

REPORTER'S PRIVILEGE: HAWAII

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

HAWAII

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I. Introduction: History & Background

In 2008 the Hawai'i legislature passed, and the Governor signed, a new shield statute. The new law became effective on July 2, 2008.

Before the passage of the shield statute, it was uncertain whether Hawai'i recognized the privilege of a journalist not to disclose his or her source(s) of information. In the only reported appellate case on the issue, the Hawai'i Supreme Court declined to recognize a First Amendment or evidentiary privilege under the facts of that case. *In re Goodfader*, 45 Haw. 317, 367 P.2d 472 (1961). However, the *Goodfader* case was decided prior to *Branzburg v. Hayes*, 408 U.S. 665 (1972). Subsequent to *Branzburg*, a Hawai'i trial court applied the privilege to bar discovery of unpublished photographs taken by a newspaper photographer. *Belanger v. City and County of Honolulu*, Civil No. 93-4047-10 (Haw. 1st Cir. Ct. May 4, 1994).

II. Authority for and source of the right

A. Shield law statute

Hawai'i enacted a shield statute in 2008. Act 210, HB2557 (Jul. 2, 2008). The new statute has a sunset provision that repeals the statute on June 30, 2011 unless the legislature reauthorizes the extension of the statute before that time.

B. State constitutional provision

The Hawai'i State Constitution does not contain a shield provision. Moreover, no state court has construed the state constitution to confer the type of protection provided by a shield statute. However, Article I, Section 4 of the Hawai'i State Constitution parallels the First Amendment of the federal Constitution. Article I, section 4 provides:

No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Haw. Const. art. I, § 4. No state court has construed article I, section 4 to create a privilege from testifying in a judicial proceeding.

C. Federal constitutional provision

In *In re Goodfader*, 45 Haw. 317, 367 P.2d 472 (1961), the Hawai'i Supreme Court held that a newspaper reporter did not have a right under the First Amendment to refuse to answer questions during a deposition regarding a confidential source of information. Although the court assumed that forced disclosure of a reporter's confidential source of information may constitute an impairment of the freedom of the press and impede the newsgathering process, the court turned to the discovery rules under the Hawai'i Rules of Civil Procedure ("HRCPP") to determine whether journalists held an evidentiary privilege to refuse to disclose their confidential sources. The court declined to recognize such a privilege. Applying the Second Circuit's analysis in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), the court held that disclosure of the reporter's sources was of enough importance to the plaintiff's case as to warrant disregarding or overriding the reporter's claim of privilege.

The applicability of *Goodfader* today is questionable. *Goodfader* was decided before *Branzburg v. Hayes*, 408 U.S. 665 (1972), which has been recognized to establish a qualified reporter's privilege under the First Amendment. In an unreported decision, a state trial court questioned the applicability of *Goodfader* in light of federal decisions after *Goodfader* recognizing the reporter's privilege. *Belanger v. City and County of Honolulu*, Civil No. 93-4047-10 (Haw. 1st Cir. Ct. May 4, 1994). In *Belanger*, the court held that a qualified reporter's privilege barred the plaintiff in a personal injury lawsuit from obtaining discovery of unpublished photographs of an accident sce-

ne taken by a newspaper photographer. In so holding, the court noted that the plaintiff failed to demonstrate that the photographs were necessary or critical to her claim and or that the information was unavailable from other sources.

On the other hand, in *Jenkins v. Liberty Newspapers Ltd.*, 89 Haw. 254, 262, 971 P.2d 1089, 1097 (1999), decided after *Belanger*, the Hawai'i Supreme Court quoted a passage from *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), which in turn cited *Branzburg* for the proposition that the First Amendment does not relieve a newspaper reporter of the obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. Whether this indirect reference to *Branzburg* is authoritative, however, is questionable, especially given that the reporters' privilege was not asserted in *Jenkins*. *Jenkins* was a defamation action against a newspaper for publishing information contained in a petition for seizure of an insurance agency.

