

# REPORTER'S PRIVILEGE: DISTRICT OF COLUMBIA

**The Reporters Committee for Freedom of the Press**

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

The complete project can be viewed at  
[www.rcfp.org/privilege](http://www.rcfp.org/privilege)

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

of the state, or supporters of criminal defendants, or as advocates for one side or the other in civil disputes.

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

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

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

### The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dis-

sent from the Court's opinion and said that the First Amendment provided journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority. Although the high court has not revisited the issue, almost all the federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege.

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

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

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

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

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

## The Reporter's Privilege Compendium: Questions and Answers

### What is a subpoena?

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

### Do I have to respond to a subpoena?

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

If your state has a shield law, your lawyer must determine whether it will apply to you, to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, or if your situation seems to fall outside its scope, the state's courts may have recognized some common law or constitu-

tional privilege that will protect you. Each state is different, and many courts do not recognize the privilege in certain situations.

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

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

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

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

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

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

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

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

### Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

#### **Do the news media have any protection against search warrants?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lawyers are trained to give a legal citation for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute sup-

porting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

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

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

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

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

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## I. Introduction: History & Background

The District of Columbia has codified the journalist's privilege against disclosing sources, news, and information. The District of Columbia enacted the Free Flow of Information Act, D.C. Code § 16-4701-4704 in 1992 largely in response to the D.C. Court of Appeals's decision in *Wheeler v. Goulart*, 593 A.2d 173 (D.C. 1991), which upheld the lower court's order holding a *Washington Post* reporter in civil contempt for refusing to answer questions regarding sources. *See generally Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 336 (D.D.C. 1994).

The District's shield law provides an *absolute privilege* against the compelled testimony about *sources*, whether or not confidential. The District's shield law also provides a *qualified privilege* for *unpublished news or information*, including any notes, outtakes, photographs or photographic negatives, video or sound tapes, film, or other data, irrespective of its nature. The courts have applied the privilege broadly, concluding that it applies "to information gathered outside of the District, by non-resident journalists, or about events that occurred elsewhere." *Prentice v. McPhilemy*, 27 Med. L. Rptr. 2377, 2381 (D.C. Super. Ct. 1999) (holding that privilege could apply to documents and information collected by a non-resident journalist, in a foreign jurisdiction, that pertain to events that occurred outside the jurisdiction). The court also has held that that Act applies to documents created or sources found prior to the enactment of the Act. *Id.*

Additionally, a trial court in the District has held that a qualified First Amendment privilege protected a trade association from having to disclose the identity of a whistleblower who communicated anonymously over the internet. *Solers v. Doe*, 35 Med. L. Rptr. 1297 (D.C. Super. Ct. 2006).

## II. Authority for and source of the right

In 1992, the District of Columbia's City Council enacted (with Congress's approval) the Free Flow of Information Act, D.C. Code § 16-4701-4704. (Under the District's Home Rule Act the City Council may pass legislation for the District with certain exceptions; an act of the Council becomes effective if Congress does not pass a joint resolution disapproving of the act within a specified time period, generally 30 or 60 days. *See* D.C. Code §§ 1-204.04, 1-206.02 (2002).)

### A. Shield law statute

In 1992, the District of Columbia's City Council enacted (with Congress's approval) the Free Flow of Information Act, D.C. Code § 16-4701-4704. (Under the District's Home Rule Act the City Council may pass legislation for the District with certain exceptions; an act of the Council becomes effective if Congress does not pass a joint resolution disapproving of the act within a specified time period, generally 30 or 60 days. *See* D.C. Code §§ 1-204.04, 1-206.02 (2002).)

## III. Scope of protection

### A. Generally

The District's shield law provides broad protection for news, information, and sources. Under the statute, testimony about sources (whether or not confidential) can never be compelled when the source was contacted by the news media during an official news gathering activity. *See Grunseth*, 868 F. Supp. at 336; D.C. Code § 16-4702. Similarly, the court may only compel disclosure of news or information other than sources if the person seeking the information can show, by clear and convincing evidence, that: (1) the news or information is relevant to a significant legal issue before a judicial, legislative, administrative, or other body that has the power to issue a subpoena; (2) the news or information could not, with due diligence, be obtained by any alternative means; and (3) an overriding public interest in disclosure exists. D.C. Code §§ 16-4702, 4703. Moreover, the District's shield law provides that this privilege is not waived when the journalist publishes or disseminates the source or portion of the news or information while pursuing a professional activity. D.C. Code § 16-4704.

A D.C. court also has held that the identity of anonymous internet speakers also is subject to a qualified privilege under the First Amendment. *Solers v. Doe*, 35 Med. L. Rptr. 1297 (D.C. Super. Ct. 2006).

