

REPORTER'S PRIVILEGE: FLORIDA

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 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) for greater flexibility in how it can be used. Printouts of individual state and circuit chapters are made available for readers' convenience.

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

FLORIDA

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I. Introduction: History & Background.....	2	V. Procedures for issuing and contesting subpoenas.....	7
II. Authority for and source of the right.....	2	A. What subpoena server must do	7
A. Shield law statute	2	B. How to Quash	8
B. State constitutional provision	3	VI. Substantive law on contesting subpoenas	10
C. Federal constitutional provision	3	A. Burden, standard of proof	10
D. Other sources.....	4	B. Elements	10
III. Scope of protection	4	C. Waiver or limits to testimony.....	12
A. Generally.....	4	VII. What constitutes compliance?.....	13
B. Absolute or qualified privilege.....	4	A. Newspaper articles.....	13
C. Type of case	4	B. Broadcast materials.....	13
D. Information and/or identity of source.....	5	C. Testimony vs. affidavits.....	14
E. Confidential and/or non-confidential information	5	D. Non-compliance remedies	14
F. Published and/or non-published material.....	5	VIII. Appealing	14
G. Reporter's personal observations.....	5	A. Timing	15
H. Media as a party	5	B. Procedure	15
I. Defamation actions	6	IX. Other issues.....	15
IV. Who is covered	6	A. Newsroom searches	15
A. Statutory and case law definitions.....	6	B. Separation orders	16
B. Whose privilege is it?	7	C. Third-party subpoenas	16
		D. The source's rights and interests	16

I. Introduction: History & Background

The reporter's privilege in Florida, as in most states, finds its roots in the First Amendment and the plurality opinion of *Branzburg v. Hayes*, 408 U.S. 665 (1972). The privilege exists in the common law and constitutional law of Florida and embodies a recognition that protecting a free and unfettered press is a sufficiently compelling interest to justify depriving litigants of potential sources of information in many cases. *See, e.g., State v. Davis*, 720 So. 2d 220 (Fla. 1998); *Tribune Co. v. Huffstetler*, 489 So. 2d 722 (Fla. 1986).

In 1976, in light of *Branzburg*, Florida first afforded a qualified reporter's privilege. *See Morgan v. State*, 337 So. 2d 951 (Fla. 1976). In *Morgan*, the Florida Supreme Court adopted the balancing test set forth in Justice Powell's concurring opinion in *Branzburg*. Thus, in assessing whether the journalist's privilege is overcome, a court must balance the interest sought to be advanced in compelling disclosure against the public's interest in unencumbered access to information. Over the next two decades, Florida courts refined that balancing test. Today, Florida's common law privilege protects a journalist's news-gathering information unless the subpoenaing party shows that the information sought is relevant to the specific issues in the case, that the information cannot be obtained by means less destructive of First Amendment rights, and that a compelling interest exists in disclosure sufficient to override the interests protected by the privilege. *See Davis*, 720 So. 2d at 224.

In 1998, the balancing test was codified in Section 90.5015, Florida Statutes. The statute became effective on May 12, 1998. As with the common law privilege, once the statutory privilege attaches, it only can be overcome by a clear and specific showing that the information in the journalist's possession is relevant and material to unresolved issues in the case, cannot be obtained from alternative sources, and compelling need exists that requires disclosure. Section 90.5015, by its express terms, does not limit the privileges existing under the First Amendment, Florida Constitution (Article I, § 4), or Florida common law. Fla. Stat. § 90.5015(5) (2006). Thus, it is beneficial to assert the U.S. and Florida constitutions, Florida common law, and Section 90.5015 in objecting to a reporter's subpoena.

II. Authority for and source of the right

A. Shield law statute

In 1998, the Florida legislature passed Section 90.5015, Florida Statutes, which codified and expanded the existing common law qualified privilege. The statute became effective on May 12, 1998.

In passing Section 90.5015, the Florida House of Representatives specifically noted that the statute would both enhance the media's ability to collect news and impede the discovery of media-held evidence. The House also noted that the privilege would clarify the common law to provide protection for non-confidential information and that the privilege would not be waived by voluntary disclosure.

Florida's shield law can be found in the Florida Evidence Code. More specifically, the statute exists at Section 90.5015, Florida Statutes. Section 90.5015 reads:

90.5015 Journalist's privilege.—

(1) DEFINITIONS.—For purposes of this section, the term:

(a) "Professional journalist" means a person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine. Book authors and others who are not professional journalists, as defined in this paragraph, are not included in the provisions of this section.

(b) "News" means information of public concern relating to local, statewide, national, or worldwide issues or events.

(2) **PRIVILEGE.**—A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news. This privilege applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes. A party seeking to overcome this privilege must make a clear and specific showing that:

- (a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
- (b) The information cannot be obtained from alternative sources; and
- (c) A compelling interest exists for requiring disclosure of the information.

(3) **DISCLOSURE.**—A court shall order disclosure pursuant to subsection (2) only of that portion of the information for which the showing under subsection (2) has been made and shall support such order with clear and specific findings made after a hearing.

(4) **WAIVER.**—A professional journalist does not waive the privilege by publishing or broadcasting information.

(5) **CONSTRUCTION.**—This section must not be construed to limit any privilege or right provided to a professional journalist under law.

(6) **AUTHENTICATION.**—Photographs, diagrams, video recordings, audio recordings, computer records, or other business records maintained, disclosed, provided, or produced by a professional journalist, or by the employer or principal of a professional journalist, may be authenticated for admission in evidence upon a showing, by affidavit of the professional journalist, or other individual with personal knowledge, that the photograph, diagram, video recording, audio recording, computer record, or other business record is a true and accurate copy of the original, and that the copy truly and accurately reflects the observations and facts contained therein.

(7) **ACCURACY OF EVIDENCE.**—If the affidavit of authenticity and accuracy, or other relevant factual circumstance, causes the court to have clear and convincing doubts as to the authenticity or accuracy of the proffered evidence, the court may decline to admit such evidence.

(8) **SEVERABILITY.**—If any provision of this section or its application to any particular person or circumstance is held invalid, that provision or its application is severable and does not affect the validity of other provisions or applications of this section.

