REPORTER'S PRIVILEGE: CONNECTICUT

The Reporters Committee for Freedom of the Press

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

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

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The Reporter's Privilege Compendium: An Introduction

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

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

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

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

Above the law?

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

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

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

CONNECTICUT

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I. Introduction: History & Background

Connecticut's reporter's shield law took effect October 1, 2006. It codifies the privilege and establishes standards for overcoming it in Connecticut state court proceedings. Connecticut's state and federal courts had recognized the privilege before the enactment of the new statute, deriving the substance of the privilege from case law emanating from the Court of Appeals for the Second Circuit. State court case law on the subject is sparse because the issue most often arises on reporters' motions to quash subpoenas, the court's rulings on which are usually oral and not memorialized in written opinions. As of this writing there are no decisions interpreting the new statute. In federal court, the privilege is governed by Second Circuit common law principles, most recently articulated in *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999).

II. Authority for and source of the right

A. Shield law statute

Text and Statute Number

Section 52-146t of the Connecticut General Statutes, entitled "Protection From Compelled Disclosure of Information Obtained by New Media," provides as follows:

(a) As used in this section:

(1) "Information" has its ordinary meaning and includes, but is not limited to, any oral, written or pictorial material, whether or not recorded, including any notes, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium; and

(2) "News media" means:

(A) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates information to the public, whether by print, broadcast, photographic, mechanical, electronic or any other means or medium;

(B) Any person who is or has been an employee, agent or independent contractor of any entity specified in subparagraph (A) of this subdivision and is or has been engaged in gathering, preparing or disseminating information to the public for such entity, or any other person supervising or assisting such person with gathering, preparing or disseminating information; or

(C) Any parent, subsidiary, division or affiliate of any person or entity specified in subparagraph (A) or (B) of this subdivision to the extent the subpoena or other compulsory process seeks the identity of a source or the information described in subsection (b) of this section.

(b) No judicial, executive or legislative body with the power to issue a subpoena or other compulsory process may compel the news media to testify concerning, or to produce or otherwise disclose, any information obtained or received, whether or not in confidence, by the news media in its capacity in gathering, receiving or processing information for potential communication to the public, or the identity of the source of any such information, or any information that would tend to identify the source of any such information, unless such judicial, executive or legislative body complies with the provisions of subsections (c) to (e), inclusive, of this section.

(c) Prior negotiations with the news media shall be pursued in all matters in which the issuance of a subpoena to, or the initiation of other compulsory process against, the news media is contemplated for information described in subsection (b) of this section or the identity of the source of such information, or any information that would tend to identify the source of any such information.

(d) If the news media and the party seeking to compel disclosure of information described in subsection (b) of this section or the identity of the source of any such information, or any information that would tend to identify the source of any such information, fail to reach a resolution, a court may compel disclosure of such information or the identity of the source of such information only if the court finds, after notice to and an opportunity to be heard by the news media, that the party seeking such information or the identity of the source of such information has established by clear and convincing evidence:

(1) That (A) in a criminal investigation or prosecution, based on information obtained from other sources than the news media, there are reasonable grounds to believe that a crime has occurred, or (B) in a civil action or proceeding, based on information obtained from other sources than the news media, there are reasonable grounds to sustain a cause of action; and

(2) That (A) the information or the identity of the source of such information is critical or necessary to the investigation or prosecution of a crime or to a defense thereto, or to the maintenance of a party's claim, defense or proof of an issue material thereto, (B) the information or the identity of the source of such information is not obtainable from any alternative source, and (C) there is an overriding public interest in the disclosure.

(e) A court of this state shall apply the procedures and standards specified by this section to any subpoena or other compulsory process whether it arises from or is associated with a proceeding under the laws of this state or any other jurisdiction, except that with respect to a proceeding arising under the laws of another jurisdiction, a court of this state shall not afford lesser protection to the news media than that afforded by such other jurisdiction. No subpoena or compulsory process arising from or associated with a proceeding under the laws of another jurisdiction shall be enforceable in this state unless a court in this state has personal jurisdiction over the person or entity against which enforcement is sought.

(f) The provisions of subsection (b) of this section protecting from compelled disclosure information described in said subsection and the identity of the source of any such information shall also apply if a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks information concerning business transactions between such third party and the news media for the purpose of obtaining information described in said subsection or discovering the identity of a source of any such information. Whenever a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks information concerning business transactions between such third party and the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard.

(g) Publication or dissemination by the news media of information described in subsection (b) of this section, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure provided in said subsection with respect to any information that is not published or disseminated.

(h) Any information obtained in violation of the provisions of this section, and the identity of the source of such information, shall be inadmissible in any action, proceeding or hearing before any judicial, executive or legislative body.