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

The privilege against compelled disclosure for news media *sources* is *absolute*, regardless of whether the source was promised confidentiality. The privilege against compelled disclosure of *news or information* is *qualified* and may only be compelled: (1) if the person seeking the news or information can prove, by clear and convincing evidence, that the news or information is relevant to a significant legal issue before a judicial, legislative, administrative, or other body that has the power to issue a subpoena; (2) the news or information could not, with due diligence, be obtained by any alternative means; and (3) an overriding public interest in disclosure exists. *See* D.C. Code §§ 16-4702, 4703; *see also* *Prentice*, 27 Med. L. Rptr. at 2381.

## **C. Type of case**

### **1. Civil**

The District's shield law, and the cases decided under it, make no distinction between civil and criminal cases.

### **2. Criminal**

The District's shield law, and the cases decided under it, make no distinction between civil and criminal cases. In pre-shield law precedent, the District recognized the privilege in criminal cases as well as civil. In *Payne v. United States*, 516 A.2d 484 (D.C. 1986), the D.C. Court of Appeals upheld the granting of a motion to quash a subpoena of a *Washington Post* reporter. A criminal defendant argued that a witness's identification of him was unreliable, and that he needed the impeachment testimony of the *Post* reporter covering the police investigation. The court upheld the granting of the motion to quash on the grounds that the reporter's testimony was not necessary and, thus, irrelevant to the issue of whether the identification was reliable.

### **3. Grand jury**

The District's shield law, and the cases decided under it, make no distinction between grand jury subpoenas and other subpoenas.

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

The District's shield law provides absolute protection for the identity of a source. Given this broad protection, the law arguably also protects information that implicitly would identify the source. However, no case law exists on point. *See* *Prentice*, 27 Med. L. Rptr. 2382 n. 10 (noting that "sources" had been defined previously to include "not only the identity of the person, but . . . documents, inanimate objects, and all sources of information.") (quotation omitted).

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

The District's shield law, and the cases decided under it, do not distinguish between confidential and non-confidential sources. In a case decided prior to the enactment of the D.C. shield law, the D.C. Court of Appeals held that a reporter could be compelled to identify a source whom she already had disclosed to two different people on separate occasions (outside of her newsgathering function). *See* *Wheeler v. Goulart*, 593 A.2d 173 (D.C. 1991) ("Once a newspaper reporter discloses the source under the circumstances presented here, the rationale for upholding any qualified privilege ceases"), *motion to vacate denied*, 623 A.2d 1177 (D.C. 1993). This holding, however, appears to have been superseded by the anti-waiver provision of the D.C. shield law. *See* D.C. Code § 16-4704.

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

The District's shield law absolutely protects testimony about sources' identities regardless of whether that information is published. *See* *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 336 (D.D.C. 1994) (noting that the law "accords total protection to news sources, whether confidential or not, and whether disclosed to others or not"); *Prentice*, 27 Med. L. Rptr. at 2381 (same); *see also* D.C. Code § 16-4702. Non-published news or information

other than sources is protected by qualified privilege under the District's shield law. *Grunseth*, 868 F. Supp. at 336; *Prentice*, 27 Med. L. Rptr. at 2381; *see also* D.C. Code §§ 16-4702, 4703.

### **G. Reporter's personal observations**

The District's shield law, and the cases decided under it, do not distinguish between situations where the reporter has personally observed the matter on which he reported, or gathered the information second-hand.

### **H. Media as a party**

The District's shield law, and the cases decided under it, do not differentiate between litigation in which cases where the media is a party and cases where the media is not a party. The D.C. Superior Court has applied the shield law to allow a media defendant to refuse to produce information regarding his sources and certain notes and other information. *See Prentice v. McPhilemy*, 27 Med. L. Rptr. 2377 (D.C. Super. Ct. 1999) (holding shield law applies in defamation actions).

### **I. Defamation actions**

The District's shield law applies in defamation actions as it does in any other action. *See Prentice v. McPhilemy*, 27 Med. L. Rptr. 2377 (D.C. Super. Ct. 1999). In *Prentice*, the D.C. Superior Court noted that nothing in the plain language of the Free Flow of Information Act nor its legislative history suggests that the District of Columbia City Council intended to carve out an exception to the Act's coverage for libel defendants. The court noted that, in its official report, the Council's Judiciary Committee recognized that "[t]wenty-eight states have adopted report shield laws, with varying degrees of qualified and absolute immunity from disclosure of sources and/or disclosure of information." 27 Med. L. Rptr. at 2383 (citation omitted). Based upon this language, the court reasoned the City Council was well aware that some states had enacted statutes limiting the protection afforded to libel defendants. *Id.* Consequently, the court determined that the absence of such a provision in the District's shield law demonstrated an intent by the City Council not to exempt defamation cases or libel defendants from the Act's scope. *Id.*; *cf. Braden v. World Comms.*, 18 Med. L. Rptr. 2040 (D.C. Super. Ct. 1991) (holding, prior to passage of Free Flow of Information Act, that a libel plaintiff could not compel a newspaper's disclosure of source, since the plaintiff had not exhausted all alternative sources for such information).

