the privilege created by subsection (2) of this section, the jury shall be neither informed nor allowed to learn that such newsperson invoked such privilege or has thereby declined to disclose any news information."

I. Defamation actions

Section 13-90-119(5) governs cases where the newsperson is a party to the proceeding, *i.e.*, defamation and privacy suits, and prevents the jury from being informed that the newsperson has exercised the privilege.

Most recently, this issue was addressed in *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000). In *Gordon*, a radio talk show host was sued for statements made on the air about an alleged altercation outside a bar involving two off-duty police officers. The host invoked the privilege when asked who he had relied upon in gathering and verifying his information. The Supreme Court found that, when a newsperson is sued for defamation and relies upon a confidential source as a basis for a defense that the statements were not published with actual malice, the newsperson will not be compelled to disclose the identity of the confidential source unless the defamation plaintiff demonstrates the probable falsity of the defendant's statements. If the court agrees that, based on the evidence presented, the three factors listed in § 13-90-119(3) have been established, including a determination that the evidence available at the time of the allegedly defamatory broadcasts demonstrated the probable falsity of the defendant's statement, the source must be revealed.

As a consequence, under *Gordon*, where a newsperson defendant can provide evidence that a confidential source's information was probably truthful, the court should not order the newsperson to disclose the source's identity.

As with news information, the Shield Law may protect information about the editorial process if it is not directly relevant. Colorado courts have not specifically addressed the discoverability of editorial processes; however, it is

likely that Colorado courts will follow the rationale of *Herbert v. Lando*, 441 U.S. 153 (1979). *See Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1365 (Colo. 1983).

As an aside, the court in *Gordon* held that, where the newsperson is a party to the case, a subpoena is not required. *Gordon*, 9 p.3d at 117, n. 13.

IV. Who is covered

The Shield Law broadly defines a newsperson as "any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write or edit news information for dissemination to the public through the mass media." C.R.S. § 13-90-119(1)(c).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The Shield Law does not include a specific definition of a reporter; however, based on the broad language of the statute, a reporter is clearly protected by the privilege. *See*, *e.g.*, *Re/Max*, 846 F. Supp. 911 (D. Colo. 1994) (*Rocky Mountain News* reporter may assert common law privilege).

b. Editor

The Shield Law does not include a specific definition of an editor; however, based on the broad language of the statute, an editor may assert the privilege. In *Gordon*, the court vacated a lower court order requiring the host's supervisor to reveal confidential sources. *Gordon*, 9 P.3d at 1122. The court stated that the supervisor, as a non-party, may rely on the protections of the privilege and that the supervisor can be compelled to testify only after the test in 13-90-119(3) is met. *Id*. The court held, however, that the corporate owner of the radio station could not avail itself of the privilege.

c. News

The Shield Law broadly defines "news information" as "any knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports . . . obtained by a newsperson." C.R.S. § 13-90-119(1)(b).

d. Photo journalist

By virtue of including observations, photographs, films, recordings, videotapes and audiotapes in the definition of news information, the statute makes clear that a photojournalist has standing to assert the privilege.

e. News organization / medium

The statute does not include the medium or organization in its definition of a newsperson. The statute specifically says that individual employees or independent contractors are covered by the privilege. C.R.S. 13-90-119(1)(c). Furthermore, the Colorado Supreme Court has held that the owner of a radio station does not have standing to assert the privilege. *Gordon*, 9 P.3d at 1122. The federal court's definition of a newsperson may be broad enough to include a news organization or medium. In *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163 (D. Colo. 1999), the District Court found that the newsperson's privilege extended to the Anti-Defamation League by virtue of the fact that the ADL engages in newsgathering activities and because it publishes books, periodicals and pamphlets.

2. Others, including non-traditional news gatherers

The Shield Law is broadly defined to incorporate those outside the realm of a traditional journalist or newsperson. *See Henderson v. People*, 879 P.2d 383 (television news helicopter pilot may invoke privilege); *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163 (Anti-Defamation League may assert privilege because it gathers news and publishes periodicals, books and pamphlets).

