

REPORTER'S PRIVILEGE: GEORGIA

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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This project was initially made possible by a generous grant from the Phillip L. Graham Fund.

Published by The Reporters Committee for Freedom of the Press.

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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

GEORGIA

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I. Introduction: History & Background

Since its enactment in 1990, the Georgia Supreme Court has repeatedly enforced Georgia's qualified reporter's privilege to protect the news media. Additionally, the Court has recognized a right of automatic appeal for non-party reporters in the event a trial court orders disclosure of newsgathering information notwithstanding an objection under the privilege. Given the established law regarding the privilege, the news media routinely prevails on those occasions that a litigant seeks to compel information from a non-party reporter obtained in the process of newsgathering.

II. Authority for and source of the right

A. Shield law statute

In Georgia, the reporter's privilege is recognized by statute, which states:

Any person, company, or other entity engaged in the gathering or dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

- (1) Is material and relevant;
- (2) Cannot be reasonably obtained by alternative means; and
- (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

O.C.G.A. § 24-9-30.

The privilege was codified in 1990 by the Georgia General Assembly after the Georgia Supreme Court ruled that Georgia law afforded no special relief to subpoenaed reporters. *See generally Vaughn v. State*, 259 Ga. 325 (1989); *Howard v. Savannah College of Art and Design, Inc.*, 259 Ga. 795 (1990).

In oral argument in *Howard*, Justice Charles L. Weltner suggested that a reporter's privilege would have to come from the state legislature. The following legislative session the Georgia Press Association lobbied for a statutory privilege, which resulted in the adoption of O.C.G.A. § 24-9-30. The statute has not been amended since its adoption.

B. State constitutional provision

The Georgia Constitution does not have an express shield law provision. Prior to the enactment of the shield statute, the Georgia Supreme Court declined to interpret the State Constitution as affording reporters a privilege in the context of grand jury testimony. *See Vaughn v. State*, 259 Ga. 325 (1989) (interpreting *Branzburg v. Hayes*, 408 U.S. 665 (1972) as affording no relief to a reporter subject to a grand jury subpoena and "declin[ing] to interpret the Constitution of Georgia to afford any greater right") (1989).

C. Federal constitutional provision

Prior to the enactment of the shield statute, the Georgia Supreme Court declined to recognize a reporter's privilege in the context of a grand jury subpoena and a deposition subpoena in civil litigation. *See Vaughn v. State*, 259 Ga. 325 (1989) (grand jury subpoena); *Howard v. Savannah College of Art and Design, Inc.*, 259 Ga. 795 (1990) (civil deposition subpoena).

D. Other sources

Even where no formal evidentiary privilege applies, Georgia courts have repeatedly recognized that trial courts must take protective measures to prevent litigants from seeking to compel sensitive information from a party or witness, particularly where there has been no showing that the evidence is necessary to prove a viable claim. *See, e.g., Ledee v. Devoe*, 225 Ga. App. 620, 625 (1997) ("it is the trial court's obligation to assure that the scope of the discovery is restricted to the extent necessary to prevent an unreasonable intrusion into the defendant's privacy").

Based on such precedent, the Georgia Court of Appeals has recognized that in defamation claims against the media where the statutory privilege does not apply because the defendant reporter is a party, the trial courts must nevertheless strictly control discovery seeking disclosure of the identity of confidential sources. *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 813 (2001) ("there is a strong public policy in favor of allowing journalists to shield the identity of their confidential sources unless disclosure is necessary to meet other important purposes of the law"), *cert. denied*, 2002 Ga. Lexis 103 (2002), *cert. denied*, 537 U.S. 814 (2002).

III. Scope of protection

A. Generally

Since its enactment, Georgia's statutory privilege has been enforced by Georgia state and federal courts in vigorous fashion. It is now well settled that the privilege applies to confidential and non-confidential information and to both testimony and records obtained in the process of gathering or delivering the news. *See generally In re Paul*, 270 Ga. 680, 684 (Ga. 1999) (rejecting compelled testimony from reporter who did a jailhouse interview of accused murderer: "[The shield law] protects against the 'disclosure of any information document or item obtained or prepared in the gathering or dissemination of the news.' Thus, the statutory language does not distinguish between the source's identity and information received from the source or between non-confidential and confidential information.>").

B. Absolute or qualified privilege

Qualified.

C. Type of case

1. Civil

The privilege applies in civil proceedings. *See, e.g.,* O.C.G.A. § 24-9-30 (privilege applies "in any proceeding where the one asserting the privilege is not a party"); *In re Paul*, 270 Ga. 680, 684 (Ga. 1999).