## **IV. Who is covered**

The District's shield law defines "news media" as newspapers, magazines, journals, press associations, news agencies, wire services, radio, television, or any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.

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

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

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

The District's shield law does not include a definition of "reporter." However, the statute applies to "any person who is or has been employed by the news media in a news gathering or news disseminating capacity." D.C. Code § 16-4702.

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

The District's shield law does not define an "editor." However, the statute applies to "any person who is or has been employed by the news media in a news gathering or news disseminating capacity." D.C. Code § 16-4702.

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

The District's shield law does not define "news" or "information." Instead, the Code refers to what the person was doing when she came into possession of the material. Thus, D.C. Code § 16-4702 protects "news or information" gathered "while acting in an official news gathering capacity" and "in the course of pursuing professional activities." D.C. Codes § 16-4702(1) and (2).

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

The District's shield law does not define "photojournalist." However, the statute applies to "any person who is or has been employed by the news media in a news gathering or news disseminating capacity." D.C. Code § 16-4702.

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

The District's shield law defines "news media" as "newspapers, magazines, journals, press associations, news agencies, wire services, radio, television, or any printed, photographic, mechanical, or electronic means of disseminating news and information to the public." D.C. Code § 16-4701.

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

Arguably, the District's shield law applies to non-traditional news gatherers, as the definition of "news media," includes "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public." In fact, in *Prentice, supra*, the D.C. Superior Court concluded that the shield law applied to the defendant, a non-resident journalist in a foreign jurisdiction, who was writing a book. *See* 27 Med. L. Rptr. at 2380-81.

Moreover, the District's shield law broadly protects news or information "procured by a person while employed by the news media in the course of pursuing professional activities" and sources "procured by a person while employed by the news media and acting in an official news gathering capacity." D.C. Code §§ 16-4701 and 4702. Thus, it would appear that all news media would fall within the ambit of the statute, so long as the news gatherer can establish that she was on a news gathering mission.

Despite the statute's use of the term "*employed* by the news media," case law suggests that freelancers, either on specific assignment or otherwise, and independent authors would be protected by the statute. *See e.g., Prentice*, 27 Med. L. Rptr. 2377.

A D.C. trial court in the District also has held that a qualified First Amendment privilege protected a trade association from having to disclose the identity of a whistleblower who communicated anonymously over the internet. *Solers v. Doe*, 35 Med. L. Rptr. 1297 (D.C. Super. Ct. 2006).

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

The privilege set forth in the District's shield law belongs to a person who is or has been employed by the news media in a news gathering or news disseminating capacity. D.C. Code § 16-4702.

## **V. Procedures for issuing and contesting subpoenas**

The following sections are concerned with the legal procedures required to serve a subpoena on a member of the news media and to defeat or quash the service.

### **A. What subpoena server must do**

#### **1. Service of subpoena, time**

No special subpoena rules exist regarding the news media. Rather, in the D.C. court system, civil subpoenas to compel disclosure from a non-party journalist or news media entity, like any other nonparty subpoenas, are governed by SCR-Civil 45. Subpoenas in criminal proceedings are governed by SCR-Crim. 17.

Under SCR-Civil 45, a subpoena must be served by a person who is not a party to the action and is 18 years or older. Subpoenas may be served upon a person located anywhere within the District or within 25 miles of the District. The subpoena must: provide the name of the court, the title civil action and individual calendar number of the action, and the time and place for the deposition or production of documents; command the subpoenaed person to attend the deposition and provide testimony, produce and permit inspection and copying of documents or other tangible items in the person's possession, custody, or control, or allow the inspection of a premises; and include the text of SCR-Civil 45(c) and (d).

Under SCR-Crim. 17, a subpoena may be served by the U.S. Marshal, a Deputy Marshal, or by any other person who is not a party and who is not less than 18 years of age. The subpoena must state the name of the court, and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena requiring attendance of a witness at a trial or hearing issued under SCR-Crim. 17 may be served at any place within the District or at any place outside the District that is within 25 miles of the place of the hearing or trial specified in the subpoena. However, a subpoena directed to a witness in a case in which a felony is charged may be served at any place within the United States upon order of a judge of the court.

## **2. Deposit of security**

The District does not require that the subpoenaing party deposit any security in order to procure the testimony or materials of the reporter. However, the subpoenaing party must provide with the subpoena, unless a sufficient showing is made that the defendant cannot pay the fee, a check sufficient to compensate the witness for one day's travel expenses and testimony fee. *See* SCR-Civil 45(b); SCR-Crim. 17(b), (d).