B. Whose privilege is it?

Although this issue has not specifically been addressed by any Colorado court, the plain language of the statute indicates that the privilege belongs to the reporter, as opposed to the source. The statute states that "no newsperson shall" be compelled to disclose news information obtained while gathering the news. C.R.S. § 13-90-119(2).

It also appears as though the privilege is the newsperson's, not the owner of the news organization. In *Gordon*, the Colorado Supreme Court stated that the privilege cannot be relied upon by the corporate owner of a radio station. *Gordon v. Boyles*, 9 P.3d at 1122. However, in *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163 (D.Colo. 1999), the a federal district court held that the Anti-Defamation League may assert the privilege.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

There are no special rules under Colorado law for serving a subpoena on a member of the news media. In cases where the media is not a party, the service of a subpoena must comply with the requirements of Rule 45 of the Colorado Rules of Civil Procedure. In cases where the news media is a party to the action, the requirements of Rules 30 and 34 of the Colorado Rules of Civil Procedure must be met. The requirements are similar in criminal courts in Colorado. *See generally*, Crim. P. Rule 17.

1. Service of subpoena, time

Under the Rules, to be valid, a subpoena or subpoena duces tecum must show the name of the court, the title of the action and the time and place at which the person is commanded to appear. Rule 45(a); *see also* Crim. P. Rule 17.

The subpoena must be personally served on the person to whom it is directed and must include the fees for one day's attendance and mileage. Rule 45(c). Under Rule 45(c), a subpoena on a member of the media or any other non-party must be served no fewer than 48 hours before the time for appearance. The Court may, however, permit a shorter notice for good cause shown. The 48-hour rule excludes weekends and holidays. *Wilkerson v. State*, 830 P.2d 1121 (Colo. App. 1992) (subpoena served on Friday at 11 a.m. for appearance on Monday at 9 a.m. did not comport with prescribed time limits).

2. Deposit of security

There is no requirement of a security deposit.

3. Filing of affidavit

Rule 45 does not require any showing as to necessity, except where a party schedules the taking of more depositions than those permitted in the Case Management Order. *See* Rule 30(a)(2). In criminal cases, however, in order to issue take a deposition, the party seeking the deposition must file a motion with an accompanying affidavit stating that the witness is either unable to attend the trial or hearing, or the deposition is necessary to prevent injustice. Crim. P. Rule 15(a). However, the Colorado Court of Appeals has held that the absence of an affidavit does not make the subpoena defective. *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

4. Judicial approval

The subpoena may be issued without a court order by an attorney of record or by the clerk of the court in which the action is pending. The issuance of a subpoena does not require approval from a judge or magistrate, except in cases where leave of court is required under Rule 30(a)(2).

There is some limitation of a Colorado court's power to compel an individual to appear as a result of a subpoena. Colorado courts do not have the power to compel nonresident witnesses to appear outside Colorado or to produce documents outside Colorado. *See Minnesota v. District Court*, 395 P.2d 601 (Colo. 1964); *Solliday v. District Court*, 313 P.2d 1000 (Colo. 1957) (any reference to the service of subpoenas on nonresident witnesses must be read to be subject to the implied limitation that those summoned must be within the jurisdiction of the court or subject to such "jurisdiction" based on a uniform act or compact with a sister state).

5. Service of police or other administrative subpoenas

An administrative subpoena is constitutionally valid where it is: (1) issued for a lawfully authorized purpose; (2) the information sought is relevant to the inquiry; and (3) the subpoena is sufficiently specific to obtain the necessary documents, but not excessive for the inquiry. *People v. Fleming*, 804 P.2d 231, 233 (Colo. App. 1990). Probable cause, however, is not required to support an administrative subpoena. *See Benson v. People*, 703 P.2d 1274 (Colo. 1985). However, it is an abuse of process to issue an administrative or grand jury subpoena for the sole purpose of gathering evidence for a pending criminal prosecution. *Fleming*, 804 P.2d at 233-34, *citing U.S. v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978); *Donaldson v. U.S.*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971).

In *Denver Post Corp v. Colorado Civil Rights Division*, 1994 WL 665684, 22 Med. L. Rptr. 2478 (Colo. Dist. Ct., Sept. 26, 1994), the Denver County District Court quashed an administrative subpoena seeking the identity of an advertiser because the subpoena was not issued for a lawfully authorized purpose.