Fla. Stat. § 90.5015 (2006).

The privilege is qualified and extends to both confidential and non-confidential sources and information. *See State v. Davis*, 720 So. 2d 220, 222 (Fla. 1998). In 1993, the Florida legislature passed a similar reporter's privilege bill that would have created an *absolute* privilege not to reveal information obtained from confidential sources. The bill was vetoed by the Governor.

B. State constitutional provision

Article I, sec. 4 of the Florida Constitution is the state law counterpart to the U.S. Constitution's First Amendment. This provision may be cited generally in support of the existence of a constitutional journalist's privilege. There is no provision in the Florida Constitution that specifically addresses the journalist's privilege.

C. Federal constitutional provision

Prior to, and even after enactment of Florida's shield law, a journalist's privilege existed in Florida under the authority of *Branzburg v. Hayes*, 408 U.S. 665 (1972), which found that a journalist's privilege exists under the First Amendment in some cases. *See Morgan v. State*, 337 So. 2d 951 (Fla. 1976). The privilege exists in the common law and constitutional law of Florida and embodies a recognition that protecting a free and unfettered press is a

sufficiently compelling interest to justify depriving litigants of potential sources of information in many cases. *See, e.g., State v. Davis*, 720 So. 2d 220 (Fla. 1998); *Tribune Co. v. Huffstetler*, 489 So. 2d 722 (Fla. 1986).

In 1976, in light of *Branzburg*, Florida first afforded a qualified reporter's privilege. *See Morgan v. State*, 337 So. 2d 951 (Fla. 1976). In *Morgan*, the Florida Supreme Court adopted the balancing test set forth in Justice Powell's concurring opinion in *Branzburg*.

The statute, enacted in 1998, expressly provides that it does not supercede these traditional sources of the journalist's privilege. Thus, advocates seeking to quash a subpoena to a reporter should cite the shield law, as well as the constitutional and common law bases for the privilege.

D. Other sources

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

III. Scope of protection

A. Generally

The reporter's privilege in Florida provides fairly broad protection to professional journalists wishing to avoid revealing their sources and information. Because the statute requires an evidentiary hearing at which the subpoenaing party must make a clear and specific showing that all three prongs of the test for overcoming the privilege are met, the journalist bears very little burden in establishing the entitlement to the privilege. So long as the journalist falls within the statutory definition of "professional journalist" contained in the statute and the information sought was obtained while actively gathering news, the privilege will attach, and the burden shifts to the party seeking disclosure to make the requisite showing.

B. Absolute or qualified privilege

The statutory privilege in Florida is qualified in all cases. The privilege is qualified because it applies only to "information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recordings of crimes." Fla. Stat. § 90.5015(2) (2006). The Fifth District Court of Appeal of Florida has held that the words "of crimes" in the statute modify "physical evidence," "eyewitness observations" and "visual or audio recordings." *See News-Journal Corp. v. Carson*, 741 So. 2d 572, 574 (Fla. 5th DCA 1999); see also *Smoliak v. Greyhound Lines, Inc.*, 33 Media L. Rep. 2452 (N.D. Fla. 2005) (applying Florida law) (privilege applies to journalist's eyewitness observations because there was no indication that journalist observed commission of crime). Thus, the privilege should be read not to apply to physical evidence of crimes, eyewitness observations of crimes, or visual or audio recordings of crimes. The privilege does apply to information *concerning* crimes, and such information is subject to the balancing test. *See id.* The privilege is further qualified by the three-part test that allows litigants to defeat the privilege in certain circumstances. *See Part VI infra.*

C. Type of case

1. Civil

The qualified reporter's privilege applies equally in civil and criminal proceedings. *See Morris Communications Corp. v. Frangie*, 720 So. 2d 230, 231-32 (Fla. 1998) (regarding application of privilege to disclosure of confidential and non-confidential information in civil proceedings).

2. Criminal

The qualified reporter's privilege applies equally in civil and criminal proceedings. *See State v. Davis*, 720 So. 2d 220 (Fla. 1998); *Kidwell v. State*, 730 So. 2d 670 (Fla. 1998). Both *Davis* and *Kidwell* were decided after the statutory privilege was enacted but are based upon the common law privilege.

Although the same three-part test applies for overcoming the reporter's privilege in a criminal case as it does in a civil case, a criminal defendant's constitutional rights to due process and compulsory process must be considered in determining whether a compelling need exists in favor of disclosure. *See Davis*, 720 So. 2d at 227. Further, to

the extent that the privilege does not apply to evidence of crimes, the privilege affords greater protection to journalists who are subpoenaed to testify or provide information in civil cases rather than criminal cases. *See id.*

3. Grand jury

The standard for overcoming subpoenas to appear before or provide information to the grand jury is the same as the standard for overcoming subpoenas in the context of criminal and civil proceedings. *See Morgan v. State*, 337 So. 2d 951 (Fla. 1976).

D. Information and/or identity of source

The shield law expressly protects journalists from disclosure of the identity of *any* sources as well as the information obtained from them. Fla. Stat. § 90.5015(2) (2006).

E. Confidential and/or non-confidential information

The statute itself does not make reference to whether the privilege protects non-confidential information. However, case law decided after the statute was passed affirmatively indicates that the privilege applies equally to both confidential and non-confidential information. *See State v. Davis*, 720 So. 2d 220, 222 (Fla. 1998) (the privilege applies to factual situations involving both non-confidential and confidential information); *Morris Communications Corp. v. Frangie*, 720 So. 2d 230, 231 (Fla. 1998) (confirming that *Davis*, which held that the privilege applies to non-confidential information in the context of a criminal proceeding, applies with equal force in civil proceedings). Thus, in both criminal and civil proceedings, non-confidential information is protected from disclosure unless the subpoenaing party can make the requisite showing to overcome the privilege.