2. Criminal

The privilege applies in criminal proceedings. *See, e.g.,* O.C.G.A. § 24-9-30 (privilege applies "in any proceeding where the one asserting the privilege is not a party"); *In re Paul*, 270 Ga. 680, 684 (Ga. 1999).

Georgia courts have repeatedly enforced the privilege in the face of claims by criminal defendants that the privilege infringed their Sixth Amendment rights. *See, e.g., Stripling v. State*, 261 Ga. 1, 8-9 (1991) (affirming trial court's refusal to require a newspaper reporter to reveal sources in a death penalty case, noting that alternative sources existed to pursue allegations of illegal conduct by sheriff's department); *Nobles v. State*, 201 Ga. App. 483, 486-87 (1991) (affirming quashing of subpoena issued to reporter covering murder trial: "it has [not] been shown that the disclosure of the source of this erroneous information was in any way material or relevant or necessary").

Georgia courts have also enforced the privilege where the state sought to compel information. *See, e.g., Paul, supra*, 270 Ga. at 685-86 ("the appeal presents a conflict between the public's right to evidence at a criminal trial and its competing right to the unencumbered flow of information through the news media").

3. Grand jury

The privilege applies to grand jury subpoenas. *See, e.g.,* O.C.G.A. § 24-9-30 (privilege applies "in any proceeding where the one asserting the privilege is not a party"); *In re Paul*, 270 Ga. 680, 684 (Ga. 1999).

D. Information and/or identity of source

The privilege protects the identity of sources and any records that would tend to reveal such sources. *See, e.g., In re Paul*, 270 Ga. 680, 684 (Ga. 1999) ("[T]he statutory language does not distinguish between the source's identity and information received from that source.").

E. Confidential and/or non-confidential information

In addition to protecting confidential sources and information, the privilege also protects against the compelled disclosure of non-confidential sources and information. *See, e.g., In re Paul*, 270 Ga. 680, 684 (Ga. 1999) ("Unlike some states, the Georgia statute does not limit the privilege solely to confidential sources, but protects against the disclosure of any information obtained or prepared.").

F. Published and/or non-published material

Publication of information waives the privilege with respect to the published article or broadcast itself, but does not waive the privilege with respect to non-published material. *See, e.g., In re Paul*, 270 Ga. 680, 686 (Ga. 1999) ("Contrary to the State's contention, publication of part of the information gathered does not waive the privilege as to all of the information gathered on the same subject because it 'would chill the free flow of information to the public.'"). *See also CSX Transportation v. Cox Broadcasting, Inc.*, No. E-59240 (Fulton County Superior Court, May 29, 1997) (denying and dismissing action in equity by CSX Transportation seeking discovery of raw, non-broadcast videotape taken by local television stations at scene of train accident, finding that the tape was privileged and CSX could not make the showing required by the statute to justify compelling the discovery sought).

G. Reporter's personal observations

A reporter's personal observations are protected by the privilege so long as they occurred as part of the gathering or dissemination of the news. *See* O.C.G.A. § 24-9-30 (affording protection to "any information, document, or item obtained or prepared in the gathering or dissemination of news"). *See also Vance v. Krause*, Civil Action No. 90-1687-5 (DeKalb County Superior Court, Nov. 21, 1990) (Where subpoena sought to compel testimony from non-party television station photographer who was also a long-time personal friend of defendant, trial court held that shield law protected from disclosure only information obtained by photographer as a news gatherer for purposes of dissemination to the public.).

H. Media as a party

The privilege does not apply where a reporter with the information or material is a party. *See* O.C.G.A. § 24-9-30 (privilege applies "in any proceeding where the one asserting the privilege is not a party"). However, the Georgia Court of Appeals has specifically recognized that in defamation claims where the statutory privilege does not apply because the defendant reporter is a party, the trial courts must nevertheless strictly control discovery seeking disclosure of the identity of confidential sources. *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 813 (2001) ("other provisions of Georgia law require the trial court to balance the interests of the parties in virtually the same manner as the statute would require if it applied"), *cert. denied*, 2002 Ga. Lexis 103 (2002), *cert. denied*, 537 U.S. 814 (2002).