The federal district court in Hawai'i has recognized a limited First Amendment privilege for reporters not to disclose their sources. *DeRoburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981). Whether the privilege applies depends on three factors: "(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?" *Id.* at 886 (quoting *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980)). *DeRoburt* was a libel action filed by a public official against a newspaper. The court held that although reporters had a conditional privilege not to disclose their sources, the enumerated factors favored requiring disclosure in this case. Refusal to comply with an order to disclose would lead to a presumption that the reporter had no source. The presumption may be removed by the reporter's disclosure of the sources at a reasonable time before trial.

D. Other sources

None.

III. Scope of protection

A. Generally

The shield statute protects journalists from disclosure of confidential sources or information that could lead to identification of the source. The statute also protects information gathered by journalists that has not been published or broadcast, whether it is confidential or not. Protection is also extended to non-traditional journalists, e.g., bloggers, if certain conditions are met. The statute does not apply in felony criminal cases or civil defamation cases if the information sought is not otherwise available; the information is noncumulative; and the information is necessary and relevant.

B. Absolute or qualified privilege

The shield statute extends a qualified privilege.

C. Type of case

1. Civil

The shield statute applies in all cases. An exception may require disclosure of otherwise protected information in a civil defamation case.

2. Criminal

The shield statute applies in criminal cases. An exception might require disclosure of protected information in a felony criminal case. In addition, the statute does not apply if probable cause exists to believe the person claiming the privilege committed or witnessed a crime.

There are no specific state court decisions addressing whether a subpoena issued by a defendant in a criminal case is given special consideration. However, Hawai'i does recognize that the Sixth Amendment right to compulsory process affords a defendant in all criminal prosecutions not only the power to compel attendance of witnesses, but also the right to have those witnesses heard. *State v. Mitake*, 64 Haw. 217, 638 P.2d 324 (1981) (citing *Washington v. Texas*, 388 U.S. 14 (1967)). Article I, section 14 of the Hawai'i State Constitution is essentially identical to the Sixth Amendment of the federal Constitution.

3. Grand jury

There is no Hawai'i law regarding whether the privilege differs with respect to grand jury subpoenas.

D. Information and/or identity of source

The shield statute protects disclosure of sources or information that could reasonably be expected to lead to the identity of a source.

Before enactment of the shield statute, the identity of the source will probably be protected subject to the qualifications set forth in *DeRoburt*, i.e., in a libel action against a newspaper arising from a news story based upon information obtained from confidential sources, the failure to identify the source may lead to the presumption that there never was any source.

E. Confidential and/or non-confidential information

The shield statute does not distinguish between confidential and non-confidential sources.

F. Published and/or non-published material

Source information is protected whether it is published or non-published. Other types of information is protected if it is non-published.

G. Reporter's personal observations

The shield law will not apply if the person claiming the privilege has observed the alleged commission of a crime; but if the interest in maintaining the privilege outweighs the public interest in disclosure, and the commission of the crime is the act of communicating or providing the information or documents at issue, then the privilege may be asserted.

H. Media as a party

The shield statute does not apply in a civil action against a media defendant for defamation.

I. Defamation actions

In *DeRoburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981), a libel action brought by a public official against a newspaper, the court held that a reporter's refusal to disclose the identities of his sources for the news stories that were the subject of the lawsuit would lead to a presumption that the defendant had no source. This is a particularly damaging presumption because one of the elements of liability in a defamation action filed by a public official or figure is "actual malice," which could be established by proof that the reporter had no reliable sources. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974).

IV. Who is covered

The shield statute does not apply in a civil action against a media defendant for defamation.

A. Statutory and case law definitions

1. Traditional news gatherers

The shield statute applies to “a journalist or newscaster presently or previously employed by or otherwise professionally associated with any newspaper or magazine or any digital version thereof.”

a. Reporter

The statute does not define “journalist or newscaster” but clearly that encompasses a reporter.

b. Editor

c. News

Not defined in the shield statute, but the statute broadly protects “information for communication to the public.”

d. Photo journalist

The shield statute does not define (or expressly include) a person who is a “photojournalist” for purposes of the privilege.

e. News organization / medium

The shield statute protects newspapers, magazines, news agencies, press associations, wire services, radio and television stations.