The legislative history of the statute also indicates the legislature's intent to include non-confidential information within the protection of the privilege. The House of Representative's Bill Analysis and Economic Impact Statement explicitly recognizes that most courts, prior to the enactment of the statute, applied the privilege only to information obtained from confidential sources. The House's Bill Analysis indicates that the new statute would depart from existing case law by protecting non-confidential information. The Senate's analysis leaves the issue open for determination by the Florida Supreme Court (see discussion of *Davis* above). Thus, the journalist's privilege in Florida extends to both confidential and non-confidential information.

F. Published and/or non-published material

Application of the privilege is not dependent upon whether the information is published. In fact, the statute explicitly recognizes a privilege exists even in material that is published or broadcast. Fla. Stat. § 90.5015(4) (2006).

G. Reporter's personal observations

Florida's journalist privilege does *not* protect physical evidence, eyewitness observations, or visual or audio recordings of crimes. Fla. Stat. § 90.5015(2) (2006). The Fifth District Court of Appeal of Florida has held that the words "of crimes" in the statute modify "physical evidence," "eyewitness observations" and "visual or audio recordings." *See News-Journal Corp. v. Carson*, 741 So. 2d 572, 574 (Fla. 5th DCA 1999). Thus, the statutory privilege does not apply to physical evidence of crimes, eyewitness observations of crimes, or visual or audio recordings of crimes. Eyewitness observations of non-criminal activity are covered by the privilege. *See id.*; *Wilensky v. Gooding*, 31 Media L. Rep. 1641 (Fla. 7th Cir. Ct. Apr. 7, 2003).

Documents are not "physical evidence" within the meaning of the exception to the statute. *See News-Journal Corp.*, 741 So. 2d at 575. The privilege protects against compelling disclosure of "information," and that term is not limited to the reporter's recollection. Rather, the term encompasses broad categories of things, such as notes, letter, papers, and microfiche. Such things are information *concerning* crimes, not physical evidence of crimes, and this information is subject to the balancing test. *See id.* Likewise, when a journalist witnesses an arrest, he or she is not making an eyewitness observation of a crime, unless a crime is committed at the time of arrest. *See Florida v. Abreu*, 16 Media L. Rep. 2493, 2494 (Fla. Cir. Ct. 1989) (applying common law privilege).

H. Media as a party

Florida's journalist privilege statute does not distinguish between cases where the media are parties and where they are not. Even if the journalist is a party, the court must still apply the statutory balancing test. *See, e.g.,*

News-Journal Corp. v. Carson, 741 So. 2d 572 (Fla. 5th DCA 1999); *Gadsden County Times, Inc. v. Horne*, 426 So. 2d 1234, 1240 (Fla. 1st DCA 1983) (applying common law privilege).

However, the test may be easier to overcome when the journalist is a party to the underlying proceeding. *See, e.g., Campus Communications, Inc. v. Freedman*, 374 So. 2d 1169, 1170 (Fla. 1st DCA 1979) ("when a newspaper becomes entangled in purely civil litigation, at least if it is a party, governmental intrusion is only peripherally involved"). For example, in a defamation action, a plaintiff may need to intrude upon the newsgathering process to show actual malice. *See Carson*, 741 So. 2d at 572 (where upholding the privilege has the effect of making "actual malice" impossible for the plaintiff to prove against the media defendant, upholding the privilege is less compelling). Particularly in defamation actions, where establishing what the publisher knew or did not know depends on the information that the journalist had in his or her possession at the time of publication, the privilege may not act as both a sword and a shield. In such a case, the privilege would apply, but it might be overcome on the theory that the media cannot invoke the privilege to prevent the other side from proving its case.

I. Defamation actions

As a general rule, the privilege operates no differently in defamation actions than it does in any other. There is no "libel exception" that operates to preclude the invocation of a journalist's privilege in a libel action, whether or not the journalist is a party, and the three-part test applies. *See, e.g., Fancher v. Lee Co. Humane Society Inc.*, 27 Media L. Rep. 1447 (Fla. Cir. Ct. Dec. 14, 1998) (applying three-part test to quash subpoena to non-party journalist in defamation case); *Gadsden County Times, Inc. v. Horne*, 426 So. 2d 1234, 1242 (Fla. 1st DCA 1983) (same); *Overstreet v. Neighbor*, 9 Media L. Rep. 2255, 2256 (Fla. 13th Cir. Ct. Sept. 13, 1983) (privilege sustained in defamation action because subpoenaing parties failed to demonstrate that they had exhausted alternative sources for the information); *Coira v. Depoo Hosp.*, 4 Media L. Rep. 1692, 1593 (Fla. 16th Cir. Ct. Nov. 6, 1978) (upholding privilege in libel action against doctors who were featured in newspaper article).

Further, penalties for noncompliance with a subpoena in a libel case are no different than the general penalties for noncompliance that operate in all cases. There is no added threat of "presumed malice" based on noncompliance with a subpoena in a defamation case.

IV. Who is covered

Generally speaking, Florida's shield law protects "professional journalists" from compelled disclosure of information obtained while actively gathering "news" as both these terms are defined by the statute.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Florida's statutory privilege applies only to "professional journalists." A professional journalist is "a person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine." Fla. Stat. § 90.5015(1)(a) (2006).

b. Editor

An editor would fall within the definition of "professional journalist" as articulated above. Fla. Stat. § 90.5015(1)(a).

c. News

Florida's statutory privilege defines "news" as "information of public concern relating to local, statewide, national, or worldwide issues or events." Fla. Stat. § 90.5015(1)(b) (2006).

d. Photo journalist

A photojournalist would fall within the definition of "professional journalist" as articulated above. Fla. Stat. § 90.5015(1)(a) (2006).

e. News organization / medium

The privilege generally protects employees and independent contractors of newspapers, news journals, news agencies, press associations, wire services, radio stations, television stations, networks, and news magazines. Fla. Stat. § 90.5015(1)(a) (2006). The statute itself does not specifically address Internet-based communications.