I. Defamation actions

Georgia's statutory privilege does not apply in cases where a reporter is a party, but other provisions of Georgia law afford protection to reporters. In *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 813 (2001), *cert. denied*, 2002 Ga. Lexis 103 (2002), *cert. denied*, 537 U.S. 814 (2002), the Georgia Court of Appeals held that although a newspaper could not invoke Georgia's statutory privilege in requesting protection for its confidential sources in discovery, it could invoke the protection afforded by Georgia law against sensitive discovery of any sort. Based on the longstanding protection Georgia courts have afforded to sensitive information, the Court of Appeals reversed the trial court and required it to take significant protective measures with respect to confidential sources:

To properly perform this balancing test in a libel case, the trial court must require the plaintiff to specifically identify each and every purported statement he asserts was libelous, determine whether the plaintiff can prove

the statements were untrue, taking into account all the other available evidentiary sources, including the plaintiff's own admissions, and determine whether the statements can be proven false through the use of other evidence, thus eliminating the plaintiff's necessity for the requested discovery. In other words, if [plaintiff] cannot succeed on a specific allegation of libel as a matter of law, or if [plaintiff] is able to prove his specific allegation through the use of available alternative means, then the trial court's balancing test should favor nondisclosure of confidential sources. If, on the other hand, a specific allegation of libel is determined to be legally viable, or if it cannot be determined whether the allegation is legally viable given the current state of the record, and if the identity of the sources either is relevant and material in and of itself or is the only available avenue to other admissible evidence, then the trial court's balancing test should favor disclosure of the confidential sources.

251 Ga. App. at 813. Performing the balancing test set forth by the Court of Appeals on remand, the trial court declined to compel the newspaper's confidential sources. *Jewell v. Cox Enters., Inc.*, No. 97VS0122804 (Ga. St. Ct. June 1, 2004) (order denying motion to compel).

IV. Who is covered

By its express statutory language, the scope of Georgia's privilege is very broad. It applies to "[a]ny person, company, or other entity engaged in the gathering or dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast." O.C.G.A. § 24-9-30.

With respect to such persons, the privilege applies not just to information or records obtained in "gathering" the news, but also to information and records prepared in "disseminating" the news. This latter provision precludes any claim that drafts or other internal records in the possession of editors or other news personnel are not privileged.

The only exception to the scope of the privilege is that it does not apply where the one asserting the privilege is a party. *But see Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 813 (2001) (recognizing in defamation action that confidential sources must still be afforded protection under traditional discovery principles), *cert. denied*, 2002 Ga. Lexis 103 (2002), *cert. denied*, 537 U.S. 814 (2002).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The privilege applies to a full or part time reporter as well as any person "engaged in the gathering or dissemination of news." O.C.G.A. § 24-9-30.

b. Editor

The privilege applies to a full or part time editor as well as any person "engaged in the gathering or dissemination of news." O.C.G.A. § 24-9-30.

c. News

The statutory privilege does not limit the definition of "news" in any fashion, nor have the Georgia courts.

d. Photo journalist

The privilege applies to a full or part time photo journalist as well as any person "engaged in the gathering or dissemination of news." O.C.G.A. § 24-9-30.

e. News organization / medium

By its express statutory language, the privilege applies to "[a]ny person, company, or other entity engaged in the gathering or dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast." O.C.G.A. § 24-9-30.

2. Others, including non-traditional news gatherers

Because of its broad scope, the privilege protects not just traditional reporters, but any person "engaged in the gathering or dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast." This definition would include all authors, be they research assistants, newspaper librarians, student interns, etc. *But see Vance v. Krause*, Civil Action No. 90-1687-5 (DeKalb County Superior Court, Nov. 21, 1990) (Where subpoena sought to compel testimony from non-party television station photographer who was also a long-time personal friend of defendant, trial court held that shield law protected from disclosure only information obtained by photographer as a news gatherer for purposes of dissemination to the public.).

B. Whose privilege is it?

The reporter's privilege belongs to the person engaged in the gathering and dissemination of the news, not the source. *In re Paul*, 270 Ga. 680, 684 (Ga. 1999).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special requirements for serving a subpoena on the news media. Generally, under Georgia law, personal service of a subpoena commanding the attendance of a witness at a hearing or trial may be perfected by any sheriff, deputy or other person more than 18 years of age. Service may also be made by certified or registered mail. O.C.G.A. § 24-10-23. A court may consider whether under the circumstances of each case a subpoena was served within a reasonable time. O.C.G.A. § 24-10-25(a). In no event may the time of service be less than 24 hours prior to the time that appearance is required. *Id.*

2. Deposit of security

A party issuing a subpoena commanding the attendance of a witness at a hearing or trial that is not in the witness's county of residence must include with the subpoena one day's witness fee (\$25) plus mileage of 20 cents per mile for going from and returning to witness's residence. O.C.G.A. § 24-10-24. However, when the subpoena is issued on behalf of the state, or an officer, agency, or political subdivision of the state, or a defendant in a criminal trial, then fees and mileage need not be tendered. *Id.*

3. Filing of affidavit

Georgia law does not require the filing of an affidavit prior to issuing a subpoena to a reporter.

4. Judicial approval

Generally, a judge or magistrate does not need to approve a subpoena prior to it being served by a party. Subpoenas are issued in blank by the clerk under the seal of the court. O.C.G.A. § 24-10-20.