2. Others, including non-traditional news gatherers

Non-traditional news gatherers, e.g., bloggers, are protected if (1) the individual invoking the privilege regularly participates in reporting or publishing news of significant public interest, (2) the person holds a position similar to a traditional journalist or newscaster, and (3) the public interest is served by extending the protection of the statute.

B. Whose privilege is it?

The shield statute extends to a “journalist or newscaster,” but those terms are not defined in the statute.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

Under the state rules of civil procedure, subpoenas may be served at any place within the State. The subpoena may be served by a sheriff, deputy sheriff, or anyone not a party who is over the age of 18. Service is made by delivering a copy of the subpoena with the fees for one day's attendance and mileage allowed by law.

1. Service of subpoena, time

HRCP 45 and HRPP 17 do not specify when a subpoena must be served; however, summonses in a civil case shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public unless a judge permits, in writing on the summons, personal delivery during those hours.

2. Deposit of security

HRCP 45 does not require that the subpoenaing party deposit any security in order to procure the testimony or materials of a reporter. HRPP 17 requires the subpoenaing party to tender to the person named in the subpoena the fee of 1 day's attendance and the mileage allowed by law, except that no such tender is necessary when the subpoena is issued on behalf of the prosecution or a defendant who is unable to pay for the fee.

3. Filing of affidavit

Hawai'i law does not specify whether the subpoenaing party must make a sworn statement to procure the reporter's testimony or materials.

4. Judicial approval

The subpoena does not need to be approved by a judge or magistrate before a party may serve it. The subpoena is issued by the clerk of the court.

5. Service of police or other administrative subpoenas

There are no special rules regarding the use and service of subpoenas issued by the police or other administrative agencies.

B. How to Quash

1. Contact other party first

Hawai'i law does not require that the subpoenaing party be contacted prior to moving to quash, however, in practice many judges strongly encourage (and some require) that the parties first attempt to amicably resolve disputes involving subpoenas before seeking the court's assistance.

2. Filing an objection or a notice of intent

A notice of intent or an objection need not be filed before a motion to quash is filed, however, under HRCP 45(d)(1), the party served with a subpoena may, within 10 days of service, make written objection to inspection or copying of any documents.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the circuit court that issued the subpoena.

b. Motion to compel

For the sake of expedience, a motion to quash should be filed without waiting for the subpoenaing party to file a motion to compel. If written objections are to be made to a request for inspection or copying of documents, those should be made within 10 days of service, or before the time specified in the subpoena for compliance if the time specified is less than 10 days.

c. Timing

HRCP 45 and HRPP 17 provide that a court may quash or modify a subpoena "upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith ..." Thus, a motion to quash may be filed immediately after receipt of the subpoena, or at any time up until the time that compliance with the subpoena is specified. What makes a motion to quash "prompt" depends on the circumstances, but it is generally recommended that the motion to quash be filed as soon as a decision is made to oppose the subpoena.

d. Language

There are no recommendations for boilerplate language.

e. Additional material

No other materials need to be attached to motions and memoranda to quash. In practice, a motion to quash is generally accompanied by a memorandum or brief in support of the motion, and an affidavit or declaration of the objecting party or his/her attorney explaining the factual reasons for quashing the subpoena.

4. In camera review

a. Necessity

The decision whether to conduct an *in camera* review of materials or information requested for production in a subpoena is within the discretion of the court.

b. Consequences of consent

There is no Hawai'i law regarding whether consent to *in camera* review results in an automatic stay pending appeal in the event of an adverse ruling.

c. Consequences of refusing

There is no Hawai'i law regarding the consequences of a reporter's or publisher's refusal to consent to an *in camera* review.

5. Briefing schedule

Pursuant to Rule 7 of the Hawai'i Rules of the Circuit Courts, opposition memoranda are due not less than 8 days before the date set for hearing on the motion, and reply memoranda are due not less than 3 days before the date set for hearing, unless otherwise ordered by the court.