2. Others, including non-traditional news gatherers

Book authors are expressly excluded from the protection of the statutory privilege. Fla. Stat. § 90.5015(1)(a) (2006). However, the common law reporter's privilege in Florida recognizes a privilege for book authors. *See Florida v. Trepal*, 24 Media L. Rep. 2595, 2596 (Fla. Cir. Ct. 1996) (the author "was functioning as a novelist and not a true news 'reporter.' However, the qualified reporter's privilege is applicable to [the author's] situation"). The *Trepal* court noted that the author's intent was to disseminate information to the public. *See id.* (citing *Branzburg*, 408 U.S. at 705 ("the informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists")). Thus, advocates seeking to quash a subpoena to a book author should base their objection on the common law and constitutional privileges.

B. Whose privilege is it?

The privilege in Florida belongs to the reporter by the terms of the shield law; however, as a practical matter, it is advisable to file any motions to quash subpoenas to reporters on behalf of both the reporter and the media entity by which the reporter is employed.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Florida has no special rules that govern the timing of service of subpoenas to reporters. Thus, the general provisions contained in the Florida Rules of Criminal Procedure and Rules of Civil Procedure apply. Those rules do not fix the time for service of a subpoena. Florida law generally requires that legal papers must be served upon individuals personally or at their residence. *See* § 48.193, *Fla. Stat.*; *Stoeffler v. Castagiola*, 629 So. 2d 196 (Fla. 2d DCA 1993); Fla. Att'y Gen. Op. 72-128 (April 6, 1972).

Under the Florida Rules of Civil Procedure, a subpoena duces tecum without deposition may be issued to a non-party provided the subpoenaing party provides notice to all other parties in compliance with the rule. *See* Fla. R. Civ. P. 1.351. The rule gives the other party a chance to object to the subpoena before it is served. *See id.* Those wishing to subpoena the reporter to testify or produce documents at trial or by deposition should use the procedures set forth in Florida Rule of Civil Procedure 1.410. The procedural requirements for issuing subpoenas in criminal cases in Florida are embodied in Florida Rule of Criminal Procedure 3.361.

2. Deposit of security

Florida does not require that the subpoenaing party deposit any security in order to procure the testimony or materials of the reporter.

3. Filing of affidavit

Florida does not require that the subpoenaing party make any sworn statement in order to procure the reporter's testimony or materials.

4. Judicial approval

Florida does not require that the subpoenaing party obtain judicial approval before subpoenaing a professional journalist. However, when the journalist objects to the subpoena or files a motion to quash, the judge is required to hold a hearing as to whether the privilege is overcome. *See* Fla. Stat. 90.5015(3) (2006).

5. Service of police or other administrative subpoenas

Florida's administrative code is similar to the Florida Rules of Civil Procedure. *See e.g.*, Fla. Admin. Code. Ann. R. 4-170.119(6) (subpoenas in Department of Insurance proceedings are to be served in the manner provided by law for service of subpoenas issued by a circuit court).

B. How to Quash

The most important step in challenging a subpoena is to assert the privilege via a Motion to Quash or for Protective Order. Florida Rules of Civil Procedure 1.280 and 1.410 govern subpoenas in civil cases. These rules, in conjunction with Rule of Criminal Procedure 3.220(h), should be used as the basis for challenging subpoenas in criminal cases.

In the interest of responding quickly, the motion may be very short. The motion may contain a supporting memorandum of law or a memorandum may be filed at a later time but before the hearing on the motion. As judges are not often familiar with the contours of the privilege, a memorandum of law often is helpful in educating the judge about the privilege.

1. Contact other party first

The law does not require that the subpoenaing party be contacted prior to filing a motion to quash or for a protective order. Local court discovery rules concerning disputes, however, may require such a conference. Moreover, as a practical matter, contacting the subpoenaing party may bring about resolution without the necessity of filing a motion to quash. For example, the subpoenaing party may request a copy only of what was broadcast or a copy of the published article. Many news organizations routinely make those items available to the public for a small fee and have no objection to making them available under the same terms to parties in litigation.

2. Filing an objection or a notice of intent

A notice of intent is not required prior to filing a motion to quash. Service of an objection, as opposed to a motion to quash, is sufficient to stay the production of documents in response to a deposition subpoena *duces tecum*. *See* Fla. R. Civ. P. 1.410(e).

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the same court that is hearing the underlying case.

b. Motion to compel

A person under subpoena should not wait for the subpoenaing party to file a motion to compel before filing a motion to quash. Failure to obey a subpoena may result in a contempt citation. If the subpoenaing party will not voluntarily extend the time for compliance until the privilege issue is heard, an emergency hearing may be the safest course.

c. Timing

If a subpoena *duces tecum* for deposition is served in a civil matter, a written objection *to the production of documents* must be served within 10 days after service of the subpoena or on or before the time specified for compliance (whichever is shorter). Fla. R. Civ. P. 1.410(e). Service of the objection stays the obligation to produce documents. The rule does not specify whether the objection stays the obligation to produce deposition testimony. Therefore, in the unlikely event that the subpoenaing party does not agree to postpone the deposition pending a hearing on the objection, the person subpoenaed might file a motion to quash within 10 days of receipt or on or before the time specified for compliance, whichever is shorter.

Other than the above, no procedural rules require a motion to quash be filed within a certain number of days after receipt of the subpoena. However, it is advisable to file the motion to quash as soon as possible, and in all cases, this must be done before the date specified for production or testimony on the subpoena. Fla. R. Civ. P. 1.351(b); Fla. R. Crim. P. 3.361(c).

d. Language

The motion should be relatively short. It should state that the reporter has received a subpoena. It should track that statutory language by stating that the reporter is a "professional journalist" and that any information the reporter has obtained while "actively gathering news." In some cases, where the application of the privilege is unclear, an affidavit from the recipient of the subpoena may be helpful in establishing the privilege.

The motion should state that the objection to the subpoena is based on constitutional, common law, and statutory grounds. This way, if the shield law is held not to apply for some reason, then the reporter may seek the protection of the constitutional and statutory privileges. The shield law itself expressly retains the protections of the common law and constitutional privileges. Fla. Stat. § 90.5015(5) (2006).