(i) Whenever any person or entity seeks the disclosure from the news media of information that is not protected against compelled disclosure pursuant to subsection (b) of this section, such person or entity shall pay the actual cost that would be incurred by the news media in making a copy of such information if a subpoena or other compulsory process was not available, and may not use a subpoena or other compulsory process as a means to avoid paying such actual cost.

(j) Nothing in subsections (a) to (i), inclusive, of this section shall be construed to deny or infringe the rights of an accused in a criminal prosecution guaranteed under the sixth amendment to the Constitution of the United States and article twenty-ninth of the amendments to the Constitution of the state of Connecticut.

History

The Shield Law was enacted by Public Act 06-140 and signed into law by Gov. Jodi Rell (R) on July 27 2006. It took effect October 1, 2006. Sponsored by State Rep. James Spallone (D-Essex), the legislation creating the law

was entitled "An Act Concerning Freedom of the Press." It was passed by the House of Representatives by a vote of 136-11, and by the Senate 36-0.

Among the bill's supporters were the Connecticut Broadcaster's Association and the Connecticut Daily Newspaper Association.

B. State constitutional provision

Connecticut's constitution has no express shield law provision, nor has one been read into it by a state court.

C. Federal constitutional provision

In *Connecticut State Board of Labor Relations v. Fagin*, 33 Conn. Supp. 204, 370 A.2d 1095 (1976), the Superior Court, Connecticut's trial court, finding that "interpretations of federal constitutional provisions" by the Court of Appeals for the Second Circuit "are binding upon this court," recognized a "limited constitutional privilege of a newsman to withhold confidential sources," the substance of which was to be found in *Baker v. F & F Investment*, 470 F.2d 778 (2 Cir. 1972). *See also Goldfeld v. Post Publishing*, 4 Med. L. Rptr. 1167 (Superior Court, 1978). Federal courts sitting in Connecticut, bound as they are by Second Circuit case law, have also recognized a First Amendment-based qualified reporters' privilege. *S.E.C. v. Seahawk Deep Ocean Technology, Inc.*, 166 F.R.D. 268 (D. Conn. 1996); *Driscoll v. Morris*, 111 F.R.D. 459 (D. Conn. 1986). The trial court case of *Rubera v. Post-Newsweek Stations*, 8 Med. L. R. 2293 (Superior Court 1982), denying the existence of a reporter's privilege, is aberrational.

D. Other sources

There are no other Connecticut sources for the reporter's privilege.

III. Scope of protection

A. Generally

The Shield Law protects both confidential and non-confidential sources. It applies to "any information obtained or received, whether or not in confidence, by the news media in its capacity in gathering, receiving or processing information for potential communication to the public, the identity of the source of any such information, or any information that would tend to identify the source of such information." Conn. Gen. Stat. § 52-146t(b)

The privilege is strong, and cannot be overcome unless the party seeking disclosure shows by "clear and convincing evidence" that *all* of the following four conditions are met: (1) that there are reasonable grounds to sustain the civil or criminal action in which the disclosure is sought, (2) that the information or the identity of the source is "critical or necessary" to critical or necessary to the investigation or prosecution of a crime or to a defense thereto, or to the maintenance of a party's claim, defense or proof of an issue material thereto, (3) that the information or source identity is "not obtainable from any alternative source," and (4) that there is "an overriding public interest in the disclosure." Conn. Gen. Stat. § 52-146t(d). Additionally, the statute requires a party seeking disclosure to pursue "[p]rior negotiations with the news media" before issuing a subpoena for any information protected by the statute.

Prior to the enactment of the statute, courts had expressly applied the privilege in cases involving confidential sources. *Fagin, supra*, 33 Conn. Supp. at 207. In *Gonzales*, 194 F.3d at 21-22, the Second Circuit affirmed that the privilege also applies to nonconfidential information, but held that the showing required to overcome the privilege is less demanding than for confidential sources. See also *von Bulow v. von Bulow*, 811 F.2d 136 (2 Cir. 1987). *Seahawk*, 166 F.R.D. at 270.

B. Absolute or qualified privilege

The privilege is a qualified one.

C. Type of case

1. Civil

The proof required to overcome the privilege is equally strict for both civil and criminal cases, but the standard is described differently. In a civil case, in addition to the other prerequisites to overcoming the privilege, a party seeking to compel disclosure of protected information or source identities must show that "there are reasonable grounds to sustain a cause of action," and that the information or source identity is "critical or necessary . . . to the maintenance of a party's claim, defense or proof of an issue material thereto." In a criminal case, the party seeking disclosure must show that "there are reasonable grounds to believe that a crime has occurred" and that "the information or the identity of the source of such information is critical or necessary to the investigation or prosecution of a crime or to a defense thereto."