B. How to Quash

Rule 45 provides guidance regarding the ways to quash a subpoena. Colorado Rule 45 differs from Federal Rule 45 in that there are only two mechanisms a deponent or witness can used to attempt to avoid having to comply with a subpoena *duces tecum*. Rule 45(b) states that "upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, [a deponent or witness] may (1) Quash or modify the subpoena if it is unreasonable or oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things."

Rule 45(d)(1) allows any person to whom a deposition subpoena is directed to move for a protective order under Rule 26. Under the requirements of Rule 26, a protective order may be issued where "for good cause shown . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Under Rule 26, a court has the power to prohibit a deposition from being taken or limit disclosure of the testimony taken during the exam. Rule 26(c)(1). To determine good cause, the court will balance the competing interested that would be served by granting or denying the discovery. Those interests include: Whether the party seeking to prevent disclosure has a legitimate expectation that the information will not be disclosed; the state's interest in facilitating the truth-seeking process through litigation; and whether disclosure can occur in a less intrusive manner. *Williams v. District Court*, 866 P.2d 908 (Colo. 1993). The party opposing the discovery bears the burden of proving "good cause." *Cameron v. District Court*, 565 P.2d 925 (Colo. 1977).

1. Contact other party first

Rule 121, § 1-15(8) provides for a duty to confer with opposing counsel where appropriate before filing a motion. It seems that in most, if not all, instances, it would be appropriate to contact counsel serving the subpoena. In addition to this requirement, experience indicates that a dialog between the party and the witness can quickly and cost effectively address many of the issues raised by the subpoena. In Colorado, where the Shield Law provides broad protection for newspersons, a letter or telephone call outlining the privilege can be helpful in narrowing or resolving issues raised by the subpoena.

2. Filing an objection or a notice of intent

There is no requirement of a notice being filed prior to filing the actual motion. The rule states that, a subpoena *duces tecum* can be quashed "upon motion made promptly."

There is no provision in the Colorado Rules similar to Fed. R. Civ. P. 45(c)(2)(B), which states that any written notification is sufficient to stay the discovery until a court resolves the matter.

3. File a motion to quash

a. Which court?

The Motion to Quash should be filed in the same court that has jurisdiction over the underlying case.

b. Motion to compel

Although the newsperson may be content to wait for a motion to compel, it is generally believed that it is more effective to take a proactive stance and file a motion to quash. There are several reasons for this. First, some courts may view a newsperson's inaction as disrespect for the court system. Second, by filing the motion, the newsperson can go on the offensive, thus having more control over the arguments.

c. Timing

While the Rule requires that the motion to quash be made promptly, it can be filed at any time up to the date and time at which compliance is requested.

d. Language

Because the outcome of a motion to quash is dependent in large part on the specific facts in the case, there is no specific language that is required in order to get a motion granted. However, at a minimum, the motion should cite to the Shield Law and apply the specific facts to the three-part test. <A:CO:6A>*See* Section VI</A>, *infra*.

e. Additional material

No additional materials are required to be attached to the motion. However, a newsperson should consider attaching any document or information it believes will help the court evaluate the law and the facts. One example of a helpful document is "Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media," the biennial survey of the incidence of news media subpoenas published by the Reporters Committee For Freedom of the Press.

4. In camera review

a. Necessity

There are no requirements that the court conduct an in camera review of the materials before ruling on a Motion to Quash. Nor are there any requirements that the court conduct an interview of the reporter.

b. Consequences of consent

Because there is no requirement for an in camera review or interview with the reporter, there is no procedure established in Colorado that grants an automatic stay pending appeal under these circumstances. Under the Rule 62(a) of the Colorado Rules of Civil Procedure, a final judgment is automatically stayed for 15 days without further action. However, to protect the reporter's rights if a trial court denies a Motion to Quash, counsel representing a newsperson at a hearing on a Motion to Quash should be certain to request a stay from the court and should also be certain to request a stay should the Court of Appeals rule against the newsperson.

c. Consequences of refusing

While it is difficult to predict how a court would react to a newsperson refusing to comply with a court order, the most likely consequence of such action is a finding of direct contempt under Colo. R. Civ. P. 107; *Gordon*, 9 P.3d at 1113 (lower court fine of $5,000 for failure to reveal sources overturned). Under Rule 107, penalties can include fine, a fixed prison sentence or both. Likewise, a party or non-party can be sanctioned or fined under Colo. R. Civ. P. 37 if the party seeking the information succeeds in filing a motion to compel. Rule 37(a)(3); *see also Todd v. Bear Valley Apartments*, 980 P.2d 973 (Colo. 1999).