After establishing that the recipient of the subpoena is a professional journalist and asserting the privilege, the motion should state the three-part test for overcoming the privilege. Because most subpoenas are received before any evidentiary showing by the subpoenaing party, the motion should also clearly state that the subpoenaing party has the burden of overcoming the three-part test by a clear and specific showing as required by the statute. Fla. Stat. 90.5015(2) (2006). The motion should conclude by stating that the requisite showing has not been made and should request that the court quash the subpoena, or in the alternative, issue a protective order.

e. Additional material

As stated above, an affidavit from the recipient of the subpoena establishing his or her entitlement to the privilege sometimes is helpful when it is not clear from the recipient's title or place of employment that he or she is a professional journalist.

Also, as most evidentiary hearings on motions to quash occur in the circuit courts, many relevant judicial opinions are either unpublished or published only in unofficial reporters such as the Media Law Reporter. When unpublished or Media Law Reporter cases are cited in support of a motion, copies of these cases should be provided to the court and to opposing counsel.

4. In camera review

a. Necessity

The law does not *require* a court to conduct an in camera review of materials or examination of the reporter, and the shield law does not contemplate in camera review as an option. The judge, in his or her discretion, may require an in camera review of the journalist's materials. *See Kidwell v. State*, 730 So. 2d 670, 671 (Fla. 1998). In camera review, however, should not be the option of first resort, as even in camera inspection impinges upon the privilege by requiring the journalist to turn over information and materials.

b. Consequences of consent

Florida courts have not addressed a situation in which the reporter or publisher consents to in camera review and whether a stay pending appeal is then automatic in the event of an adverse ruling.

c. Consequences of refusing

If the reporter or publisher does not consent to in camera review ordered by the judge, the judge could hold the reporter or publisher in contempt. For a complete discussion of contempt, please see that section below.

5. Briefing schedule

A journalist wishing to challenge a subpoena generally must file a motion to quash at or before the time of compliance. The reporter also may wish to file a supporting memorandum of law and may do so at any time before the hearing on the motion. The opposing side may file a response to the motion or memo at any time before or at the hearing. Some courts and judges have their own rules concerning the time for filing of memoranda and other materials, so it is advisable to check for specific requirements with the judge assigned to the underlying case.

6. Amicus briefs

Florida courts at all levels accept amicus briefs. Potential amici in reporter's privilege cases include the First Amendment Foundation (Barbara Petersen; 336 East College Avenue; Suite 101; Tallahassee, Florida 32301; Phone: 800-337-3518; 850-222-3518; email: foi@FloridaFAF.org) and Florida Press Association (Dick Shelton; Florida Press Association; 2636 Mitcham Drive; Tallahassee, FL 32308; Phone: (850) 222-5790; Fax: (850) 224-6012; email: fpa-info@flpress.com).

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Once the journalist establishes that he or she is covered by the privilege, the burden shifts to the subpoenaing party to make a *clear and specific* showing that the privilege has been overcome. If the privilege has been overcome, then the judge must limit the compelled disclosure to those items of information for which the clear and specific showing has been made and must support the decision with clear and specific findings made after a hearing.

B. Elements

To overcome the privilege, the subpoenaing party must make a *clear and specific* showing that:

- (a) the information is *relevant and material* to unresolved issues in the case;
- (b) the information *cannot be obtained from alternative sources*; and
- (c) a *compelling interest* exists in favor of disclosure.

Fla. Stat. 90.5015(2) (2006) (emphasis added); *State v. Davis*, 720 So. 2d 220 (Fla. 1998). It is important to recognize that if the subpoenaing party fails to make a clear and specific showing as to any of the three prongs of the test, the journalist's privilege will not be overcome.

1. Relevance of material to case at bar

The information must be *relevant and material* to unresolved issues that have been raised in the case. Fla. Stat. 90.5015(2)(a) (2006). A mere possibility that the reporter might have information that might be helpful to the subpoenaing party does not meet the standard of a clear and specific showing on the issue of relevance.

2. Material unavailable from other sources

In order to overcome the privilege, the subpoenaing party must make a clear and specific showing that the information "cannot be obtained from alternative sources." Fla. Stat. 90.5015(2)(b) (2006).

a. How exhaustive must search be?

Available sources generally must be deposed or at least interviewed before the alternative sources prong of the privilege has been overcome, even if that involves hundreds of depositions or interviews. *See, e.g., Overstreet v. Neighbor*, 9 Media L. Rep. 2255, 2256 (Fla. 13th Cir. Ct. Sept. 13, 1983) (requiring exhaustion of at least 117 individuals to defeat common law privilege); *McCarty v. Bankers Ins. Co.*, 195 F.R.D. 39 (N.D. Fla. 1998) (exhaustion of *all* alternative sources must be shown). Simply put, when obvious possible alternative witnesses exist, compelled disclosure of news gathering information is inappropriate. *See, e.g., Smoliak v. Greyhound Lines, Inc.*, 33 Media L. Rep. 2452 (N.D. Fla. 2005) (applying Florida law); *Green v. Office of the Sheriff's Office, Consol. City of Jacksonville*, 31 Media L. Rep. 1756 (M.D. Fla. 2002) (applying Florida law); *State v. Davis*, 720 So. 2d 220, 228 (Fla. 1998); *Gadsden County Times, Inc. v. Horne*, 426 So. 2d 1234 (Fla. 1st DCA 1983); *State v. Trepal*, 24 Media L. Rep. 2595, 2598 (Fla. 10th Cir. Ct. Aug. 19, 1996). When substantially similar information can be obtained from a source other than the journalist, the journalist's privilege will not be overcome. *See, e.g., State v. Smith*, 29 Media L. Rep. 2438, 2439 (Fla. 12th Cir. Ct. March 16, 2001) (substantially similar information in letter in court file precluded finding that information was not available from alternative sources).

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

The information in the journalist's possession may be disclosed only if the information *cannot* be obtained from alternative sources. Fla. Stat. 90.5015(2)(b) (2006). The alternative sources prong of the Section 90.5015 requires

exhaustion of *all* alternative sources of information. This is an evidentiary burden — the subpoenaing party must provide clear and specific proof of exhaustion. *State v. Trepal*, 24 Media L. Rep. 2595, 2598 (Fla. 10th Cir. Ct. Aug. 19, 1996). The subpoenaing party must prove not only that he or she has explored all alternative sources but also that every one of those sources is not available to testify concerning the information in the journalist's possession.