## **3. Filing of affidavit**

An affidavit is not necessary to obtain a subpoena. However, a party may need to file an affidavit with a motion to compel or a motion to quash in order to establish sufficient evidence that the privilege does or does not apply. *See generally* SCR-Civil 6(d), 4B Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.3d* § 1170 n. 1 ("The use of affidavits in support of motions is recognized in Rule 6(d) and the verification of motions by affidavit is the general practice."); SCR-Crim. 47.

## **4. Judicial approval**

Judicial approval is not necessary for a civil subpoena issued under SCR-Civil 45. However, for criminal matters, under SCR-Crim. 17, defense counsel upon an *ex parte* application may request that the court issue a subpoena provided that the defendant makes a satisfactory showing that the defendant is financially unable to pay the witness and the presence of the witness is necessary to an adequate defense.

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

There is no statutory or case law addressing this issue.

### **B. How to Quash**

Under SCR-Civil 45, a court may quash or modify a civil subpoena that does not permit a reasonable time for compliance, requires a deponent to travel further than is permitted by the rules, *requires the disclosure of privileged information*, or unduly burdens the witness. When ruling on a motion to quash or modify a subpoena, the court generally considers: (1) the relevance of the evidence sought; (2) the need for the seeking party for the evidence; (3) any likely hardship faced by the witness in responding to the subpoena; and (4) whether the witness is a party to the action. *In re Herndon*, 596 A.2d 592, 596 (D.C. 1991).

SCR-Crim. 17 does not specify procedures for quashing or otherwise objecting to the subpoena that commands appearance to give testimony. However, the rule does imply that a party opposing a subpoena to produce documents should file a motion to quash the subpoena. *See* SCR-Crim. 17(c). The rule also provides that failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed in contempt of the court. SCR-Crim. 17(g).

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

Counsel, by rule, must contact opposing counsel prior to moving to quash. Under the District's civil procedure rules, all motion filed in the Superior Court Civil Division are subject to the consent requirement in SCR-Civil 12-I(a), which requires that a movant in a civil case must attempt to obtain consent for the relief requested in a motion from any party affected by such request prior to filing a motion. Essentially, the rule requires the movant to contact all affected parties and discuss the nature of the motion.

Although criminal rules require the motion to be served on the other party, no provision requiring the movant to contact the opposing party exists. SCR-Crim. 47-I.

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

The criminal subpoena provisions suggest that a party seeking to object to the subpoena should file a motion to quash. *See* SCR-Crim. 17(c) (providing: "The Court on motion made promptly may quash or modify a subpoena if compliance would be unreasonable or oppressive"). The civil subpoena provisions suggest that when objecting to a subpoena to command appearance at a hearing or *trial or deposition*, the objecting party shall file a motion to quash. However, if objecting to subpoena *to provide tangible information*, a written objection may suffice when supported by a description of the nature of the documents, communications, or things not produced. *Compare* SCR-Civil 45(c) *with* SCR-Civil 45(d). The written objection must be served within 14 days of the service of the subpoena, or before the time specified in the subpoena for compliance if less than 14 days. SCR-Civil 45(c)(2)(B).

## 3. File a motion to quash

### a. Which court?

A motion to quash pursuant to the shield law or a motion to compel discovery must be filed with the court that issued the subpoena. However, if the court that issued the subpoena does not have jurisdiction over the party, the subpoenaed party should file a miscellaneous matter in the court in its jurisdiction and seek a protective order.

### b. Motion to compel

No statutory or case law exists on this issue. Arguably, however, it generally is advisable when challenging a subpoena to file a motion to quash or otherwise object to the subpoena and not wait for a motion to compel.

### c. Timing

A motion to quash is timely if made at any time before the date specified in the subpoena for compliance. In considering a motion to quash, the trial court may hold a hearing and, as necessary, entertain any relevant testimony. *See e.g., Wheeler v. Goulart*, 593 A.2d 173, 187 (D.C. 1991) (trial court held a hearing on a motion to quash and heard testimony from several witnesses).

### d. Language

The person seeking to quash the subpoena must provide language establishing that the privilege applies. *Cf. Prentice v. McPhilemy*, 27 Med. L. Rptr. 2377, 2383 (D.C. Super. Ct. 1999) (noting burden on person seeking to invoke the privilege to establish he falls within the ambit of the D.C. shield law). Accordingly, the movant must establish that he or she obtained the information or source in the course of pursuing professional activities, while employed by the new media (as the D.C. shield law defines that term). D.C. Code § 16-4701 et seq. If unpublished information is involved, the movant also should show that the information was not published.

Additionally, the movant may want to show that the subpoena does not permit a reasonable time for compliance, requires a deponent to travel further than is permitted by the rules, requires the disclosure of privileged information, or unduly burdens the witness, in order to successfully quash the subpoena. SCR-Civil 45(c)(3); SCR-Crim. 17(c).

### e. Additional material

No case law or statutes addressing this issue exist.