5. Service of police or other administrative subpoenas

Georgia law does not recognize subpoenas for police and fire investigations in the absence of a grand jury or other judicial body. Certain administrative bodies can serve subpoenas, and their service rules generally conform to Georgia law referenced above.

B. How to Quash

1. Contact other party first

It is generally advisable to contact the subpoenaing party prior to moving to quash a subpoena both because Georgia courts encourage voluntary efforts to resolve disputed matters and because it is helpful in the motion to quash to identify the alleged purpose for which the subpoenaing party seeks the information.

2. Filing an objection or a notice of intent

A non-party can serve an objection in lieu of filing a motion to quash if the non-party receives a notice for the production of documents or a subpoena for the production of documents in connection with discovery in a civil case.

Pursuant to O.C.G.A. § 9-11-34(c)(1), where a party issues a *notice* to produce documents to a non-party as part of discovery in a civil case, the non-party may serve an objection to the notice, and the party will thereafter have to move to compel in order to obtain the discovery. The objection must be served within *thirty days* after the service of the notice.

Pursuant to O.C.G.A. § 9-11-45(a)(2), where a party issues a *subpoena* to produce documents (and not a subpoena for testimony) to a non-party as part of discovery in a civil case, the non-party may serve an objection to the subpoena, and the party will thereafter have to move to compel in order to obtain the discovery. The objection must be served "within *ten days* after the service [of the subpoena] or on or before the time specified in the subpoena for compliance if such time is less than ten days after service."

Georgia practice does not require the filing of a notice of intent. A motion to quash, however, must be accompanied by a memorandum in support. Uniform Superior Court Rule 6.1.

3. File a motion to quash

a. Which court?

Generally, if a witness is a resident of Georgia and receives a subpoena to compel his attendance at a hearing or trial in a Georgia civil or criminal case, a motion to quash should be filed in the court hearing the case. *See generally* § 24-10-21 ("A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state."). If the subpoenaed party is not a resident of Georgia, a motion to quash may be appropriate in the party's jurisdiction. *See generally* O.C.G.A. § 24-10-94.

b. Motion to compel

If a party to a lawsuit serves a subpoena or notice to produce and receives no compliance or response whatsoever, the party can argue that the failure to respond works as a waiver of objections. Accordingly, if a subpoena is not void on its face, the better practice is to move for a protective order.

c. Timing

The amount of time a party has to respond to a subpoena or notice to produce depends on the legal authority under which it was issued.

For a subpoena issued to compel attendance at a trial or court hearing pursuant to O.C.G.A. 24-10-20 *et seq.*, a motion to quash may be filed "promptly and in any event at or before the time specified in the subpoena for compliance therewith." O.C.G.A. § 24-10-22.

For a subpoena for deposition issued as part of civil discovery pursuant to O.C.G.A. § 9-11-45, a motion to quash may be filed "promptly and in any event at or before the time specified in the subpoena for compliance therewith." O.C.G.A. § 9-11-45(a)(1)(C).

For a subpoena to produce documents as part of civil discovery pursuant to O.C.G.A. § 9-11-45, an objection to the subpoena may be served "within *ten days* after the service [of the subpoena] or on or before the time specified in the subpoena for compliance if such time is less than ten days after service." O.C.G.A. § 9-11-45(a)(2).

For a notice to produce documents as part of civil discovery pursuant to O.C.G.A. § 9-11-34, an objection to the notice may be served "within *thirty days* after the service of the request." O.C.G.A. § 9-11-34(c)(1).

d. Language

There is no preferred language that should be included in a motion to quash.

e. Additional material

Apart from the subpoena, additional materials appropriate for a motion to quash would depend on the circumstances of the case.

4. In camera review

a. Necessity

Georgia law does not direct a court to conduct an in camera review of materials or interview a reporter prior to deciding a motion to quash. Moreover, as a matter of common practice, such review is generally not undertaken by Georgia courts.

b. Consequences of consent

There is no Georgia law concerning consent to in camera review.

c. Consequences of refusing

There is no Georgia law concerning the consequences of refusing to consent to an in camera review. Generally, in Georgia, a person protected by the privilege at O.C.G.A. § 24-9-30 can seek an immediate, direct appeal if they are ordered to testify or produce documents after invoking the privilege. *See generally In re Paul*, 270 Ga. 680, 684 (Ga. 1999).

5. Briefing schedule

Pursuant to Uniform Superior Court Rule 6.2, unless otherwise ordered, a party opposing a motion shall serve and file a response not later than 30 days after service of the motion.

6. Amicus briefs

Georgia's trial and appellate courts do generally accept amicus briefs. *See generally* Georgia Supreme Court Rule 23; Georgia Court of Appeals Rule 25.

