

REPORTER'S PRIVILEGE: IOWA

The Reporters Committee for Freedom of the Press

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

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

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The Reporter's Privilege Compendium: An Introduction

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

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

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

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

Above the law?

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

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

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

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

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

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I. Introduction: History & Background

Iowa has a unified trial court system whereby original jurisdiction for claims in excess of \$5,000 rests in the district court. Claims for damages under \$5,000 must be brought in small claims court. Appeals from final decisions of the district court may be made as a matter of right to the Iowa Supreme Court. The Iowa Supreme Court may refer the case to the Iowa Court of Appeals for appellate review or retain jurisdiction over the appeal. If a case is referred to the Iowa Court of Appeals, the Iowa Supreme Court may choose to review it on application for further review. Appellate review in civil cases generally is on an error of law standard for cases at law and a *de novo* review for cases in equity.

In Iowa, the judicially created reporter's privilege "protects confidential sources, unpublished information and reporter's notes." *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97, 102 (Iowa 2002). The Iowa reporter's privilege is grounded on state and federal constitutional law only; there is not a shield statute or other legislative protection for journalists. The reporter's privilege has been the subject of five Iowa Supreme Court decisions, over the past 25 years, all of them favorable to the press. Because Iowa cases employ a *Farber* two-step procedure for *in camera* inspections, Iowa journalists typically do not face an immediate criminal contempt citation.

II. Authority for and source of the right

Iowa has not adopted a shield law statute. Authority for the reporter's privilege in Iowa is based upon the First Amendment to the United States Constitution and Article I, § 7, of the Iowa Constitution. *Winegard v. Oxberger*, 258 N.W.2d 847, 3 Med. L. Rptr. 1326 (Iowa 1977). Iowa decisions rely heavily on *Branzburg v. Hayes*, 408 U.S. 665, 1 Med. L. Rptr. 2617 (1972), *Garland v. Torre*, 259 F.2d 545, 1 Med. L. Rptr. 2541 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910 (1958), and *In re Farber*, 78 N.J. 259, 394 A.2d 330, 4 Med. L. Rptr. 1360 (N.J. 1978), *cert. denied* 439 U.S. 997 (1978).

A. Shield law statute

Iowa has not adopted a shield law statute. In the mid-1980's some news media organizations discussed whether lobbying efforts should be instituted with the goal of passage of a shield statute. No serious legislative effort toward adoption of the shield law has taken place in the last ten years. New organizations that would participate in drafting and support for such legislation include the Iowa Freedom of Information Council, the Iowa Newspaper Association, the Iowa Broadcasters Association and the Iowa Broadcast News Association. The lack of significant and concentrated effort toward adoption of a shield statute likely results from the strong protection provided by the court cases although these organizations are mindful that a statutory shield may be needed in light of negative case law in the federal courts.

B. State constitutional provision

Iowa's reporter's privilege law is based, in part, upon the Iowa Constitution article I, § 7. *Winegard*, 258 N.W.2d at 852. Article I, § 7, states:

Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.

Id.

In holding that the reporter's privilege is constitutionally based, the Iowa Supreme Court cited United States Supreme Court cases that recognized that freedom of speech and freedom of the press, as guaranteed by the First Amendment, are fundamental personal rights. *Winegard*, 258 N.W.2d at 850; citing *Branzburg v. Hayes*, 408 U.S.

665, 1 Med. L. Rptr. 2617 (1972); and *Schneider v. State of New Jersey*, 308 U.S. 147 (1939). After finding that a reporter's privilege existed, mostly having referenced the United States Constitution, the Iowa Supreme Court cursorily mentioned that their analysis of the federal law was equally applicable to article I, § 7, of the Iowa Constitution. *Winegard*, 258 N.W.2d at 852. See also Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and the Press, Article I, Section 7 of the Iowa Constitution*, 38 Drake L. Rev. 9, 26-27 (1988). No express shield law provision exists in the Iowa Constitution.

C. Federal constitutional provision

The law of reporter's privilege in Iowa is based, in large part, upon the rights guaranteed by the First Amendment of the United States Constitution, namely, freedom of speech and freedom of the press. *Winegard*, 258 N.W.2d at 849-51. In *Winegard* the Court quoted language from both *Branzburg* and *Schneider* approvingly. *Id.* No Iowa decisions have been filed in the wake of the developments in 2006 in the Judith Miller, Matthew Cooper, Wen Ho Lee and *San Francisco Chronicle* cases.

D. Other sources

Rule 1.1701(2)(c)(1)(3) of the Iowa Rules of Civil Procedure provides that a subpoena requiring disclosure of privileged information will be quashed by the court or modified to protect against disclosure of the privileged information. Rule 1.1701(2)(c)(1)(4) provides that an unduly burdensome subpoena will be modified or quashed by the court. Rule 1.1701(2)(a) provides that the attorney responsible for the issuing of a subpoena must take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. Rule 1.504 provides that a party of whom impermissible discovery is sought may seek and for good cause be granted a protective order stopping the burdensome discovery request.

Rule 2.15(2) of the Iowa Rules of Criminal Procedure provides that a subpoena that is unreasonable or oppressive will be dismissed by the court upon motion. Rule 2.14(6)(a)(3) allows the court to regulate discovery and issue protective orders to prohibit compelled disclosure of privileged information.