5. Briefing schedule

Under Rule 45(b), a Motion to Quash should be made "promptly and at any event at or before the time specified in the subpoena for compliance therewith." Although Colo. R. Civ. P. Section 1-15(1) sets for a briefing schedule for response and reply briefs, the timing is usually dictated on a case-by-case basis and often is accelerated by an impending trial date.

6. Amicus briefs

Amicus briefs are permitted at the appellate level. There is no prohibition against submitting an *amicus* brief to the trial court; however, the filing of an *amicus* brief at the trial court level is unusual.

There are media organizations in Colorado that would support an *amicus* brief opposing the subpoenaing of a newsperson. They include the Colorado Press Association, 303-571-5117; and the individual newspapers, television stations and radio stations throughout the state.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

In opposing a Motion to Quash, the party seeking the information has the burden of proving that (1) the information sought is directly relevant to a substantial issue in the case; (2) there are no other reasonable means of obtaining the information; and (3) the interest in obtaining the information outweighs any First Amendment interest of the newsperson. These three elements must be established by a preponderance of the evidence. C.R.S. §§ 13-90-119(3)(a)–(c).

B. Elements

1. Relevance of material to case at bar

The Shield Law states that the information sought must be "directly relevant" to a "substantial issue" in a proceeding. Colorado courts have determined when something is directly relevant to a substantial issue on a case by case basis. C.R.S. § 13-90-119(3)(a); *Gordon*, 9 P.3d at 1118. "In some cases, the confidential information may be the only evidence of a crucial aspect of the case, while in other situations, the information may be only marginally relevant to a less significant issue. *Id*. In Gordon, the court found that the identity of the source was directly relevant to a substantial issue. "[I]n a media defamation case the information about the reliability of the declarant's source may be relevant to a significant issue of the reporter's state of mind about the truth or falsity of his broadcasts. The less credible the source, the more likely the declarant acted with malice or reckless disregard. . ." Id.

Federal courts, applying a constitutional qualified privilege in Colorado, have determined that the information sought must be "centrally relevant" or "substantially relevant." *Re/Max*, 846 F. Supp. at 911-12. In Re/Max, the court found that the party seeking the information had not met its burden of proof as to the relevancy. "The only possible value in deposing Rebchook [the reporter] is to impeach Lininger's testimony. . . I conclude that deposing Rebchook offers de minimis impeachment value." *Id*. at 912.

2. Material unavailable from other sources

The second prong of the test is whether the information is obtainable through other reasonable means. C.R.S.§ 13-90-119(3)(b). The burden is on the party seeking the information to demonstrate "that no other reasonably available sources of the information exist and that the party has exhausted the reasonably available sources that might provide the information sought." Gordon, 9 P 3d. at 1118.

a. How exhaustive must search be?

The party must prove it has made "substantial efforts" to obtain the information. *Id.* "[B]ald assertions that the information cannot be obtained through alternative sources cannot sustain a court's order requiring disclosure by a newsperson asserting the privilege." *Id*. *See also Henderson*, 879 P.2d at 393 (newsperson cannot be compelled to disclose information because plaintiff had not sought information about a helicopter's flight path from public aviation authorities and because other witnesses had provided the information sought).