State organizations that regularly oppose the issuance of subpoenas to reporters include:

Georgia Press Association
3066 Mercer University Drive
Suite 200
Atlanta, Georgia 30341
(770) 454-6776

Georgia First Amendment Foundation
150 E. Ponce de Leon Avenue
Suite 350
Decatur, Georgia 30030-2588
(404) 525-3646

ACLU of Georgia
142 Mitchell Street, SW
Suite 301
Atlanta, Georgia 30303
(404) 523-5398

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Once a member of the news media demonstrates that he or she is covered under the privilege, the challenged subpoena should be quashed unless the subpoenaing party can demonstrate either that the privilege has been waived or that the information sought (1) is material and relevant; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. O.C.G.A. § 24-9-30.

Although there is no legal authority specifically defining the standard of proof a subpoenaing party must meet, Georgia's appellate courts have repeatedly affirmed trial courts that rejected insufficient showings. *See, e.g., Stripling v. State*, 261 Ga. 1, 8-9 (1991); *Nobles v. State*, 201 Ga. App. 483, 486-87 (1991).

B. Elements

A subpoenaing party seeking to compel testimony or documents from a member of the news media who has invoked the privilege must show that the information sought (1) is material and relevant; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. O.C.G.A. § 24-9-30.

1. Relevance of material to case at bar

According to the statute, the subpoenaing party must demonstrate that the information sought is both "material and relevant" and "necessary to the proper preparation or presentation of the case." Georgia courts have interpreted this to mean that the information must be essential to a disputed material element of the claim or defense. *Nobles v. State*, 201 Ga. App. 483, 486-87 (1991) (affirming quashing of subpoena issued to reporter covering murder trial: "it has [not] been shown that the disclosure of the source of this erroneous information was in any way material or relevant or necessary").

2. Material unavailable from other sources

According to the statutory privilege, the subpoenaing party must demonstrate the information sought "cannot be reasonably obtained by alternative means." This has been interpreted to require a showing that the information is unavailable from other sources. *See, e.g., In re Paul*, 270 Ga. 680, 687 (Ga. 1999) ("[T]he state has failed to show that it could not reasonably obtain much of the information it seeks by alternative means.").

a. How exhaustive must search be?

No court has specifically addressed how exhaustive a search must be, but the reasoning of decisions demonstrates that there must be a compelling showing that no other source for the information exists. *See, e.g., In re Paul*, 270 Ga. 680, 687 (Ga. 1999) ("The state cannot obtain the identity of confidential sources or information from newspapers under the second prong of the test without first exerting an effort to obtain the same information from county and city employees."); *Stripling v. State*, 261 Ga. 1, 9 (1991) (affirming trial court's protection of reporter's confidential sources under the privilege in a death penalty case where the "defense team made no effort to contact" fewer than a dozen former sheriff's department employees who could have been the reporter's sources).

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

A subpoenaing party must make an evidentiary showing that demonstrates that no alternative source exists. *See, e.g., In re Paul*, 270 Ga. 680, 687 (Ga. 1999) ("The state cannot obtain the identity of confidential sources or information from newspapers under the second prong of the test without first exerting an effort to obtain the same information from county and city employees."); *Stripling v. State*, 261 Ga. 1, 9 (1991) (affirming trial court's protection of reporter's confidential sources under the privilege in a death penalty case where the "defense team made no effort to contact" fewer than a dozen former sheriff's department employees who could have been the reporter's sources).

c. Source is an eyewitness to a crime

Georgia courts have upheld the privilege in the context of a subpoena seeking the identity of a news reporter's source who is an eyewitness or participant in a crime. *See Stripling v. State*, 261 Ga. 1, 8-9 (1991) (affirming trial court's protection of reporter's confidential sources under the privilege in a death penalty case where the reporter refused to disclose the identity of former sheriff's department employees who informed her of a "systematic policy of eavesdropping" on attorney client conversations at a county jail).

3. Balancing of interests

Although case law interpreting the Georgia privilege does not explicitly contemplate a "balancing" of interests, the analysis used by the appellate courts clearly incorporates a sensitivity to the broader principles protected by the privilege. *See, e.g., In re Paul*, 270 Ga. 680, 682 (Ga. 1999) ("News stories based on confidential sources and

information enable citizens to make more informed decisions about the conduct of government and its respect for individual rights.").

4. Subpoena not overbroad or unduly burdensome

Under general principles applicable in Georgia criminal and civil procedure, a subpoena can be quashed if it is overbroad or unduly burdensome. *See generally* O.C.G.A. §§ 9-11-26(c) (authorizing entry of protective orders to protect party's from undue burden and to limit the scope of discovery) .

5. Threat to human life

There is no provision in Georgia law that requires a court to consider whether the matter subpoenaed involves a threat to human life.