Prior to the enactment of the statute, no state court case discussed any difference based on whether the case was civil or criminal, but *Seahawk, supra*, at 271, implied an easier standard for requiring disclosure in criminal cases. The Shield Law, however, makes no such distinction.

2. Criminal

The proof required to overcome the privilege is equally strict for both civil and criminal cases, but the standard is described differently. In a criminal case, in addition to the other prerequisites to overcoming the privilege, a party seeking to compel disclosure of protected information or source identities must show that "there are reasonable grounds to believe that a crime has occurred" and that "the information or the identity of the source of such information is critical or necessary to the investigation or prosecution of a crime or to a defense thereto." In a civil case, the party seeking disclosure must show that "there are reasonable grounds to sustain a cause of action," and that the information or source identity is "critical or necessary . . . to the maintenance of a party's claim, defense or proof of an issue material thereto."

No state court case discusses any difference based on whether the case is civil or criminal. *Seahawk, supra*, at 271 implies an easier standard for requiring disclosure in criminal cases.

3. Grand jury

Neither the statute nor the case law discusses the privilege in the context of grand juries.

D. Information and/or identity of source

The Shield Law protects information and the identity of sources of information. Under the statute, "'Information' has its ordinary meaning and includes, but is not limited to, any oral, written or pictorial material, whether or not recorded, including any notes, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium." In addition to also protecting both confidential and non-confidential sources, the statute protects "information that would tend to identify" such sources.

E. Confidential and/or non-confidential information

The Shield Law expressly applies the same protection to both confidential and non-confidential sources.

F. Published and/or non-published material

The Shield Law applies to both published and non-published material, prohibiting compulsory process of "*any* information obtained or received, whether or not in confidence, by the news media in its capacity in gathering, receiving or processing information for *potential* communication to the public." It also provides that publication of information "shall not constitute a waiver of the protection from compelled disclosure provided in said subsection with respect to any information that is not published or disseminated.

G. Reporter's personal observations

Neither the Shield Law nor the case law discusses reporter's personal observations.

H. Media as a party

Neither the Shield Law nor the case law discusses how the privilege would be affected if the media were a party to the action.

I. Defamation actions

The Shield Law makes no express accommodation for defamation actions.

IV. Who is covered

The Shield Law extends its protections to all members of the "News Media," which it defines as:

> (A) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates information to the public, whether by print, broadcast, photographic, mechanical, electronic or any other means or medium;
>
> (B) Any person who is or has been an employee, agent or independent contractor of any entity specified in subparagraph (A) of this subdivision and is or has been engaged in gathering, preparing or disseminating information to the public for such entity, or any other person supervising or assisting such person with gathering, preparing or disseminating information; or
>
> (C) Any parent, subsidiary, division or affiliate of any person or entity specified in subparagraph (A) or (B) of this subdivision to the extent the subpoena or other compulsory process seeks the identity of a source or the information described in subsection (b) of this section.

Conn. Gen. Stat. § 52-146t(a)(2).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Neither the Shield Law nor the case law define "reporter," but the privilege expressly applies to employees, agents and contractors of the various news media, either directly "engaged in gathering, preparing or disseminating" information, or merely "assisting" with those activities. No distinctions are made based on full- or part-time status of the reporter or the nature of the reporter's employment. Conn. Gen. Stat. § 52-146t(a)(2).

b. Editor

Neither the Shield Law nor the case law define "editor," but the privilege expressly applies to "any person *supervising or assisting*" a person "engaged in gathering, preparing or disseminating" information for the news media. Conn. Gen. Stat. § 52-146t(a)(2).

c. News

Neither the Shield Law nor the case law define "news."

d. Photo journalist

There is no definition of "photojournalist," but the information protected by the Shield Law includes "pictorial material," including "photographs, video or sound tapes, film or other data of whatever sort in any medium." Conn. Gen. Stat. § 52-146t(a)(1).

e. News organization / medium

The Shield Law defines "News Media" as

> (A) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates information to the public, whether by print, broadcast, photographic, mechanical, electronic or any other means or medium;

(B) Any person who is or has been an employee, agent or independent contractor of any entity specified in subparagraph (A) of this subdivision and is or has been engaged in gathering, preparing or disseminating information to the public for such entity, or any other person supervising or assisting such person with gathering, preparing or disseminating information; or

(C) Any parent, subsidiary, division or affiliate of any person or entity specified in subparagraph (A) or (B) of this subdivision to the extent the subpoena or other compulsory process seeks the identity of a source or the information described in subsection (b) of this section.

2. Others, including non-traditional news gatherers

The Shield Law's broad definition of "News Media" is not limited to traditional print and broadcast outlets, but there is no case law addressing what sorts of non-traditional news gatherers are protected by the privilege.