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

The party seeking the information must prove that he or she has already sought the information from other reasonably available sources. For example, in *Henderson*, the court granted the motion to quash because the plaintiff had not sought the information from other reasonable sources. 879 P. 2d at 393. The plaintiff was seeking information regarding the altitude at which a helicopter had been flying when it passed over a private home. *Id*. Plaintiff, however, had not sought the information from public aviation authorities. *Id.* In addition, the information had been provided by the defendants. *Id*.

c. Source is an eyewitness to a crime

Colorado courts have not directly addressed whether information obtained from an eyewitness to or participant in a crime is "unavailable" from any other source. However, in *Henderson*, the defendant was charged with cultivating marijuana based in part on the observations of law enforcement officer who was riding in a television news helicopter. *Henderson*, 879 P.2d at 392. The defendant subpoenaed the helicopter pilot in an effort to support his claim that the observations from the helicopter were an illegal search, violating his 4th Amendment rights. *Id*. The helicopter pilot, who was an employee of the television station, asserted the privilege under the Shield Law. *Id*. at 393. The court found that the pilot's assertion of the privilege was appropriate because the information sought in the subpoena was available from other sources, including the law enforcement officer on board. *Id*. at 394.

3. Balancing of interests

The individual seeking information from a newsperson must also show a strong interest in the information that supersedes the newsperson's First Amendment interested. C.R.S. § 13-90-119(3)(c); *Henderson*, 879 P.2d at 393. In *Gordon*, the Colorado Supreme Court found that, in considering whether a motion to quash should be granted, the court must balance the interests of the party seeking the information against the First Amendment interests of the newsperson in withholding it and the public's interest in promoting the gathering and reporting of news." *Gordon*, 9 P.3d at 1119. A key element in that balancing test is the "nature of the claim at issue." *Id*. In cases where the journalist is a party and that journalist's state of mind is at issue, the "equities weight somewhat more heavily in favor of disclosure." *Id*., *quoting Zerilli v. Smith*, 656 F. 2d 705, 714 (D.C.Cir. 1981). Where the newsperson is not a party, but is merely a source of information, "the equities weigh in favor of respecting the privilege." *Id*.

4. Subpoena not overbroad or unduly burdensome

Both the Civil and Criminal rules permit a court to quash a subpoena if it is "unreasonable or oppressive." Any fact a newsperson can convey to the court regarding the burdensomeness of responding to the subpoena is likely to be taken into consideration by the court. C.R.S. §§ 13-90-119(3)(a)–(c).

5. Threat to human life

There is no specific requirement in the rules or case law that the court is required to weigh whether the matter subpoenaed involves a threat to human life. However, since the court must balance the interest of the person seeking the information against the First Amendment interest of the newsperson and the public, it is conceivable that threat to human life would be one of the factors in that balancing act.

6. Material is not cumulative

The Shield Law provides, in part, that a privilege will exist for a newsperson unless the information is not available by any other reasonable means. C.R.S. § 13-90-119(3)(b). As a consequence, if the material is available from another source, the privilege will protect the newsperson. Thus, if the material is cumulative, the newsperson will be able to assert the privilege. *See, e.g.*, *Henderson*, 879 P.2d at 393 (helicopter pilot can assert the privilege because information available from other sources); *Re/Max*, 846 F. Supp. at 912 (information sought only of *de minimis* value)

7. Civil/criminal rules of procedure

The civil and criminal rules permit a non-party to move to quash a subpoena that is frivolous or unduly burdensome. *See* Colo. R. Civ. P. 45; Colo. R. Crim. P. 17.

8. Other elements

In order to overcome the qualified privilege established by the Shield Law, a party seeking information from a newsperson must establish by a preponderance of the evidence that the information is directly relevant to a substantial issue in the proceeding; there is no reasonable alternative for obtaining the information; and the interest in obtaining the information outweighs the newsperson's First Amendment interest in protecting the information. There are no other elements that must be proved.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Under the Colorado Press Shield Law it is possible to waive the privilege. However, the statute makes clear that the waiver of the privilege is in fact limited to information that has actually been published, and does not extend to information that has not actually been published, even if this information is related to the subject matter of information that has been published. C.R.S. § 13-90-119(4). The statute states that the "privilege of nondisclosure established by subsection (2) of this section may be waived only by the voluntary testimony or disclosure of a newsperson that directly addressed the news information or identifies the source of such news information sought. A publication or broadcast of a news report through the mass media concerning the subject area of the news information sought, but which does not directly address the specific news information sought, shall not be deemed a waiver of the privilege of nondisclosure as to such specific news information."