In arguing motions to quash subpoenas, particularly in criminal cases, it is important to recognize that journalists are not private investigators at the disposal of the state and litigants. The journalist's privilege is not to be used to resolve problems of proof. Thus, when alternative sources exist that are unreliable, the information is deemed obtainable from those sources, and the journalist's privilege is not overcome. *See Florida v. Abreu*, 16 Media L. Rep. 2493, 2494 (Fla. Cir. Ct. 1989) (the credibility of a witness is for the finder of fact to determine at an appropriate time and is not relevant to whether the witness is an alternative source within the meaning of the journalist's privilege); *see also Kidwell v. State*, 730 So. 2d 670, 671 (Fla. 1998) ("extreme care must be taken to ensure that the media is [sic] not used as an investigative arm of the government"); *State v. Davis*, 720 So. 2d 220, 224 (Fla. 1998) ("the test was designed to prevent the government from using reporters as an investigatory arm of the government"). The credibility of the available alternative sources is for the finder of fact to determine at the proper time and has no bearing on whether such alternative sources are "available" within the meaning of the privilege. *See Abreu*, 16 Media L. Rep. at 2494 (whether testimony of other eyewitnesses is trustworthy is not relevant to the alternative sources inquiry of the journalist's privilege); *Tribune Co. v. Green*, 440 So. 2d 484, 486 (Fla. 2d DCA 1983) ("[A]ny person who can provide the same information as [the journalist] is an alternative source" and "It is inconceivable that [the journalist] could add anything more to the testimony of the [] 'first hand players'"). "The test is simply whether other sources for the same information are available." *Abreu*, 16 Media L. Rep. at 2494.

c. Source is an eyewitness to a crime

The test for overcoming the journalist's privilege in Florida is not altered when the *source* is an eyewitness to a crime. Whether the privilege is overcome will be determined by whether the information is relevant and material and cannot be obtained from alternative sources, and whether a compelling need exists in favor of disclosure. Where the source is known, the argument against overcoming the privilege is strongest because the source himself is an alternative source. Even when the source is unknown, if the subpoenaing party cannot demonstrate by a clear and specific showing that all other possible sources of the information have been exhausted, then the privilege likewise will not be overcome.

3. Balancing of interests

The reporter's privilege, unlike most others recognized under the privilege law, is not based on a privacy theory. Although a reporter may be required to keep a source or information confidential under a contractual duty to the source, the privilege belongs not to the source, but to the reporter. By protecting the reporter, the privilege protects the press's access to information. Where the press's access to information is protected, it follows that the public's access to that information is protected. *See, e.g., Ulrich v. Cost Dental Serv.*, 739 So. 2d 142, 143-144 (Fla. 5th DCA 1999). Thus, often courts must balance the interests of the public — that is, their interest in obtaining information — with the interests of the subpoenaing party in requiring disclosure. In criminal cases, often First Amendment rights must be balanced against constitutional rights protecting the criminally accused.

In Florida, courts balance those interests by requiring the subpoenaing party to make a clear and specific showing that a compelling interest exists for requiring disclosure of the information. Fla. Stat. 90.5015(2)(c) (2006). A compelling need exists only if non-production "will result in a miscarriage of justice or substantially prejudice a party's ability to present its case." *Redd v. U.S. Sugar Corp.*, 21 Media L. Rep. 1508, 1509 (Fla. 15th Cir. Ct. May 27, 1993) (applying Florida common law privilege, which is similar to Section 90.5015); *McCarty v. Bankers Ins. Co.*, 195 F.R.D. 39 (N.D. Fla. 1998) (moving party must show that "he would be unable to succeed on his claims without [the reporter's] testimony").

One area where the compelling need prong of the test has received a fair amount of judicial coverage is the use of journalists' information for impeachment purposes. The possible usefulness of the journalist's information to bolster or attack the credibility of a party or another witnesses is insufficient to meet the compelling need prong of

the test. It is within the province of the finder of fact to weigh the credibility of alternative sources, and the journalist's privilege may not be overcome simply to support or attack the credibility of another witness. *Smith*, 29 Media L. Rep. at 2439 (although journalist's information may be helpful to impeach the defendant, the interest in disclosing the information is not compelling); *Fancher v. Lee County Humane Society, Inc.*, 27 Media L. Rep. 1447, 1447-1448 (Fla. Cir. Ct. Dec. 14, 1998) (verification of the accuracy of a party's statements as contained in a newspaper article is not a sufficiently compelling need to overcome the privilege); *Redd*, 21 Media L. Rep. at 1509 ("the possible use of the information for impeachment of a witness in a civil case is not sufficiently compelling to overcome the news reporter's qualified testimony privilege"). "[I]mpeachment does not go to the heart of issues before the Court and does not demonstrate a sufficiently compelling need to overcome the reporter's privilege." *Redd*, 21 Media L. Rep. at 1509.

4. Subpoena not overbroad or unduly burdensome

Florida's shield law specifically directs judges to require disclosure only of that portion of the information for which a clear and specific showing under each prong of the test has been made. Fla. Stat. 90.5015(3) (2006). Thus, in all cases where the judge rules that the privilege has been overcome, he or she must ensure that only that information which has been supported by the showing is revealed. The judge must support his or her order with clear and specific findings made after a hearing. *See id.*

5. Threat to human life

The privilege does not require the court to weigh whether the matter subpoenaed involves a threat to human life, and this issue has not been addressed in Florida courts.

6. Material is not cumulative

When the information in the journalist's possession would be cumulative, counsel for the reporter should argue that that information is available from alternative sources and that there is no compelling need for disclosure (i.e., a miscarriage of justice will not result if the journalist is allowed to maintain the secrecy of his or her information or sources).

7. Civil/criminal rules of procedure

Florida Rules of Civil Procedure 1.280 and 1.410 govern objections to subpoenas in civil cases. These rules, in conjunction with Florida Rule of Criminal Procedure 3.361 and 3.220(h), should be used as the basis for objecting to subpoenas in criminal cases.