Pursuant to Local Rule 7.4 of the United States District Court For the District of Hawai'i, opposition memoranda are due not less than 18 days before the date set for hearing on the motion, and reply memoranda are due not less than 7 days before the date set for hearing. If the motion is a non-hearing motion, then opposition memoranda are due not less than 11 days after service of the motion, and reply memoranda are due not less than 11 days after service of the opposition memoranda.

Local Rule 37.1 provides a procedure for expedited resolution of discovery disputes before the Magistrate Judges in federal district court. The process entails abbreviated simultaneous briefing, and, if appropriate, a conference before the Magistrate Judge. Counsel desiring to avail themselves of this procedure must contact opposing counsel in an effort to reach agreement on the deadline for the submission of letter briefs, and then inform the courtroom deputy or chambers staff of the Magistrate Judge of the agreed upon deadline. Letter briefs are to be no longer than 5 pages, including exhibits. After reviewing the letter briefs, the Magistrate Judge will determine whether this expedited procedure will entail just the letter briefs, or the letter briefs and a discovery conference.

6. Amicus briefs

Amicus briefs are routinely accepted by the Hawai'i Supreme Court and Intermediate Court of Appeals. Typically amicus briefs are limited to 10 pages.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

HRCF 45 and HRPP 17 state that a subpoena may be quashed "if it is unreasonable and oppressive." There are no cases applying that standard in the specific context of the reporters' privilege. The person moving to quash the subpoena has the burden of meeting the standard.

B. Elements

1. Relevance of material to case at bar

If Hawai'i courts recognize the reporter's privilege, the factor that seems to be most critical in determining whether the privilege applies is the relevance of the information sought from the reporter to the case. The Hawai'i Supreme Court in *Goodfader* declined to recognize an evidentiary privilege because disclosure of the reporter's confidential sources of information in that case was of overriding importance to the plaintiff in the case.

In *DeRoburt*, one of the factors considered by the court in determining whether the plaintiff in a defamation case was entitled to disclosure of the reporters' sources was whether disclosure was a "critical element" and went "to the heart" of the plaintiff's case.

In *Belanger*, the trial court applied the reporters' privilege because the plaintiff failed to demonstrate that the photographs were necessary or critical to his claim.

2. Material unavailable from other sources

The *Belanger* court cited the unavailability of the requested information from other sources as a reason for applying the reporters' privilege.

a. How exhaustive must search be?

There are no reported cases.

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

There are no reported cases.

c. Source is an eyewitness to a crime

There are no reported cases.

3. Balancing of interests

Although Hawai'i courts have not explicitly articulated a test for applying the reporters' privilege, *Goodfader* suggests that a court should balance the First Amendment's protection of the freedom of the press with the court's fundamental authority to compel the attendance of witnesses and to exact their testimony, as well as the right of a litigant to gather evidence. *Goodfader*, 45 Haw. at 329, 334-35, 367 P.2d at 480.

DeRoburt examined three factors to determine whether the privilege applies: (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?

4. Subpoena not overbroad or unduly burdensome

A subpoena cannot be overly broad or unduly burdensome. In *State v. Pacarro*, 61 Haw. 84, 595 P.2d 295 (1979), the Hawaii Supreme Court held that a subpoena duces tecum cannot be phrased in general terms, without specification or particularization of the documents required to be produced. The designated documents or objects must be of an evidentiary nature and also meet the tests of relevancy and admissibility. A subpoena duces tecum is not a means for conducting a "fishing expedition."

5. Threat to human life

There is no authority in Hawai'i addressing this factor.

6. Material is not cumulative

There is no authority in Hawai'i addressing this factor.

7. Civil/criminal rules of procedure

Hawai'i's rules of civil and criminal procedure do not specify the methods for contesting frivolous or unduly burdensome subpoenas. A motion to quash is the means for objecting to a subpoena for in person testimony. Written objections may be filed within 10 days (or before the time specified in the subpoena for compliance if the time specified is less than 10 days) to a subpoena requesting inspection or copying of documents.

8. Other elements

None.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There are no reported cases.

2. Elements of waiver

There are no reported cases.