## 4. In camera review

### a. Necessity

Case law suggests that a court has discretion to order in camera review of the information in issue, and that the court generally will not exercise such discretion unless it is necessary to review the information to assess a claim of privilege. *See e.g., Prentice*, 27 Med. L. Rptr. at 2388 (concluding that in camera review not necessary for certain documents because the documents undoubtedly were protected under the Free Flow of Information Act, and that in camera review was premature for other documents because the person withholding the information had not indicated the specific legal basis for doing so); *see also Carter v. United States*, 614 A.2d 913, 916 (D.C. 1992) (noting, in the context of a different privilege, that "the trial court has discretion to conduct an in camera hearing

in the course of deciding whether to require disclosure, and holding that the trial court "should require a showing of a factual basis adequate to support" the request for an in camera hearing).

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

No statutory or case law addressing this issue exists.

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

No statutory or case law addressing this issue exists.

### **5. Briefing schedule**

In civil cases, the general motions practice rules govern. Thus, the opposition to the motion to quash is due within 10 days from service of the motion or such further time as the court may grant. SCR-Civil 12-I(e). Similarly, in criminal cases, the opposing party must file its response within 10 days. SCR-Crim. 47-I(c).

### **6. Amicus briefs**

Pursuant to Rule 29 of the Rules of the D.C. Court of Appeals, a brief of an amicus curiae generally may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. The motion for leave shall identify the interests of the applicant and shall state the reasons why a brief of an amicus curiae is desirable.

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

This section analyzes the substantive law that makes up the reporter's privilege and how a subpoenaing party can avoid the privilege protection.

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

The person seeking to invoke the privilege must first establish that he or she falls within the ambit of the shield law, i.e., that he or she is a member of the news media and that the information sought is a source or other information that was collected or obtained while acting in an official news gathering capacity. *Prentice*, 27 Med. L. Rptr. 2833. After a party establishes that information sought falls within the shield law, the burden shifts to the party seeking the information to show that the information is not protected by the shield law. The District's shield law accords absolute protection to news sources, whether confidential or not, and whether disclosed to third parties or not. *See Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 336 (D.D.C. 1994); *Prentice*, 27 Med. L. Rptr. at 2381. Thus, if the person subpoenaed demonstrates that the information sought regards sources obtained while acting in an official news capacity, the inquiry ends. However, if the information sought concerns material other than the source, then the Court must perform the balancing test set forth below. *See* D.C. Code §§ 16-4701-4704.

### **B. Elements**

If the information sought is news or information otherwise protected from disclosure under § 16-4702(2) (i.e., information that has not been published), then a person must establish the following by clear and convincing evidence in order to overcome the privilege:

- (1) the news or information is relevant to a significant legal issue before a judicial, legislative, administrative, or other body that has the power to issue the subpoena;
- (2) the news or information could not, with due diligence be obtained by any alternative means; and
- (3) there is an overriding public interest in the disclosure.

D.C. Code § 16-4703; *see also Gray v. Hoffman-LaRoche, Inc.*, 2002 WL 1801613, 30 Med. L. Rptr. 2376 (D.D.C. Mar. 27, 2002) (applying D.C. law) (granting newspaper reporter's motion to quash subpoena for trial deposition because plaintiff failed to show, by clear and convincing evidence, that: (1) the information sought "goes to the heart of the matter of the pending litigation; (2) the plaintiff has exhausted alternative means for obtaining the information; and (3) the disclosure of the information is in the public interest."); *Grunseth v. Marriott*

*Corp.*, 868 F. Supp. 333, 336 (D.D.C. 1994); *Prentice v. McPhilemy*, 27 Med. L. Rptr. 2377, 2381 (D.C. Super. Ct. 1999).

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

Case law suggests that the information must go to the heart of the claims and be essential to establish liability or a defense. *See generally Grunseth*, 868 F. Supp. 335-36 (noting that the criteria for applying the conditional privilege for news or information set forth in the District's shield law closely track those set forth in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981)).

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

The person seeking disclosure must establish that the information sought remains unavailable from other sources. *Prentice*, 23 Med. L. Rptr. at 2381; D.C. Code § 4703; *see also generally Braden v. World Comms.*, 18 Med. L. Rptr. 2040 (D.C. Super. Ct. 1991) (holding, prior to passage of Free Flow of Information Act, that a libel plaintiff could not compel a newspaper's disclosure of source, since the plaintiff had not exhausted all alternative sources for such information).

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

No cases decided under the D.C. shield law address this issue. Case law suggests, however, that the criteria for applying the Free Flow of Information Act's privilege closely tracks the First Amendment protections. *See Grunseth*, 868 F. Supp. at 336. Thus, exhaustion case law from the D.C. federal courts may be persuasive.