6. Material is not cumulative

The Georgia privilege cannot be overcome where a party seeks testimony or materials that would be cumulative of existing evidence. *See, e.g., In re Paul*, 270 Ga. 680, 682 (Ga. 1999) ("Not only does the state have at least two confessions on videotape, where the jury can observe the defendant, but the state also presented expert testimony of a forensic psychiatrist. Thus, the state does not need the reporter's testimony to prepare or present its case to the jury concerning Jill's mental state when he confessed to police.").

7. Civil/criminal rules of procedure

In response to a subpoena seeking testimony, Georgia allows the filing of a motion to quash. *See generally* O.C.G.A. §§ 9-11-26(c); 24-10-22(b). If a non-party receives a notice for the production of documents or a subpoena for the production of documents as part of discovery in a civil case, Georgia procedure permits an objection in lieu of filing a motion to quash. *See generally* O.C.G.A. §§ 9-11-34(c)(1); 9-11-45(a)(2).

8. Other elements

None.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Under settled Georgia law, the privilege belongs to the reporter. *See, e.g., In re Paul*, 270 Ga. 680, 686 (Ga. 1999) ("The reporter's privilege belongs to the person engaged in the gathering and dissemination of news."). The privilege can be waived by a reporter, but Georgia law is generally hostile to claims of unintentional waiver. *See, e.g., Kennestone Hosp. v. Hopson*, 273 Ga. 145 (2000).

A reporter's voluntary decision to testify will waive the privilege. The publication of information also waives the privilege as to the published or broadcast information. *See generally Paul*, 270 Ga. App. at 686. Thus, in *In Re Morris Communications Co.*, 258 Ga. App. 154 (2002), the Georgia Court of Appeals denied a motion to quash in a criminal trial when the subpoena sought the reporter's authentication of two articles and testimony that those were the only articles the newspaper published on a particular issue. The court found that the privilege was waived because the subpoena "does not seek substantive, confidential, or unpublished information, nor is the State asking that [the reporter] comment on the content of the articles. Instead, the State seeks testimony related to published information only, and even then, the State desires to elicit extremely limited testimony . . ." 258 Ga. App. at 155-56.

Nonetheless, publication of "part of the information gathered does not waive the privilege as to all of the information gathered on the same subject matter because it 'would chill the free flow of information to the public.'" *Id.* at 155 (quoting *Paul*, 270 Ga. App. at 686).

2. Elements of waiver

a. Disclosure of confidential source's name

Voluntary public disclosure of a confidential source's name in testimony or in a publication would likely be interpreted as a waiver of the privilege with respect to the source's name, but no Georgia court has addressed this spe-

cific issue. Because the privilege applies not just to reporters but to any persons engaged in the gathering and dissemination of news, communication of information by a reporter to an editor or other news staff should not constitute waiver of the privilege. Again, however, no Georgia court has addressed the issue.

b. Disclosure of non-confidential source's name

Voluntary public disclosure of a non-confidential source's name in testimony or in a publication would likely be interpreted as a waiver of the privilege with respect to the source's name, but no Georgia court has addressed this specific issue. The disclosure would not constitute a waiver of the privilege as to undisclosed information obtained from the source. *See, e.g., In re Paul*, 270 Ga. 680, 686 (Ga. 1999).

c. Partial disclosure of information

Publication of "part of the information gathered does not waive the privilege as to all of the information gathered on the same subject matter because it 'would chill the free flow of information to the public.'" "); *In re Paul*, 270 Ga. 680, 686 (Ga. 1999).

d. Other elements

None.

3. Agreement to partially testify act as waiver?

No Georgia court has addressed the specific issue of whether an agreement to testify as to a limited issue would be deemed a waiver of the privilege generally. However, Georgia law is generally hostile to arguments asserting waiver. *See, e.g., Kennestone Hosp. v. Hopson*, 273 Ga. 145 (2000). Moreover, publication of "part of the information gathered does not waive the privilege as to all of the information gathered on the same subject matter because it 'would chill the free flow of information to the public.'" *In re Paul*, 270 Ga. 680, 686 (Ga. 1999).

VII. What constitutes compliance?

A. Newspaper articles

Georgia law does not recognize newspapers as self-authenticating, but parties to litigation in almost all cases stipulate to their authenticity. Failure to stipulate without a good faith basis to dispute authenticity is potentially sanctionable. The Georgia Court of Appeals has ruled that a reporter can be compelled to testify at a criminal trial to authenticate articles, provided the subpoena does not seek testimony about substantive, confidential, or unpublished information or about the content of the articles. *See generally In re Morris Communications*, 258 Ga. App. 154 (2002).