B. Whose privilege is it?

Neither the Shield Law nor the case law address whether the privilege belongs to the source, the reporter, the reporter's employer, or any combination thereof.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

The Shield Law requires that, prior to issuing a subpoena or initiating compulsory process against the news media, the party seeking information must first pursue "prior negotiations with the news media."

Subpoenas to be served on news gatherers are governed by the same statute as governs subpoenas for any other witness. It is General Statutes §52-143, and states as follows:

(a) Subpoenas for witnesses shall be signed by the clerk of the court or a commissioner of the superior court and shall be served by an officer, indifferent person or, in any criminal case in which a defendant is represented by a public defender or special public defender, by an investigator of the division of public defender services. The subpoena shall be served not less than eighteen hours prior to the time designated for the person summoned to appear, unless the court orders otherwise.

(b) Any subpoena summoning a police officer as witness may be served upon the chief of police or any person designated by the chief of police at the appropriate police station who shall act as the agent of the police officer named in the subpoena. Service upon the agent shall be deemed to be service upon the police officer.

(c) Any subpoena summoning a correctional officer as witness may be served upon a person designated by the Commissioner of Correction at the correctional facility where the correctional officer is assigned who shall act as the agent of the correctional officer named in the subpoena. Service upon the agent shall be deemed to be service upon the correctional officer.

(d) Subpoenas for witnesses summoned by the state, including those issued by the Attorney General or an assistant Attorney General, or by any public defender or assistant public defender acting in his official capacity may contain this statement: Notice to the person summoned: Your statutory fee as witness will be paid by the clerk of the court where you are summoned to appear, if you give the clerk this subpoena on the day you appear. If you do not appear in court on the day and at the time stated, or on the day and at the time to which your appearance may have been postponed or continued by order of an officer of the court, the court may order that you be arrested."

(e) If any person summoned by the state, or by the Attorney General or an assistant Attorney General, or by any public defender or assistant public defender acting in his official capacity, by a subpoena containing the statement as provided in subsection (d), or if any other person upon whom a subpoena is served to appear and testify in a cause pending before any court and to whom one day's attendance and fees for traveling to court have been tendered, fails to appear and testify, without reasonable excuse, he shall be fined not more than

> twenty-five dollars and pay all damages to the party aggrieved; and the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d), or on proof of the service of a subpoena and the tender of such fees, may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify.

The statute governing subpoenas for depositions is General Statutes § 52-148e, and states as follows:

> (a) Each judge or clerk of any court, justice of the peace, notary public or commissioner of the superior court, in this state, may issue a subpoena, upon request, for the appearance of any witness before him to give his deposition in a civil action or probate proceeding, if the party seeking to take such person's deposition has complied with the provisions of sections 52-148a and 52-148b and may take his deposition, each adverse party or his agent being present or notified.
>
> (b) The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which are material to the cause of action or the defense of the party at whose request the subpoena was issued and within the possession or control of the person to be examined. However, no subpoena may compel the production of matters which are privileged or otherwise protected by law from discovery.
>
> (c) Any person to whom a subpoena commanding production of books, papers, documents or tangible things has been directed may, within fifteen days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than fifteen days after service, serve upon the issuing authority designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party at whose request the subpoena was issued shall not be entitled to inspect and copy the disputed materials except pursuant to an order of the court in which the cause is pending. The party who requested the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.
>
> (d) The court in which the cause is pending may, upon motion made promptly and in any event at or before the time for compliance specified in a subpoena authorized by subsection (b) of this section, (1) quash or modify the subpoena if it is unreasonable and oppressive or if it seeks the production of materials not subject to production under the provisions of subsection (b) of this section, or (2) condition denial of the motion upon the advancement by the party who requested the subpoena of the reasonable cost of producing the materials which he is seeking.
>
> (e) If any person to whom a lawful subpoena is issued under any provision of this section fails without just excuse to comply with any of its terms, the court before which the cause is pending, or any judge thereof, may issue a capias and cause him to be brought before such court or judge, as the case may be, and, if the person subpoenaed refuses to comply with said subpoena, such court or judge may commit him to jail until he signifies his willingness to comply with it.
>
> (f) Deposition of witnesses living in this state may be taken in like manner to be used as evidence in a civil action or probate proceeding pending in any court of the United States or of any other state of the United states or of any foreign country, on application of any party to such civil action or probate proceeding.

Subpoenas must be served upon the witness personally, Abode service does not suffice.

2. Deposit of security

There is no requirement that the subpoenaing party deposit any security in order to procure the testimony or materials of the reporter.

3. Filing of affidavit

Historically, the subpoenaing party has not been required to make a sworn statement in order to procure the reporter's testimony or materials. Given the new statute's requirement that a party pursue negotiations with the news media prior to initiating compulsory process against the news media, it is feasible that some certification of compliance with that requirement will be necessary.