3. Agreement to partially testify act as waiver?

There are no reported cases.

VII. What constitutes compliance?

A. Newspaper articles

Under Rule 902(6) of the Hawai'i Rules of Evidence, newspapers are self-authenticating.

B. Broadcast materials

Typically the subpoenaed party will designate a custodian of records who will produce the materials. In typical practice the records are usually requested by a deposition upon written questions.

C. Testimony vs. affidavits

No reported cases, but in practice most media attorneys in Hawaii will attempt to work out an agreement with the parties to have the article or material in question authenticated by affidavit or declaration, thus obviating the need for live testimony. In most cases this turns out to be sufficient.

D. Non-compliance remedies

The shield statute provides that "no fine or imprisonment shall be imposed against a person claiming the privilege pursuant to this section for refusal to disclose information privileged pursuant to this section."

1. Civil contempt

a. Fines

There is no authority in Hawai'i regarding caps on fines for contempt. However, the Hawai'i Supreme Court has the authority to mitigate or reduce fines imposed on civil contempt when the promotion of justice would be better enhanced by such mitigation or reduction. Haw. Rev. Stat. § 602-5(7). There are no recent experiences with reporters being jailed or fined for refusal to comply with a subpoena.

b. Jail

There is no authority in Hawai'i regarding the length of jail sentences permissible. Again, however, there are no recent experiences with reporters being jailed or fined for refusal to comply with a subpoena.

2. Criminal contempt

Whereas civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained due to noncompliance, criminal contempt is punitive in purpose. *Hawaii Pub. Employment Relations Bd. v. United Pub. Workers*, 66 Haw. 461, 667 P.2d 783 (1983); *State v. Brown*, 70 Haw. 459, 776 P.2d 1182 (1989). To impose sanctions for criminal contempt, intent to disobey a court order is required and must be established beyond a reasonable doubt. *Hawaii Pub. Employment Relations Bd.*, 66 Haw. 461, 667 P.2d 783.

3. Other remedies

In *DeRoburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981), the federal district court in Hawai'i held that a reporter's refusal to comply with an order to disclose his or her sources of information gives rise to a presumption that the reporter had no source. The presumption may be removed by disclosure of the sources at a reasonable time before trial.

VIII. Appealing

A. Timing

1. Interlocutory appeals

There is no authority in Hawai'i stating that a reporter must wait until he or she is held in contempt for failing to comply with a subpoena before appealing a denial of a motion to quash.

In order to appeal an interlocutory order, the appealing party must apply for leave from the court issuing the order from which appeal is sought to be taken. HRS § 641-1(b). Within thirty days from the filing of the order being appealed, the appealing party must request leave to file an interlocutory appeal, the court must enter an order pursuant to HRCF Rule 45(b) granting such leave, and the appealing party must file a notice of appeal in the court that issued the order being appealed. HRAP 4(a)(1); *King v. Wholesale Produce Dealers Ass'n*, 69 Haw. 334, 335, 741 P.2d 721, 722 (1987). The thirty-day period runs from the entry of the order appealed from, not from the date that leave to appeal is granted. *King*, 69 Haw. at 335, 741 P.2d at 722.

Alternatively, an appeal might possibly be taken under the collateral order doctrine. *International Sav. & Loan Ass'n v. Woods*, 69 Haw. 11, 731 P.2d 151 (1987); *Association of Owners of Kukui Plaza v. Swinerton & Walburg*, 68 Haw. 98, 705 P.2d 28 (1985). The doctrine allows appeals from orders falling "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Swinerton*, 68 Haw. at 105, 705 P.2d at 34 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). An interlocutory order is appealable pursuant to the collateral order doctrine if it: "(1) fully disposes of the question at issue; (2) resolves an issue completely collateral to the merits of the case; and (3) involves important rights which would be irreparably lost if review had to await a final judgment." *State v. Baranco*, 77 Hawai'i 351, 353-54, 884 P.2d 729, 731-32 (1994) (citing *Abney v. United States*, 431 U.S. 651, 658-59 (1977)). An appeal taken pursuant to the collateral order doctrine is governed by the same time limits applicable to an ordinary interlocutory appeal.