2. Elements of waiver

a. Disclosure of confidential source's name

The privilege is waived *only* upon voluntary testimony or disclosure. The information may be disclosed without waiver to an editor or attorney representing the newsperson's organization. *Gordon*, 9 P.3d at 1119-24.

b. Disclosure of non-confidential source's name

The privilege is waived *only* upon voluntary testimony or disclosure. The information may be disclosed without waiver to an editor or attorney representing the newsperson's organization. *Gordon*, 9 P.3d at 1119-24.

c. Partial disclosure of information

The information that is published or broadcast is deemed waived by the publication or broadcast. However, such publication or broadcast does not waive the privilege regarding any of the unpublished or unbroadcast material. C.R.S. § 13-90-119(4).

d. Other elements

There is no Colorado case law addressing other elements.

3. Agreement to partially testify act as waiver?

If a newsperson agrees to testify, the privilege is waived *only* as to the information provided during the testimony. C.R.S. § 13-90-119(4) (emphasis added).

VII. What constitutes compliance?

A. Newspaper articles

Rule 902 of the Colorado Rules of Evidence provides that newspapers and periodicals are self-authenticating for the purpose of establishing that an article or statement was published. CRE 902(6); *see also People v. Morise*, 859 P.2d 247, 250 (Colo. App. 1993).However, any statements contained in the article — when offered as the truth of the matters stated in the article — are hearsay. *Id*. Where there is a dispute over authenticity, the editor, reporter or custodian of records can authenticate the fact that the material was published.

B. Broadcast materials

If the broadcast is being offered in evidence, Rule 1003 of the Colorado Rules of Evidence allows as admissible a duplicate unless a genuine question arises as to the authenticity of the original, or where circumstances would be unfair if the duplicate were admitted.

C. Testimony vs. affidavits

Rule 108 of the Colorado Rules of Civil Procedure state that an affidavit "may be sworn to either within or without this state before any officer authorized by law."

D. Non-compliance remedies

1. Civil contempt

There are several possible consequences for a newsperson's refusal to comply with a court's order requiring compliance with a subpoena. Where the newsperson is a party to the proceeding, refusal to comply with a court's order may result in a finding of direct contempt under Colo. R. Civ. P. 107; *Gordon*, 9 P.3d at 1113 (lower court fine of $5,000 for refusal to reveal sources overturned, $15,000 sanction for evasive and misleading discovery responses not challenged on appeal). Under Rule 107, a court may impose either punitive or remedial sanctions where it concludes that a person has committed disorderly and disruptive behavior, such as actions that unreasonably interrupt the course of judicial proceedings and actions that obstruct the administration of justice. *Gordon*, 9 P.3d at 1113, n. 5. Penalties can include fine, a fixed prison sentence or both. Colo. R. Civ. P. 107.

Likewise, a party or non-party can be sanctioned or fined under Colo. R. Civ. P. 37 if the party seeking the information succeeds in filing a motion to compel and a court orders compliance. Rule 37(a)(3); *see, also, Todd v. Bear Valley Apartments*, 980 P.2d 973 (Colo. 1999).

a. Fines

In *Gordon*, the defendant talk show host was sanctioned $5,000 for refusing to reveal the identity of sources regarding his news report on an altercation at a bar. *Gordon*, 9 P.3d at 1111. The talk show host was also sanctioned $15,000 for "obfuscation of the discovery process." *Id*. at 1113. Under Rule 37, an "evasive or incomplete disclosure, answer or response" is considered a failure to disclose and is sanctionable. *Id*, at 1112, n. 4.

b. Jail

A jail sentence is permitted under Rule 107 in a case where a newsperson refuses to comply with a court order compelling testimony. In *People v. Silvers*, 99CR2936, Div. 1, an Arapahoe County district judge fined a television reporter $100 and sentenced him to 1 day in jail for failing to comply with the court's order compelling him to provide pretrial testimony and evidence in a criminal case. The reporter's sentence was stayed pending appeal. As of the date of publication, the reporter has filed a notice of appeal with the Colorado Court of Appeals. The reporter's sentence was stayed pending appeal, and the reporter filed a notice of appeal with the Colorado Court of Appeals, but there is no record of appeal proceedings.