4. Judicial approval

Generally, no judge or magistrate need approve a subpoena issued by a commissioner of the court, including attorneys admitted to practice before Connecticut courts.

5. Service of police or other administrative subpoenas

There are no special rules regarding such service.

B. How to Quash

1. Contact other party first

The Shield Law requires a party seeking information from the news media to pursue negotiations with the news media prior to issuing a subpoena. However, in the event a subpoena is issued without such an effort it is wise to contact the party issuing the subpoena before moving to quash it. Inevitably, the judge hearing the motion to quash will ask if this contact was made; and experience indicates that discussion may either dissuade the issuer from pursuing the subpoena or both parties will come to realize that what the issuer really seeks is something the subpoenaed party either does not have or will not know, or else will willingly disclose informally without jeopardy to the privilege.

2. Filing an objection or a notice of intent

The law does not require filing either an objection or a notice of intent, except for an objection to production of things under General Statutes § 52-148e(c) *supra*.

3. File a motion to quash

a. Which court?

The motion to quash must be filed in the case in which the subpoena was issued and in the Judicial District of the Superior Court in which that case is pending.

b. Motion to compel

The media party should not wait for the subpoenaing party to file a motion to compel before filing a motion to quash. A motion to compel would only be filed after passage of the date and time specified in the subpoena; and if no motion to quash has been filed prior to that date, the subpoenaed party will be deemed to have waived the right to do so.

c. Timing

A motion to quash should be made promptly and in no event after the date and time specified for compliance in the subpoena. For subpoenas in civil cases for depositions, see General Statutes § 52-148e(d), *supra*. For subpoenas for appearance or production before an investigative grand jury, Connecticut Practice Book Section 44-31 provides as follows:

> (a) Whenever a subpoena has been issued to compel the attendance of a witness or the production of documents at an inquiry conducted by an investigative grand jury, the person summoned may file a motion to quash the subpoena with the chief clerk of the judicial district wherein the investigation is then being conducted. No fees or costs shall be required or assessed.
>
> (b) The motion shall be docketed as a criminal matter. The party filing the motion shall be designated as the plaintiff and the state's attorney for such judicial district shall be designated as the defendant. A prosecuting authority shall appeal and defend on behalf of the state's attorney.
>
> (c) Unless otherwise ordered by the judicial authority before whom such hearing shall be conducted, the hearing on the motion to quash shall be conducted in public and the court file on the motion to quash shall be open to public inspection.
>
> (d) The motion shall be heard forthwith by a judicial authority who is not a member of the panel of judges which acted on the application, nor the grand jury in the proceeding. The hearing date and time shall be set by

the clerk after consultation with the judicial authority having responsibility for the conduct of criminal business within the judicial district. The clerk shall give notice to the parties of the hearing so scheduled.

If a subpoena has been issued on short notice for testimony at trial, the presiding judge will generally hear the motion to quash prior to the start of evidence.

d. Language

There is no stock language or preferred text that should be included in a motion to quash. The following is a sample of a motion to quash:

MOTION TO QUASH SUBPOENA

[Reporter's name], a journalist with [news organization] ("Movant"), hereby moves that the subpoena attached hereto, made a part hereof, and marked "Exhibit A," commanding the presence of [name] at a hearing before this Court on [date] at [time] be quashed pursuant to Section 52-146t of the Connecticut General Statutes (the "Shield Law").

In support hereof, Movant represents as follows:

1. [Name] is a journalist employed by [news organization], and meets the Shield Law's definition of "News Media." [He/She] is therefore protected by the reporter's privilege as set forth in the Shield Law.

2. Neither [Name] or [news organization] is a party to this case.

3. Upon information and belief, this suit deals with [description of case].

4. The Shield Law provides that a party in a [civil/criminal] action cannot overcome the reporter's privilege and compel a member of the News Media to testify, produce information or identify confidential or non-confidential sources without first establishing *by clear and convicing evidence* the following:

(a) That there are reasonable grounds to [sustain the cause of action / defense / etc.];

(b) That the information sought from the news media is "critical or necessary" to the maintenance of the claim;

(c) That the information is "not obtainable from any alternative source"; and

(d) That there is "an overriding public interest in disclosure."

5. Plaintiff has not and cannot, under the circumstances of this case, met the weighty burden of proof set forth in the Shield Law. [He/She] has not shown by clear and convincing evidence that there are reasonable grounds to [sustain the cause of action / defense / etc.], that the information sought is "critical or necessary," that there is no alternative source for the information, or that there is an overriding public interest in disclosure, especially when balanced against traditional constitutional and common law rights.