B. Broadcast materials

Georgia law does not recognize news broadcasts as self-authenticating, but parties to litigation in almost all cases stipulate to their authenticity. Failure to stipulate without a good faith basis to dispute authenticity is potentially sanctionable.

C. Testimony vs. affidavits

Under Georgia law, parties can agree to accept an affidavit or stipulation in lieu of live testimony.

D. Non-compliance remedies

If a non-party reporter invokes the privilege but is nevertheless ordered to testify, the reporter is entitled to bring a direct appeal from that order. *See, e.g., In re Paul*, 270 Ga. 680, 683 (Ga. 1999) ("[W]e hold that non-parties engaged in news gathering may file a direct appeal of an order denying them a statutory reporter's privilege under the collateral order exception to the final judgment rule."). The filing of the notice of appeal stays the trial court from imposing any punishment to compel compliance with its order. *See generally* O.C.G.A. §§ 5-6-46; 5-6-13(a).

1. Civil contempt

If an order compelling testimony from a non-party reporter were upheld on direct appeal (an event that has never occurred since enactment of the privilege), a Georgia trial court would be authorized to fashion a penalty intended to force compliance with its order. Under circumstances of civil contempt, the Georgia Court of Appeals has held that statutory restrictions on contempt powers found at O.C.G.A. § 15-7-4 (fine of no more than \$500 and/or 20 days in jail) do not apply. *Grantham v. Universal Tax Systems*, 217 Ga. App. 676, 678 (1995); *Mathis v. Corrugated Gear and Sprocket, Inc.*, 263 Ga. 419, 421-22 (1993). However, as with all contempt citations, "courts should limit their orders to the least possible exercise of power required." *In re Siemon*, 264 Ga. 641, 641 (1994).

a. Fines

If an order compelling testimony from a non-party reporter were upheld on direct appeal (an event that has never occurred since enactment of the privilege), a Georgia trial court would be authorized to consider imposing fines in order to force compliance with its order. The Georgia Court of Appeals has held that statutory restrictions on contempt powers found at O.C.G.A. § 15-7-4 (fine of no more than \$500 and/or 20 days in jail) do not to apply in the civil contempt context. *Grantham v. Universal Tax Systems*, 217 Ga. App. 676, 678 (1995); *Mathis v. Corrugated Gear and Sprocket, Inc.*, 263 Ga. 419, 421-22 (1993).). However, as with all contempt citations, "courts should limit their orders to the least possible exercise of power required." *In re Siemon*, 264 Ga. 641, 641 (1994).

b. Jail

If an order compelling testimony from a non-party reporter were upheld on direct appeal (an event that has never occurred since enactment of the privilege), a Georgia trial court would be authorized to consider ordering a reporter jailed in order to force compliance with its order. The Georgia Court of Appeals has held that statutory restrictions on contempt powers found at O.C.G.A. § 15-7-4 (fine of no more than \$500 and/or 20 days in jail) do not to apply in the civil contempt context. *Grantham v. Universal Tax Systems*, 217 Ga. App. 676, 678 (1995); *Mathis v. Corrugated Gear and Sprocket, Inc.*, 263 Ga. 419, 421-22 (1993).). However, as with all contempt citations, "courts should limit their orders to the least possible exercise of power required." *In re Siemon*, 264 Ga. 641, 641 (1994).

2. Criminal contempt

Since enactment of Georgia's statutory privilege, an order compelling testimony from a non-party reporter has never been upheld on appeal. Accordingly, there are no recent examples of a reporter being held in criminal contempt for continuing to refuse to testify after appeal. In instances of criminal contempt, Georgia courts are authorized by statute to impose a sentence of a fine of no more than \$500 and/or incarceration of no more than 20 days in jail. O.C.G.A. § 15-7-4. Prior to the enactment of the privilege, a reporter was given a probated sentence requiring that the reporter perform one hundred hours of community service. *Vaughn v. State*, 259 Ga. 325 (1989).

3. Other remedies

None.

VIII. Appealing

A. Timing

1. Interlocutory appeals

A denial of a motion to quash can be appealed directly by a non-party reporter, without having to wait until a reporter is held in contempt for failing to comply with the subpoena. *See, e.g., In re Paul*, 270 Ga. 680, 686 (Ga. 1999) ("[W]e hold that non-parties engaged in news gathering may file a direct appeal of an order denying them a statutory reporter's privilege under the collateral order exception to the final judgment rule.").

2. Expedited appeals

The Georgia appellate courts will consider motions to expedite an appeal. However, in most circumstances, such a motion should not be necessary, because the filing of the notice of appeal itself stays the trial court from pursuing

a contempt citation or imposing any punishment to compel compliance with its order. *See generally* O.C.G.A. §§ 5-6-46; 5-6-13(a).