2. Criminal contempt

In Colorado, criminal contempt is determined by whether the sanctions are punitive or remedial. Punitive sanctions are defined under Rule 107(a)(4) as "[p]unishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and the dignity of the court." Punitive sanctions may be combined with remedial sanctions.

Before a punitive sanction can be enforced there must be notice, the appointment of a special prosecutor, and a hearing. Rule 107(c), (d)(1). For all intents and purposes, the hearing is similar to a criminal trial in that the accused has, among other things, the right to counsel, the right to a jury trial, the right to enter a plea and the presumption of innocence. *See, generally*, Knapp, *Colorado Civil Procedure Forms and Commentary*, §§ 107.12.-15.

The individual charged with contempt is permitted a jury trial if the sentence imposed is more than six months. Rule 107(d)(1), *People v. Barron*, 677 P.2d 1370, 1374, n. 4 (Colo. App. 1984). If a jury trial is conducted, there is no specific limit to the prison sentence, but if there is no jury trial, the maximum sentence is 180 days. *Id*. There must be proof beyond a reasonable doubt. *Harthun v. District Court*, 495 P.2d 539 (Colo. 1972).

Colorado courts urge trial judges to use the contempt power "with caution and self restraint to protect the rights of litigants and he administration of justice, not to protect [the court's] dignity." *Estate of Elliot*, 993 P.2d 474, 478 (Colo. 2000).

3. Other remedies

In accordance with Rules 26 and 37 of the Colo. R. Civ. P., trial courts have broad discretion to fashion sanctions for non-compliance with discovery rules. *Prefer v. Pharm-NetRx, LLC*,18 P.3d 844 (Colo. App. 2000). The sanctions range from fines to dismissal of claims. The sanction of dismissal of claims is only appropriate for willful or deliberate disobedience of discovery rules. *Id*.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Under Colorado Appellate Rules, a final judgment of a district court may be appealed. C.A.R.1. The appellant has 45 days from the date of entry of the judgment to file a notice of appeal. C.A.R. 4.

Where no final order has been entered, a newsperson may seek a writ of mandamus with the Supreme Court. Mandamus is available only upon a showing that judicial discretion has been abused and the harm to the newsperson cannot be cured on appeal. *See e.g., Seymour v. District Court*, 581 P.2d 302 (Colo. 1978).

2. Expedited appeals

There are no special statutory procedures in place to address the appeal of an order compelling a newsperson to testify or provide documents. A newsperson could move for an expedited appeal. To succeed, the movant must show a reason why the appeal is time sensitive.

B. Procedure

1. To whom is the appeal made?

Decisions made by courts of limited jurisdiction in Colorado are appealed to courts of general jurisdiction. As such, decisions by municipal courts of record and county courts must be filed with the district court in the district in which the municipal or county court is located. C.R.S. § 13-6-110, 111, 116-125. The district court on de novo review, may affirm, reverse, remand or modify the judgment. C.R.S. § 13-6-110. The notice of appeal must be filed within 15 days for entry of judgment. Colo. R. Civ. P. 441(a).

Administrative decisions may be reviewed either by the district court or the appellate court, depending on the agency action to be reviewed. In general, judicial review of agency action is guided by C.R.S. § 4-4-106. In appealing an agency decision to the district court, an appellant has 30 days of the effective date of the agency action to file a notice of appeal. C.R.S. § 24-4-106(4). For an appeal to the appellate court, the appellant must file a notice of appeal within 45 days of the effective date of the agency action. C.R.S. § 24-4-106(11). An appellant may also seek relief under Colo. R. Civ. P. 106 for certain actions of city and county agencies. For Shield Law purposes, Rule 106 has been used to challenge a county court's citation for contempt. *Jordan v. County Court In and For City and County of Denver*, 722 P.2d 450 (Colo. App. 1986). Once a final order is entered in a Rule 106 proceeding, it can be appealed in the same manner as any other final district court judgment. *Milburn v. El Paso County Court*, 859 P.2d 909 (Colo. App. 1993).