Finally, if an appeal is not available, a writ of mandamus could be sought. A writ of mandamus is an extraordinary remedy which will not issue unless the petitioner demonstrates: (1) a clear and indisputable right to relief; and (2) a lack of other means adequately to redress the wrong or to obtain the requested action. *State v. Oshiro*, 69 Haw. 438, 441, 746 P.2d 568, 570 (1987). A petition for a writ of mandamus is not intended to take the place of an appeal. *Kema v. Gaddis*, 91 Haw. 200, 204-05, 982 P.2d 334, 338-339 (1998). A writ of mandamus is warranted where there is a showing of "irremedial abuse resulting in a denial of justice." *Fong v. Sapienza*, 39 Haw. 79, 79 (1951). A writ of mandamus will not be issued if the right to appeal is available. *Brown v. Hawkins*, 50 Haw. 232, 235, 437 P.2d 97, 98 (1968). In practice such extraordinary writs are rarely granted.

2. Expedited appeals

A motion to expedite an appeal may be filed pursuant to Rules 2, 27, and 28 of the Hawai'i Rules of Appellate Procedure. Rule 27 provides that an application for an order or other relief from the Hawai'i Supreme Court shall be made by filing a written motion with proof of service on all other parties. Rule 2 permits a Hawai'i appellate court to suspend the requirements or provisions of any of the Hawai'i Rules of Appellate Procedure in the interest of expediting a decision. Rule 28 governs the timing for filing of briefs. In the motion to expedite, the movant should request that Rule 28, along with any other applicable rules, be suspended or modified to expedite a decision on the appeal.

B. Procedure

1. To whom is the appeal made?

The Intermediate Court of Appeals has jurisdiction over all appeals from the circuit courts. HRS § 602-57. A party to the appeal may apply for a transfer of the appeal to the Supreme Court. HRS § 607-58; HRAP 40.2. A party may also seek Supreme Court review of a decision of the Intermediate Court of Appeals by filing an application for writ of certiorari with the Supreme Court. HRS § 607-59; HRAP 40.1.

2. Stays pending appeal

A stay may be sought by filing a motion. The movant may have to need security in order to obtain a stay, such as a supersedeas bond. Haw. Rev. Stat. § 641-3.

3. Nature of appeal

If the order being appealed from has merged into judgment, then there is an appeal as of right. However, if the order appealed from is not part of a final judgment, then the appeal is interlocutory in nature, and leave from the

trial court must be obtained unless the collateral order doctrine applies. By contrast, a petition for a writ of mandamus is treated as an independent action that invokes the original jurisdiction of the appellate court.

4. Standard of review

The order of a court quashing or enforcing a subpoena will be disturbed on appeal only if plainly arbitrary and without support in the record. *Powers v. Shaw*, 1 Haw. App. 374, 619 P.2d 1098 (1980).

5. Addressing mootness questions

There is no authority in Hawai'i regarding whether an appeal of an order denying a motion quash a subpoena is moot where the trial or grand jury session for which the subpoena was issued has concluded.

6. Relief

There are no reported cases, but if the court will not quash the subpoena and the reporter is held in contempt, the reporter's attorney should strongly consider filing a writ of mandamus. Although such extraordinary writs are rarely granted, a contempt order is one situation where the appellate court might strongly consider granting such relief.

IX. Other issues

A. Newsroom searches

There is no authority in Hawai'i regarding newsroom searches.

B. Separation orders

There is no authority in Hawai'i regarding separation orders issued against reporters who are on the witness list of a trial they are covering. In practice, it is a good idea for the reporter's employer's attorney to attempt to work out such issues beforehand.

C. Third-party subpoenas

There is no authority in Hawai'i regarding subpoenas issued to third parties in an attempt to discover a reporter's source.

D. The source's rights and interests

There is no authority in Hawai'i regarding whether sources may intervene anonymously to halt disclosure of their identities, or whether sources may sue a reporter for disclosure of their identities.