Therefore, pursuant to the Shield Law, as well as the rights accorded [Name] under the First Amendment to the United States Constitution, Article First, Section Five of the Connecticut Constitution, and federal and state common law applicable to these sorts of inquiries, plaintiff has not demonstrated the existence of the conditions precedent requisite to compelling the presence of [name] or [her/his] testimony.

Accordingly, the subpoena was improvidently issued and should be quashed.

e. Additional material

Connecticut judges are not uniformly familiar with the Shield Law or the constitutional principles underlying the privilege. It is recommended that movants file a brief memorandum of law in support of their motion to quash, setting forth the requirements of the Shield Law and explaining the nature, extent and source of the privilege on which the motion is based, and applying these principles to the particular facts of the case. The subpoena and, where applicable, notice of deposition ought to be exhibits to the motion itself (as contrasted to the memorandum of law: the motion is a pleading, and will be part of the printed record on appeal; the memorandum is not).

In addition, an Appearance form (JD-CL-12) should be filed to ensure the matter is in the court's computer and that counsel will receive all filings and court notices and calendars. The reporter technically is not freed from the subpoena until the motion to quash is granted, and therefore if the motion to quash is argued at the time the reporter is ordered to appear for testimony, the reporter should be available on short notice, though not necessarily in the courtroom or even at the courthouse.

4. In camera review

a. Necessity

Neither the Sheild Law nor the case law directs a court to conduct an *in camera* review of materials or interview with the reporter prior to deciding a motion to quash. Judges have, of course, done the former to determine, e.g., whether the documents, film, negatives and the like constitute unique pieces of relevant data not obtainable from non-media sources.

b. Consequences of consent

Neither the Shield Law nor the case law address the consequences of consent.

c. Consequences of refusing

Neither the Shield Law nor the case law address the consequences of refusing consent.

5. Briefing schedule

There is no regular briefing schedule. Usually, movant's brief is filed with its motion. After conclusion of the hearing the court upon request likely will give the subpoenaing party the opportunity to file a brief.

6. Amicus briefs

Amicus briefs are generally rare at the trial court level, but more common in the Appellate and Supreme Courts.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Under the Shield Law, the party seeking to compel disclosure must prove by "clear and convincing evidence" the following:

> "(1) That (A) in a criminal investigation or prosecution, based on information obtained from other sources than the news media, there are reasonable grounds to believe that a crime has occurred, or (B) in a civil action or proceeding, based on information obtained from other sources than the news media, there are reasonable grounds to sustain a cause of action; *and*
>
> "(2) That
>
> (A) the information or the identity of the source of such information is critical or necessary to the investigation or prosecution of a crime or to a defense thereto, or to the maintenance of a party's claim, defense or proof of an issue material thereto,
>
> (B) the information or the identity of the source of such information is not obtainable from any alternative source, *and*
>
> (C) there is an overriding public interest in the disclosure."

Conn. Gen. Stat. § 52-146t(d)

There have been no cases interpreting the elements of the Shield Law, but guidance may be found in the case law applying the common-law standard developed primarily by federal courts. Under the federal court analysis, before the privilege can be overcome, the party seeking to compel disclosure of unpublished information or material from a journalist or publication bears the burden of showing: (1) that the information he seeks is material, relevant and necessary for his case — that it goes to the heart of his case; (2) that there is no other source *un*protected by

the First Amendment from which the party could get the information; and (3) that he has exhausted other means of obtaining the information. *Riley v. City of Chester*, 612 F.2d 708, 716-717 (3 Cir.; 1979); *Baker v. F & F Investment*, 470 F.2d 778, 784-785 (2 Cir.; 1972), *cert. den.* 411 U.S. 966; *Application to Quash Subpoena To National Broadcasting Co.: Krase v. Graco Children's Products, Inc.*, 79 F.3d 346, 353 (2 Cir. 1996); *Carey v. Hume*, 492 F.2d 631, 637-639 (D.C. Cir.; 1974); *Garland v. Torre*, 259 F.2d 545 (2 Cir.; 1958), *cert. den.*, 358 U.S. 910. In making the showing as to exhaustion of alternative sources, it has been held, for instance, that requiring the taking of as many as 60 non-journalist depositions of those likely to possess the information is a legitimate exhaustion requirement. *Baker*, *supra*, cited in *Carey*, *supra*, at 639. The showing that the one seeking to overcome the privilege has the burden of making is "a clear and specific showing" and must be "a concern so compelling as to override the precious rights of freedom of speech and the press." *United States v. Burke*, 700 F.2d 70, 76-78 (2 Cir.; 1983); *Baker*, *supra* at 785.

B. Elements

1. Relevance of material to case at bar

See VI-A *supra*. To overcome the privilege, the subpoenaing party must show by clear and convincing evidence that the information sought is "critical or necessary to the investigation or prosecution of a crime or to a defense thereto, or to the maintenance of a party's claim, defense or proof of an issue material thereto." Conn. Gen. Stat. § 52-146t(2)(A).