8. Other elements

The test for overcoming the journalist's privilege contains only the three-prongs articulated above. That is, the information must be: 1. relevant and material to unresolved issues in the case; 2. unavailable from alternative sources; and 3. supported by a compelling interest requiring disclosure. *See Fla. Stat. 90.5015(2)* (2006).

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Section 90.5015, Florida Statutes expressly states that "[a] professional journalist *does not* waive the privilege by publishing or broadcasting information." Fla. Stat. 90.5015(4) (2006) (emphasis added). Indeed, the legislative history of the statute suggests that both the Florida House of Representatives and Florida Senate intended that the privilege be protected against waiver. *See House Bill Analysis* ("the privilege created by [the journalist's privilege statute] would not be waived by a journalist's full or partial disclosure of the information sought"); *Senate Staff Analysis* ("disclosure of the information as the result of a successful challenge to the privilege does not constitute a waiver of the privilege"). The statute does not address whether other disclosures may constitute a waiver.

The Fifth District Court of Appeal of Florida has twice, within the same few months, addressed the issue of waiver of Florida's journalists' privilege. In *Ulrich v. Coast Dental Serv.*, 739 So. 2d 142 (Fla. 5th DCA 1999), the court distinguished the journalist's privilege from others based on the fact that the reporter's privilege is not conditioned upon a prior agreement of confidentiality. *Id.* at 143-144. Thus, the journalist's privilege protects both confidential and non-confidential information. The court held that this logically leads to the conclusion that disclo-

sure of the information to a third party does not constitute a waiver. *See id.* at 144. Accordingly, a journalist does not waive the privilege by speaking with the parties to the underlying proceeding or to their legal representatives. *Wilensky v. Gooding*, 31 Media L. Rep. 1641 (Fla. 7th Cir. Ct. Apr. 7, 2003); *Seo v. Kim*, 30 Media L. Rep. 1799 (Fla. Cir. Ct. Apr. 9, 2002).

One month after *Ulrich*, the Fifth District found a waiver of the privilege in a case where the journalist was a party to the underlying lawsuit. In *News-Journal Corp. v. Carson*, 741 So. 2d 572 (Fla. 5th DCA 1999), the plaintiff sued for libel a journalist and the newspaper for which the journalist worked. The newspaper attached an unemployment form to an affidavit placed in the public court file. The court held that the privilege was waived as to the contents of the form by the act of filing. *See id.* at 574. Thus, disclosure of the information in the public records may constitute a waiver of the privilege as to that information.

2. Elements of waiver

a. Disclosure of confidential source's name

<A:FL:6C1>As discussed above, the disclosure of information by publication does not waive the journalist's privilege.

b. Disclosure of non-confidential source's name

<A:FL:6C1>As discussed above, the disclosure of information by publication does not waive the journalist's privilege.

c. Partial disclosure of information

<A:FL:6C1>As discussed above, the disclosure of information by publication does not waive the journalist's privilege.

d. Other elements

Where the journalist is a party to the underlying lawsuit and files information in the public records, one court has held that the privilege is waived as to the information filed in the public records. *See News-Journal v. Carson*, 741 So. 2d 572, 574 (Fla. 5th DCA 1999).

3. Agreement to partially testify act as waiver?

If the reporter testifies in court concerning privileged information, the privilege likely is deemed waived as to the information revealed under the *News-Journal* analysis discussed above.

VII. What constitutes compliance?

A. Newspaper articles

Newspapers are self-authenticating in Florida state courts under the provisions of the Florida Evidence Code. *See Fla. Stat. 90.902(6)* (2006). Thus, a reporter is not required to testify as to the authenticity of a newspaper article before it can be admitted into evidence.

B. Broadcast materials

Section 90.5015, Florida statutes, provides for authentication via journalist's affidavit of certain information. *See Fla. Stat. 90.5015(6)* (2006). Specifically, Section 90.5015(6) provides:

Photographs, diagrams, video recordings, audio recordings, computer records, or other business records maintained, disclosed, provided or produced by a professional journalist, or by the employer of principal of a professional journalist, may be authenticated for admission in evidence upon a showing, by affidavit of the professional journalist, or other individual with personal knowledge, that the photograph, diagram, video recording, audio recording, computer record, or other business record is a true and accurate copy of the original, and that the copy truly and accurately reflects the observations and facts contained therein.

Fla. Stat. 90.5015(6) (2006). Thus, even where the privilege has been overcome, a journalist may avoid appearance in court by filing an affidavit that establishes both that the document or recording is what it purports to be and that the information contained within the document or recording accurately reflects the observations of the professional journalist. In short, it is an affidavit of authenticity *and* accuracy, though the court does have the discretion to refuse to admit the evidence. *See* Fla. Stat. 90.5015(7) (2006).

C. Testimony vs. affidavits

As stated in the previous section, Florida's shield law provides for authentication of documents and other materials that must be disclosed by the journalist. *See* Fla. Stat. 90.5015(6) (2006). Where the reporter's testimony is sought, however, it is unclear whether an affidavit would be a sufficient substitute for the in-court (and subject to cross examination) testimony of a journalist.

D. Non-compliance remedies

1. Civil contempt

a. Fines

No published Florida appellate decision addresses whether a journalist might face a civil contempt fine for non-compliance with a subpoena. However, in theory contempt is an available remedy for failure to comply with the requirements of a subpoena once a motion to quash has been denied. The reviewing court will look to the merits of the underlying motion to quash in deciding whether to uphold the contempt citation. *See, e.g., Tribune Co. v. Huffstetler*, 489 So. 2d 722, 724 (Fla. 1986) (quashing subpoena); *Morgan v. State*, 337 So. 2d 951, 956 (Fla. 1976); (overturning 90-day jail sentence); *In re Mary Jo Tierney*, 328 So. 2d 40, 47 (Fla. 4th DCA 1976) (vacating contempt sentence due to expiration of term of grand jury before which journalist refused to answer questions).

b. Jail

The jailing of a journalist in Florida for civil contempt in defying a subpoena has never been upheld on appeal. However, in theory contempt is an available remedy for failure to comply with the requirements of a subpoena once a motion to quash has been denied. The reviewing court will look to the merits of the underlying motion to quash in deciding whether to uphold the contempt citation. *See, e.g., Tribune Co. v. Huffstetler*, 489 So. 2d 722, 724 (Fla. 1986) (quashing subpoena); *Morgan v. State*, 337 So. 2d 951, 956 (Fla. 1976); (overturning 90-day jail sentence); *In re Mary Jo Tierney*, 328 So. 2d 40, 47 (Fla. 4th DCA 1976) (vacating contempt sentence due to expiration of term of grand jury before which journalist refused to answer questions).