Under Colorado Appellate Rules, a final judgment of a district court may be appealed. C.A.R.1. The appellant has 45 days from the date of entry of the judgment to file a notice of appeal. C.A.R. 4. Extensions of time "not to exceed thirty days" may be granted at the discretion of the appellate court upon a showing of "excusable neglect." *Id., Collins v. Boulder Urban Renewal Authority*, 684 P.2d 952 (Colo. App. 1984).

2. Stays pending appeal

Rule 62 of the Colorado Rules of Civil Procedure provide for an automatic stay of any final judgment for 15 days from the date of the ruling. If there is no final judgment, counsel for the newsperson should request a stay pending appeal. If a motion to stay under Rule 62 is denied, an application may be made to the appellate court under Colorado Appellate Rule 8. Please note that the appellate court does not acquire jurisdiction to entertain the motion for stay until a notice of appeal is filed.

3. Nature of appeal

Under Colorado Appellate Rules, a final judgment of a district court may be appealed. C.A.R.1. The appellant has 45 days from the date of entry of the judgment to file a notice of appeal. C.A.R. 4.

Where no final order has been entered, a newsperson may file an original proceeding with the Supreme Court. Mandamus is available only upon a showing that judicial discretion has been abused and the harm to the newsperson cannot be cured on appeal. *See e.g., Seymour v. District Court*, 581 P.2d 302 (Colo. 1978).

4. Standard of review

In general, discovery rulings are reviewed under an abuse of discretion standard. *See, generally, J.P. v. District Court*, 873 P.2d 745 (Colo. 1994); *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991) (abuse of discretion standard used to determine validity of sanction award by district court under Rule 37).

5. Addressing mootness questions

The mootness issue has not specifically been addressed in Colorado in the context of a subpoena of a newsperson. In general, a case is moot where there no longer is a justiciable, actual controversy, unless the issue is capable of repetition and would otherwise evade review. *Humphrey v. Southwestern Development Co.*, 734 P.2d 637 (Colo. 1987). In the case of *People v. Silvers*, *supra*, a trial court judge sentenced a reporter to one day in jail anda $100 fine for refusing to comply with a subpoena, but granted a stay pending appeal. The trial was conducted by a different judge, and the reporter was issued another subpoena to testify. The reporter again moved to quash and the second motion was granted. While it appears that the contempt proceeding ended due to mootness, no confirming record is available.

6. Relief

On an appeal of a Motion to Quash that has been denied, counsel should request that the court of appeals outline the test to be applied and request that the trial judge reconsider the issues in light of the appellate ruling. *See, e.g., Gordon*, 9 P.3d 1106, 1124. Other types of relief the appellate court can provide include reversing a lower court's order of contempt and vacating a lower court's order compelling responses to a subpoena. *Id*.

IX. Other issues

A. Newsroom searches

The federal Privacy Protection Act (42 U.S.C. 2000aa) is incorporated by reference into the Shield Law. Section 13-90-119 explicitly states that no provisions in the Shield law will "preclude the issuance of a search warrant in compliance with the federal 'Privacy Protection Act of 1980." C.R.S. § 13-90-119(6). Although not specifically addressing the Privacy Protection Act, the Colorado Supreme Court has ruled that the Colorado Constitution provides important protections where the right to receive and distribute information are concerned. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002). In *Tattered Cover*, the Supreme Court found that, because of the fundamental rights implicated, the police could not execute a search warrant to recover receipts from a book store except for a showing of a compelling need that outweighs the privacy interests of the book store and its customers and a sufficient connection between the information sought and the criminal investigation. *Id*.

B. Separation orders

No reported cases in Colorado.

C. Third-party subpoenas

While there are no cases specifically addressing the question of third-party subpoenas in media cases, in *Colorado v. Thill*, 98CR621 (Colo. Dist. Ct. Feb. 5, 1999), a criminal case, a Denver District Court judge excluded as improperly obtained evidence of a television reporter's telephone records, which, without using a subpoena, the defense had obtained directly from the reporter's cellular carrier. The defense had contacted the telephone company directly after the court quashed its subpoena directed at forcing the reporter to testify as to the identity of a source. *See also Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002) (privacy and first amendment rights upheld against third party search warrant).

D. The source's rights and interests

No reported cases in Colorado.