In the D.C. Circuit, exhaustion requires that all "reasonable" sources of evidence be tapped. *Lee v. Dept. of Justice*, 287 F.Supp.2d 15, 20-23 (D.D.C. 2003) (plaintiff demonstrated exhaustion of alternative sources where he issued six document requests, one set of interrogatories, four sets of requests for admissions, and a total of 20 depositions). There is no specific number of depositions necessary to create exhaustion, *Lee v. Dept. of Justice*, 413 F.3d 53, 61 (D.C. Cir. 2005), though the D.C. Circuit suggested that as many as 60 depositions may not suffice. *Carey v. Hume*, 492 F. 2d 631 (D.C. Cir. 1974). The number of depositions necessary for exhaustion must be determined on a case-by-case basis. *Lee v. Dept. of Justice*, 413 F.3d 53 at 61. It is not necessary to depose every individual who could conceivably identify the source. *Id. Cf. Zerilli v. Smith*, 656 F.2d at 724 (although limits to the obligation to pursue alternative sources exist, the exhaustion obligation is "clearly very substantial").

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

The subpoenaing party must demonstrate that it has already conducted a search for the material outside of the subpoenaing the news media or that such a search would be futile. *See e.g., Prentice*, 27 Med. L. Rptr. at 2381 (noting that the plaintiffs had demonstrated that they could not obtain the information by means other than through discovery obtained from the media defendant); D.C. Code 16-4703(2).

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

No statutory or case law addressing this issue exists.

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

Because identity of media sources is absolutely privileged, the Act does not require a balancing of interests if sources are at issue. *Grunseth*, 868 F. Supp. at 336. However, a balancing test is required if the information at issue is unpublished news or other related information.

In *Prentice*, 27 Med. L. Rptr. at 2381, the court concluded that the libel plaintiffs had established the information sought was relevant to the subject matter, and that the plaintiffs could not obtain the information from any other source. Nevertheless, the court denied the motion to compel otherwise privileged information, because the plaintiffs had not persuaded the court of an "overriding public interest" in disclosure. *Id.* The court specifically rejected plaintiffs' arguments that the paramount interest at stake was the search for truth, the right of civil litigants to discover information genuinely relevant to their lawsuit, and an individual's interest in protecting his or her reputation. *Id.*

On a motion for reconsideration, the libel plaintiffs argued that *Prentice* court's ruling rendered D.C. Code § 16-4703 "inapplicable in libel cases because no libel plaintiff could ever demonstrate a public interest sufficient to justify compelled disclosure." *Id.* at 2387. The court disagreed, stating that were it to accept the plaintiffs' argument, § 16-403 would envelop the general statutory prohibition against compelled disclosure in virtually every libel case. *Id.* The court reiterated its refusal to "carve out an exception for most, if not all, libel cases where the legislature could have created an exception for libel defendants and refused to do so." *Id.*

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

Because the grant or denial of a motion to quash a subpoena is a matter within the court's discretion, and because the court ordinarily will consider the hardship faced by the witness in responding to a subpoena, the court may determine whether a subpoena is overly broad or unduly burdensome. *See, e.g., In re Herndon*, 596 A.2d 592, 596 (D.C. 1991).

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

The Act is silent as to whether the court must weigh whether the matter subpoenaed involves a threat to human life. Because the Act absolutely protects sources, a court most likely cannot consider whether the identity of the source involves a threat to human life. However, because the balancing test for disclosure of unpublished news or other related information includes a prong concerning an "overriding societal interest," D.C. Code § 16-4703, such an interest likely would include a threat to human life. Thus, if the subpoena does not seek source information, and the person issuing it has shown that the information is relevant and that no other available source exists, the court most likely would consider whether the subpoenaed matter involves a threat to human life.

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

If the material sought would be cumulative, the court most likely would recognize the privilege. In such a case, the equities taken into consideration during the judicial balancing would weigh in favor of non-disclosure. *See generally Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

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

The rules of procedure (both criminal and civil) allow the subpoenaed party to object to the subpoena by moving to quash or responding by written objection. *See* SCR-Civil 45; SCR-Crim. 17.

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

The elements set forth in the Act are the only elements the person seeking disclosure must or can show to overcome the qualified privilege for news information. D.C. Code §§ 16-4702-4703.

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

Some states have determined, either through statutory or decisional law, that a journalist in certain circumstances is deemed to have waived the privilege.

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

Under the plain terms of the statute, the absolute privilege as to media sources is not waivable. The D.C. courts have not addressed or construed the scope of D.C. Code § 16-4704, the statute's waiver provision. However, under the plain terms of § 16-4704, the publication by the news media or the dissemination by a person employed by the news media of a portion of the news or information protected by the Act does not constitute a waiver of the privilege.

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

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

As noted above, under the plain terms of the statute, the disclosure of sources name, whether confidential or not, does not waive the privilege. *See Grunseth*, 868 F. Supp. at 336.

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

As noted above, under the plain terms of the statute, the disclosure of sources name, whether confidential or not, does not waive the privilege. *See Grunseth*, 868 F. Supp. at 336.