2. Criminal contempt

Criminal contempt also theoretically is an available remedy for noncompliance with a subpoena once the journalist's privilege has been unsuccessfully asserted, though the issue has not been addressed by a Florida court since the shield law was enacted in 1998. In 1996, a reporter was found guilty of indirect criminal contempt, fined \$500, and sentenced to 70 days in jail. *See Kidwell v. McCutcheon*, 962 F. Supp. 1477, 1478 (S.D. Fla. 1996). The journalist had refused to answer questions at a deposition at which he was subpoenaed to testify. A circuit court judge had issued the contempt order but had stated that the journalist could purge himself of the contempt by answering the subpoenaing party's questions within six days. *See id.* The federal district court, noting the uncertainty in Florida law at the time, stayed imposition of the jail sentence until state court remedies could be exhausted. *See id.* at 1481. In 1990, another journalist was cited for criminal contempt and sentenced to thirty days in jail for refusing to identify the source that provided a confidential court order. *See In re Investigation: Florida Statute 27.04, Subpoena of Roche v. State*, 589 So.2d 978, 980 (Fla. 4th DCA 1991). The criminal contempt citation was upheld on appeal. *Id.*

3. Other remedies

Florida courts do not appear to have addressed this issue.

VIII. Appealing

A. Timing

1. Interlocutory appeals

A reporter may seek review of the denial of a motion to quash without waiting to be held in contempt for failing to comply with the subpoena. Review should be sought by writ of certiorari, which must be filed within thirty (30) days of the rendering of the order. *See Fla. R. App. P. 9.100(c)*.

2. Expedited appeals

A journalist may request that the appeal be expedited. In the case of the news media, courts often will grant review on an expedited basis. If appeal is taken on an expedited basis, the court typically will alter the normal briefing schedule by an order establishing the response times to apply to the expedited proceeding.

B. Procedure

1. To whom is the appeal made?

An order from a county court judge must be appealed to the circuit court. An order from the circuit court must be appealed to the district court. *See Fla. R. App. P. 9.030*.

2. Stays pending appeal

A journalist seeking to stay an order on a motion to quash pending review must make a motion in the court issuing the order and such court has the discretion to grant, modify, or deny relief. *See Fla. R. App. P. 9.310*. The stay remains in effect during the pendency of review proceedings until a mandate issues, or unless it is otherwise modified or vacated. *See id.*

3. Nature of appeal

Review should be sought by writ of certiorari, which must be filed within thirty (30) days of the rendering of the order. *See Fla. R. App. P. 9.100(c)*.

4. Standard of review

Discretionary review by certiorari is afforded only where there is a "departure from the essential requirements of law" causing a miscarriage of justice. *Ocala Star Banner Corp. v. State*, 721 So. 2d 838, 838-39 (Fla. 5th DCA 1998).

5. Addressing mootness questions

In a case in which a subpoena of a journalist had been withdrawn before the journalist gave testimony, Florida's Fifth District Court of Appeal denied a petition for certiorari as moot. *See Ocala Star Banner Corp. v. State*, 721 So. 2d 838, 838 (Fla. 5th DCA 1998). But the same court previously granted review in a case in which a reporter covering a hearing had been ordered to take the stand and to testify. *See Times Publ'g Co. v. Burke*, 375 So. 2d 297, 298 (Fla. 5th DCA 1979). In that case, the court cited the substantial public interest in the issue and the fact that the controversy was capable of repetition yet evading review. *Id.*

6. Relief

The appellate court should be asked to quash the order compelling testimony or disclosure. *See, e.g., Morgan v. State*, 337 So. 2d 951 (Fla. 1976); *Times Publ'g Co. v. Burke*, 375 So. 2d 297, 299 (Fla. 5th DCA 1979). The appellate court also may overturn a contempt conviction. *See, e.g., Tribune Co. v. Huffstetler*, 489 So. 2d 722 (Fla. 1986); *Morgan v. State*, 337 So. 2d 951 (Fla. 1976).

IX. Other issues

A. Newsroom searches

The Federal Privacy Protection Act (42 U.S.C. 2000aa), which limits searches of newsrooms, has not been addressed in Florida state courts, and no similar provisions exist under state law.

B. Separation orders

The issue of sequestering a reporter who was both a witness and working to cover the trial has come up once in Florida courts. In *Gore Newspaper Co. v. Reasbeck*, 363 So. 2d 609 (Fla. 4th DCA 1978), an attorney for the defendant in a criminal case asked the court to place several news reporters under oath and exclude them from the courtroom under the rule allowing for sequestration of witnesses. *Id.* at 610. The trial judge complied. On appeal, the Fifth District Court of Appeal held that there was not the slightest indication that the reporters were likely to be called as witnesses in the trial and that the entire "charade" was simply a "ruse" by counsel to exclude the press from the courtroom during the suppression hearing. *See id.* The court held that the grant of sequestration by the trial judge was improper. *See id.* The purpose of the rule allowing sequestration of witnesses is to prevent the testimony of one witness from influencing the testimony of another. Where the reporters never were intended to be witnesses in the case, and the sequestration rule was invoked merely to keep the proceedings from public view, it was error to invoke the rule against the reporters. *See id.* at 611.

C. Third-party subpoenas

Florida courts do not appear to have addressed whether any privilege applies to records third parties might have (*e.g.*, telephone records) that relate to newsgathering.

D. The source's rights and interests

Florida courts do not appear to have addressed this issue.