2. Material unavailable from other sources

See VI-A *supra*. To overcome the privilege, the subpoenaing party must show by clear and convincing evidence that "(A) in a criminal investigation or prosecution, based on information obtained from other sources than the news media, there are reasonable grounds to believe that a crime has occurred, or (B) in a civil action or proceeding, based on information obtained from other sources than the news media, there are reasonable grounds to sustain a cause of action." Conn. Gen. Stat. § 52-146(d)(1). *See also Baker v. F & F Investment*, 470 F.2d 778 (2 Cir; 1972) (holding that as many as 60 non-journalist depositions of those likely to possess the information is a legitimate exhaustion requirement).

a. How exhaustive must search be?

There is no Connecticut case law on this topic.

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

There is no Connecticut case law on this topic.

c. Source is an eyewitness to a crime

There is no Connecticut case law on this topic.

3. Balancing of interests

See VI-A *supra*. One seeking to overcome the privilege must show "a concern so compelling as to override the precious rights of freedom of speech and the press." *United States v. Burke*, 700 F.2d 70, 76-78 (2 Cir.; 1983).

4. Subpoena not overbroad or unduly burdensome

See VI-A *supra*. This standard is significant in that it applies to subpoenas to non-media witnesses as well. As such, it affords a ground that does not show preferential treatment to the media.

5. Threat to human life

See VI-A *supra*, but this topic has not been directly addressed.

6. Material is not cumulative

See VI-A *supra*. General Statutes section 52-148e allows a court to quash a subpoena that is "unreasonable and oppressive." Moreoever, a subpoena may be quashed or limited if it requests material that would be cumulative of other evidence in the case. *See, e.g., State v. Weiner*, 753 A.2d 376 (Conn. App. 2000).

7. Civil/criminal rules of procedure

See statutes and Practice Book sections *supra*. General Statutes section 52-148e allows a court to quash a subpoena that is "unreasonable and oppressive."

8. Other elements

Courts have listed no other elements.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There are no cases on this subject. It is best to assume, however, that like any other testimonial privilege, it is waivable by its holder. The Shield Law provides that publication of information "shall not constitute a waiver of the protection from compelled disclosure provided in said subsection with respect to any information that is not published or disseminated.

2. Elements of waiver

There is no case law specifically and separately addressing waiver of a reporter's privilege in Connecticut. The general law of waiver presumably applies, requiring knowledge of the privilege and a conscious, knowing and intentional waiver of it.

3. Agreement to partially testify act as waiver?

There is no case law specifically and separately addressing waiver of a reporter's privilege in Connecticut. The general law of waiver presumably applies, requiring knowledge of the privilege and a conscious, knowing and intentional waiver of it.

VII. What constitutes compliance?

A. Newspaper articles

Newspapers are not self-authenticating. A librarian, archivist or other administrator can appear in court to do so, but not as a replacement of the one expressly subpoenaed without the consent of the issuing party or court order.

B. Broadcast materials

There is no rule as to who must appear with the subpoenaed materials; but absent the consent of the issuer or court order, the person subpoenaed should appear to verify that the things produced are what was sought.

C. Testimony vs. affidavits

Courts are fond of saying that affidavits cannot be cross-examined. Absent consent of the parties, affidavits cannot be substituted for live testimony.

D. Non-compliance remedies

1. Civil contempt

a. Fines

Fines are not capped. There are no recent examples.

b. Jail

Jail sentences are not limited. There are no recent examples.

2. Criminal contempt

There are no reported cases of the imposition of criminal contempt sanctions on a media person.

3. Other remedies

There are no reported cases regarding other remedies except for *Driscoll v. Morris*, 111 F.R.D. 459 (D. Conn. 1986), which held that, the plaintiff-reporter having placed the confidentiality of his sources at issue, his failure to disclose their identity would expose him to sanctions under F.R.C.P. 37.

VIII. Appealing

A. Timing

1. Interlocutory appeals

A reporter must wait until found in contempt for failing to comply with a subpoena after being ordered to comply by the court.

2. Expedited appeals

Beyond the inherent power of appellate courts to expedite appeals before them, upon motion or *eo motu*, there are no rules or statutes specially dealing with appeals of this sort.

B. Procedure

1. To whom is the appeal made?

Appeals are made to the Appellate Court from the decisions of the Superior Court, Connecticut's sole trial court.