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

Under the plain terms of the statute, "the publication by the news media or the dissemination by a person employed by the news media of a source of news or information, or a portion of the news or information, procured while pursuing professional activities shall not constitute a waiver of the protection from compelled disclosure that is contained in [ §] 16-4702." D.C. Code § 16-4704.

### **d. Other elements**

No statutory or case law addressing this issue after the passage of the Act exists.

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

The plain language of the statute suggests that an agreement to partially testify most likely will not constitute a waiver. *See* D.C. Code § 16-4704.

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

This section examines what members of the news media must do to comply with a valid, upheld subpoena request.

### **A. Newspaper articles**

Because the District courts apply often follow the federal rules of evidence, newspapers most likely are self-authenticating. *See e.g.*, Fed. R. Evid. 902(6). However, as noted in the D.C. federal outline, the statements within newspaper articles may not be admissible as evidence. *See* 31 Charles Alan Wright and Victor James Gold, *Fed. Prac. & Proc. Evid.* § 7140 ("Even assuming authenticity is established, that does not mean that the item is necessarily admissible since admissibility issues other than authenticity may still be raised under the Evidence Rules").

### **B. Broadcast materials**

No statutory or case law addressing this issue exists. However, case law generally suggests that the person who recorded the broadcast tape need not be called in order to authenticate it. Rather, a witness who is familiar with the object or scene depicted in the video may lay the predicate foundation. *See generally Washington Post v. District of Columbia Dept. of Employment Servs.*, 675 A.2d 37, 43 (D.C. 1996).

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

No statutory or case law addressing this issue exists.

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

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

##### **a. Fines**

No statutory or case law addressing the appropriate fine for a reporting refusing to obey a subpoena exists. However, under SCR-Civil 37, if a person has refused to testify without substantial justification, the Court may award the opposing party who moved to compel both attorneys' fees and costs in bringing the motion.

##### **b. Jail**

Under D.C. Code § 11-944 (2001), in addition to the powers conferred by 18 U.S.C. § 402 (2000), the Superior Court "may punish for disobedience of an order or for contempt committed in the presence of the court." An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order, who continues to disobey the order, may be prosecuted for criminal contempt at any time within 12 months of the first day of incarceration. *Id.* Any individual who was charged with civil contempt and then is charged with criminal contempt

may continue to be imprisoned for civil contempt until the completion of such individual's trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt pursuant to the contempt power. *Id.* (D.C. Code § 11-741 (2001) provides the same contempt powers for the District of Columbia Court of Appeals). *See also generally In re Wheeler*, 18 Med. L. Rptr. 2061 (the court adjudged a Washington Post reporter in civil contempt and ordered imprisonment until she agreed to answer to the questions propounded by plaintiff's counsel).

## **2. Criminal contempt**

The statutes addressing the courts' contempt powers also provide for criminal contempt. *See* D.C. Code §§ 11-741, 944. Specifically, the statutes provide that: "An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order . . . who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time before the expiration of the 12-month period that begins on the first day of such individual's imprisonment. . . ." *See* D.C. Code §§ 11-741(a)(3), 944(a)(3). The statutes further provide that the trial of any individual prosecuted for criminal contempt: (1) "shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;" (2) "shall, upon the request of the individual, be a trial by jury;" and (3) "may not be conducted before the judge who imprisoned the individual for disobedience of an order pursuant to subsection (a)" of the statute. *See* D.C. Code §§ 11-741(b), 944(b).

## **3. Other remedies**

No statutory or case law addressing this issue exists.

# **VIII. Appealing**

## **A. Timing**

### **1. Interlocutory appeals**

Generally, denial of motion to quash or a motion to compel (when non-parties are not involved) is not a final and appealable order. *See generally, In re Johnson*, 699 A.2d 362, 367 n.14 (D.C. 1997) (denial of motion to quash subpoena for a psychiatric examination is a non-final order). Additionally, a subpoena or discovery order directed to a non-party witness is not final, and therefore is not appealable, until the witness has failed to comply and has been sanctioned by the trial court. *See generally, Crane v. Crane*, 614 A.2d 935, 940 (D.C. 1992); *United States v. Harrod*, 428 A.2d 30, 31 (D.C. 1981) (en banc). Notably, in *Prentice*, the court denied the plaintiff's motion for reconsideration, which sought among other things, an amendment to its previous order to allow plaintiffs to take an immediate appeal pursuant to D.C. Code § 11-721(d) and D.C. App. R. 5. The court concluded that, given the plain terms of the District's shield law, the case did not involve "a controlling question of law as to which there is substantial ground for difference of opinion. *Prentice*, 27 Med. L. Rptr. 2388.