B. Procedure

1. To whom is the appeal made?

Georgia has two levels of appellate courts. The Georgia Court of Appeals is the intermediate appellate court, and the Supreme Court is Georgia's highest court.

Whether the Supreme Court or the Court of Appeals is the proper court to hear a direct appeal from an order denying protection under the reporter's privilege "depends on the nature of the underlying action." *See, e.g., In re Paul*, 270 Ga. 680, 683 n.10 (Ga. 1999). The Court of Appeals reviews all appeals from the trial courts in which jurisdiction is not reserved to the Supreme Court. The Supreme Court has jurisdiction over election contests; cases in which the constitutionality of a law is drawn into question, cases involving title to land; equity cases; cases involving wills; habeas corpus cases; cases involving extraordinary remedies; divorce and alimony cases; and cases in which a sentence of death was or could be imposed.

For appeals from Municipal Courts, Magistrate Courts and Probate Courts, which have very limited jurisdictions, appeals are first to Georgia's primary trial court, termed the Superior Court.

2. Stays pending appeal

If a non-party reporter invokes the privilege but is nevertheless ordered to testify, the reporter is entitled to bring a direct appeal from that order. *See, e.g., In re Paul*, 270 Ga. 680, 683 (Ga. 1999) ("[W]e hold that non-parties engaged in news gathering may file a direct appeal of an order denying them a statutory reporter's privilege under the collateral order exception to the final judgment rule."). The filing of the notice of appeal stays the trial court from imposing any punishment to compel compliance with its order. *See generally* O.C.G.A. §§ 5-6-46; 5-6-13(a). The Georgia Supreme Court, in fact, recognized a right of automatic appeal to avoid the problems caused in the absence of a stay. *See Paul*, 270 Ga. at 683 ("The public interest in a free press would be irreparably harmed if review of the order compelling disclosure had to await a jury verdict in the murder case. Either the reporter would have already revealed the information or been imprisoned for failing to obey the disclosure order.").

3. Nature of appeal

The appeal is a direct, interlocutory appeal. *In re Paul*, 270 Ga. 680, 683 (Ga. 1999) ("[W]e hold that non-parties engaged in news gathering may file a direct appeal of an order denying them a statutory reporter's privilege under the collateral order exception to the final judgment rule.").

4. Standard of review

With respect to the legal application of the privilege, the standard of review is de novo.

5. Addressing mootness questions

Georgia courts have not addressed the mootness issue in the context of a reporter's privilege case, but they do generally recognize jurisdiction over issues that are "capable of repetition but evading review."

6. Relief

Georgia's appellate courts are authorized to reverse an order compelling testimony, dissolve contempt citations, or take any other action needed to vindicate the privilege. *See, e.g., In re Keith Paul*, 270 Ga. 680, 683 (Ga. 1999) ("[W]e hold that the reporter's privilege protects Paul from disclosing the confidential source and undisclosed information that the state seeks in its motion to compel. Judgment reversed."); *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 813, 555 S.E.2d 175, 29 Med. L. Rep. 2537 (2001) (reversing contempt citation), *cert. denied*, 2002 Ga. Lexis 103 (2002), *cert. denied*, 537 U.S. 814 (2002).

IX. Other issues

A. Newsroom searches

The Privacy Protection Act (42 U.S.C. 2000aa) has been effective in preventing newsroom searches in Georgia. Although there is no similar provision under Georgia law (apart from the reporter's privilege), the authors are unaware of any newsroom search or seizures of camera equipment or film in Georgia in which the Privacy Protection Act had to be invoked.

B. Separation orders

Because Georgia's reporter's privilege has effectively precluded the use of reporters as witnesses, there is not any statutory or case law addressing separation or sequestration orders when reporters are called as witnesses in trials that they are covering. However, it is well-established under Georgia law that a trial court has discretion to lift or modify the rule of sequestration with respect to witnesses. Accordingly, consistent with the reporter's privilege, trial courts should exercise that discretion to modify separation orders.

C. Third-party subpoenas

Under Georgia law, third parties receiving a notice for production of documents or a subpoena for production of documents have an opportunity to object. *See, e.g.*, O.C.G.A. §§ 9-11-34(c)(1); 9-11-45(a)(2). Credit card companies, telephone companies and internet service providers, thus, can object to such subpoenas where they are issued in an effort to identify a client news organization's confidential sources or other privileged information. However, Georgia law does not provide the news media with automatic notice of such subpoenas, so cooperation from organizations providing services to the news media is essential to protect news gatherers' rights.

D. The source's rights and interests

Georgia law does not recognize a cause of action for a reporter's breach of an agreement with a source in the absence of evidence that the resulting publication was false. *See generally Raskin v. Swann*, 216 Ga. App. 478 (1995).