2. Stays pending appeal

Practice Book § 61-11 provides for an automatic stay of any appealable order until the time for appeal has passed, and if an appeal has been timely taken, until "final determination of the cause". § 61-11(d) provides for motions to terminate stays. Because no case deals with this issue in the context of reporters' privilege appeals, it is possible that the automatic stay provided by § 61-11 does not exist. In that event, the court is empowered to grant a discretionary stay under Practice Book §61-12, which provides as follows:

> In noncriminal matters in which the automatic stay provisions of Section 61-11 are not applicable and in which there are no statutory stay provisions, any motion for a stay of the judgment or order of the superior court pending appeal shall be made to the judge who tried the case unless that judge is unavailable, in which case the motion may be made to any judge of the superior court. Such a motion may also be filed before judgment and may be ruled upon at the time judgment is rendered unless the court concludes that a further hearing or consideration of such a motion is necessary. A temporary stay may be ordered sua sponte or on written or oral motion, ex parte or otherwise, pending the filing or consideration of a motion for stay pending appeal. The motion shall be considered on an expedited basis and the granting of a stay of an order for the payment of money may be conditional on the posting of suitable security.
>
> In the absence of a motion filed under this section, the trial court may order, sua sponte, that proceeding to enforce or carry out the judgment or order be stayed until the time to take an appeal has expired or, if an appeal has been filed, until the final determination of the cause. A party may file a motion to terminate such a stay pursuant to Section 61-11.

Given the uncertain state of the law on stays in this context, prudence may dictate following the course under § 61-12.

3. Nature of appeal

There is no case law on this subject. Presumably, however, an appeal from a finding of contempt of court is of the same nature as an appeal by right from any other final judgment.

4. Standard of review

There is no case law on this subject. Generally speaking, the standard of review on appeal is as stated below:

> An appellate court's review of a trial court decision is circumscribed by the appropriate standard of review. As we have often stated: "The scope of our appellate review depends upon the proper characterization of the rul-

> ings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record."

Torres v. Waterbury, 249 Conn. 110, 119 (1999) (quoting *SLI International Corp. v. Crystal*, 236 Conn. 156, 163 (1996)).

5. Addressing mootness questions

There is no case law on this subject. In light of the fact that an appeal lies only from a finding of contempt for failure to obey a court order, a finding of criminal contempt would presumably never be moot. Facts and circumstances would determine whether a finding of civil contempt would be considered as "capable of repetition but evading review" if the hearing to which the reporter had been subpoenaed had concluded.

6. Relief

The reporter's attorney should seek a reversal of the finding of contempt. The appellate court can, of course, reverse and remand to the trial court for further proceedings (e.g., application of proper legal standard, factual inquiry including all required elements, etc.).

IX. Other issues

A. Newsroom searches

General Statutes §§ 54-33i and j provide as follows:

> § 54-33i:
>
> For the purposes of this section and sections 54-33a and 54-33j:
>
> (1) "Journalist" means a person engaged in the business of investigating, collecting or writing news, or of supervising such activity, with the intent of publication or presentation or for publication or presentation to the public through a news organization.
>
> (2) "News organization" means (A) an individual, partnership, corporation or other association engaged in the business, whether or not for profit, of (i) publishing a newspaper or other periodical that reports news events and that is issued at regular intervals or has a general circulation; or (ii) providing newsreels or other motion picture news for public showing; or (iii) broadcasting news to the public by wire, radio, television or facsimile; and (B) a press association or other association of individuals, partnerships, corporations or other associations described in subparagraph (A) of this subdivision or in subdivision (1) of this section engaged in gathering news and disseminating it to its members for publication.
>
> (3) "News" means any compilation of facts, theories, rumors or opinions concerning any subject for the purpose of informing the public.
>
> . . .
>
> §54-33j:
>
> (a)No search warrant, as provided in section54-33a, may be issued to search any place or seize anything in the possession, custody or control of any journalist or news organization unless such warrant is issued upon probable cause that such person or organization has committed or is committing the offense related to the property named in the warrant or such property constitutes contraband or an instrumentality of a crime.
>
> (b)Nothing in this section shall be construed as limiting the right to subpoena any such evidence if such subpoena is otherwise permitted by law.

B. Separation orders

There is no case law in Connecticut on separation orders in the context of a reporter who will also be a witness. Sequestration of witnesses generally is authorized in criminal cases by Practice Book § 42-36.

C. Third-party subpoenas

The Shield Law's protection extends to subpoenas issued to third parties if the subpoenas seek "information concerning business transactions between such third party and the news media for the purpose of obtaining" information that would be protected by the Shield Law if sought directly from the news media. When such subpoenas are issued, the statute requires that notice be given to the affected news media, and that the affected news media has an opportunity to be heard.

Courts have not addressed a media interest in fighting subpoenas to third parties seeking to discover a reporter's source. To the extent that media have an interest which will be invaded by such a subpoena, courts presumably will recognize their right to intervene to protect that interest, as they have in cases where orders sealing a court file are at issue.

D. The source's rights and interests

There is no Connecticut law addressing this issue.