### **2. Expedited appeals**

Case law suggests that an expedited appeal may be available. *See Wheeler v. Goulart*, 593 A.2d 173, *motion to vacate denied*, 623 A.2d 1177 (D.C. 1993) (granting expedited appeal of lower court's order during the course of civil trial in progress that denied of motion to quash and adjudged the news reporter in civil contempt for refusing to answer certain questions put to her by counsel for the litigants). In an expedited appeal, counsel for appellant must notify the clerk of the Court of Appeals and opposing counsel of the forthcoming appeal, and must promptly make arrangements for transmission of the record on appeal. D.C. App. R. 4(c).

## **B. Procedure**

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

The District of Columbia Court of Appeals has jurisdiction over "all final orders and judgments of the Superior Court," as well as certain categories of interlocutory Superior Court orders and decision of the District of Columbia administrative agencies issued in "contested cases." D.C. Code §§ 1-1510, 11-721, 11-722.

### **2. Stays pending appeal**

Ordinarily a motion for stay must first be sought by the court or agency whose decision is being reviewed on appeal. *See* D.C. App. R. 8, 18. The motion for a stay must describe with particularity the following: (1) a likelihood of prevailing on the merits; (2) the movant will be irreparably harmed absent a stay; (3) issuance of a stay will not substantially harm other parties; and (4) the public interest favors granting a stay. A copy of the order sought to be stayed must be attached to a motion to stay. *Id.* Hand service is required if a ruling is requested before expiration of the normal, seven-day period for responding. *Id.* The movant must notify the clerk of the Court of Appeals of the filing of the motion and whether any transcripts will be necessary. *Id.*; *see also generally Wheeler v. Goulart*, 593 A.2d 173 (noting "A stay pending appeal of a trial court judgment or order may be granted either by the trial court or by the Court of Appeals under D.C. App. R. 8."); *Horton v. United States*, 591 A.2d 1280 (D.C. 1991) (noting that both trial and appellate courts are authorized to issue stays of orders and judgments). The court refused to grant a stay of the reporter's commitment in *In re Wheeler*, 18 Med. L. Rptr. 2061, 2063 (D.C. Super. Ct. 1991).

### 3. Nature of appeal

As noted in section VIII.A.1. above, the right to appeal and the procedures governing the appeal depend on whether the person seeking to quash the subpoena is a party or non-party and whether the court has granted or denied the motion to quash. A party generally must wait until the final deposition of the case to appeal the presiding court's order regarding its motion to quash. *See* section VIII. A.1. Conversely, the order granting a motion to quash by a court other than the court hearing the case may be appealed. *See id.* And, an order by such a court denying a motion to quash may be appealed after a finding of contempt by the court. *See id.*

### 4. Standard of review

A trial court has broad discretion in determining whether to grant or deny a motion to compel discovery, and its decision will not be disturbed on appeal unless there has been an abuse of discretion resulting in prejudice. *Haynes v. District of Columbia*, 503 A.2d 1219, 1224 (D.C. 1986); *White v. Washington Metro. Area Transit Auth.*, 432 A.2d 726, 728-729 (D.C.1981).

### 5. Addressing mootness questions

In the pre-shield law case, *Wheeler v. Goulart*, 593 A.2d 173 (D.C. 1991), *motion to vacate denied*, 623 A.2d 1177 (D.C. 1993), the Superior Court had denied the motion to quash and held a reporter in civil contempt. On expedited appeal, the D.C. Court of Appeals upheld the compelled disclosure on the ground that the reporter waived her qualified constitutional privilege by disclosing the identity of the source to two individuals not involved in the newsgathering privilege. (Remember, this case arose prior to the passage of the District's shield law.) The parties to the underlying litigation settled during the period in which the reporter could have petitioned for certiorari to the U.S. Supreme Court. Although the reporter's need to testify at trial was obviated, she renewed her motion to vacate the prior opinion of the Court of Appeals. Despite the settlement and the interim passage of the District's shield law, the court denied the motion to vacate, concluding that "under the circumstances [before it], the case had reached practical finality and should not be disturbed." 623 A.2d at 1179. The court emphasized the fact that reporter never moved to stay the issuance of the court's mandate pending application to the Supreme Court. *See id.* at 1178 (citing D.C. App. R. 41(b)).

### 6. Relief

The reporter may request that the district court reverse the district court's order compelling him or her to comply with the subpoena and reverse the contempt order. *See generally In re Sealed Case*, 877 F.2d 83 (D.C. Cir. 1989) (upholding portions of the contempt order but reversing other portions of contempt order and order compelling the appellant to comply with the subpoena).

## IX. Other issues

### A. Newsroom searches

The D.C. courts have not applied or construed the federal Privacy Protection Act, 42 U.S.C. § 2000aa.

**B. Separation orders**

No statutory or case law addressing this issue exists.

**C. Third-party subpoenas**

No statutory or case law addressing this issue exists.

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

No statutory or case law addressing this issue exists.