These court rules often allow a reporter or news organization to avoid filing a motion to quash by simply objecting to the state court subpoena, on privilege grounds, and thereby placing the burden on the person seeking enforcement of the state court subpoena to file a motion to compel.

III. Scope of protection

The reporter's privilege is a qualified privilege that is presumptively available to persons falling into the protected class of journalists. The privilege may be subordinated if the requesting party has a substantial need for the information and has exhausted other means of attaining the information. *Winegard*, 258 N.W.2d at 850 (stating that privilege is qualified and not absolute); *Lamberto v. Bown*, 326 N.W.2d 305, 308, 8 Med. L. Rptr. 2525 (Iowa 1982)(setting forth the test for rebuttal of the reporter's privilege presumption). The privilege "protects confidential sources, unpublished information, and reporter's notes." *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97, 102 (Iowa 2002). A district court ruling held that a freelance journalist was eligible for the privilege as a member of the protected class because he was engaged in the news gathering process. *Stanfield v. Polk County*, 18 Med. L. Rptr. 1262, 1265 (Iowa Dist. Ct., No. CE 34-20125 (1990))

A. Generally

The reporter's privilege provides a presumptive privilege from discovery if the party resisting production "falls within the class of persons qualifying for the privilege" and the information was obtained in the "news gathering process." *Bell v. City of Des Moines*, 412 N.W.2d 585, 587, 14 Med. L. Rptr. 1729 (Iowa 1987). The privilege "protects confidential sources, unpublished information, and reporter's notes." *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97, 102 (Iowa 2002). The phrases "class of persons" and "news gathering process" are not well defined by statute or case law. In *Stanfield* and *Waterloo/Cedar Falls Courier*, the journalists were deemed to be engaging in newsgathering and they qualified for the privilege.

If the party resisting production "falls within the class of persons qualifying for the privilege" and the information was obtained in the "news gathering process," then the information sought is presumptively privileged and pro-

tected from discovery. *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97, 101 (Iowa 2002). However, the reporter's privilege is a qualified privilege, which may be subordinated if the requesting party has a substantial need for the information and only after the requesting party has exhausted other less intrusive means of attaining the information. *Id.*; *Winegard*, 258 N.W.2d at 850 (stating that privilege is qualified and not absolute).

B. Absolute or qualified privilege

The Iowa reporter's privilege is a qualified privilege, which may be subordinated if the requesting party has a substantial need for the information and has exhausted other less intrusive means of attaining the information. *Winegard*, 258 N.W.2d at 850 (stating that privilege is qualified and not absolute); *Lamberto*, 326 N.W.2d at 308 (setting forth the test for rebuttal of the reporter's privilege presumption). The privilege will not be subordinated for evidence that is cumulative, collateral or gathered for impeachment purposes only. *See Lamberto*, 326 N.W.2d at 308; *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97, 104 (Iowa 2002).

C. Type of case

1. Civil

In civil cases, the reporter's privilege is a qualified privilege, which may be subordinated if the requesting party has a substantial need for the information and has exhausted other less intrusive means of attaining said information. *Winegard*, 258 N.W.2d at 850 (stating that privilege is qualified and not absolute); *Lamberto*, 326 N.W.2d at 308 (setting forth the test for rebuttal of the reporter's privilege presumption). The presumption of privilege is stronger in civil cases than it is in criminal cases. *Denk*, 20 Med. L. Rptr. at 1455 (three justice panel holds that burden to overcome reporter's privilege is lower in criminal cases).

2. Criminal

The reporter's privilege is a qualified privilege, which may be subordinated if the requesting party has a substantial need for the information and has exhausted other means of attaining said information. *Winegard*, 258 N.W.2d at 850 (stating that privilege is qualified and not absolute); *Lamberto*, 326 N.W.2d at 308 (setting forth the test for rebuttal of the reporter's privilege presumption). However, in criminal cases, the requesting party's need for the information does not have to be as compelling to overcome the reporter's privilege presumption. *Denk*, 20 Med. L. Rptr. at 1455 (three justice panel holds that burden to overcome reporter's privilege is lower in criminal cases but fails to analyze the reason behind such a distinction). In criminal cases, just as in civil suits, the court must make specific written findings "(1) that the reporter has presumptive status, (2) that the party seeking access to the evidence has established the necessity for it, and (3) that the evidence is not available from other sources." *Id.* Once the court makes the determination that the presumption has been rebutted, the court must conduct an *in-camera* inspection to determine if the evidence sought is necessary and relevant. *Id.*

3. Grand jury

No Iowa case relates to the reporter's privilege and grand jury subpoenas. Because the Iowa cases so heavily rely on *Branzburg*, it is likely the privilege would be more easily subordinated in a grand jury context.

D. Information and/or identity of source

The Iowa reporter's privilege specifically protects confidential sources and the identity of the confidential source was in issue in *Winegard* and *Waterloo/Cedar Falls Courier*. While the cases do not discuss information that implicitly identifies a source of information, given the strength of the protection for confidential sources it is anticipated that ancillary information that implicitly identifies a source similarly would be protected.

E. Confidential and/or non-confidential information

In *Lamberto* and *Waterloo/Cedar Falls Courier*, the Iowa Supreme Court shielded the journalist from compelled disclosure of confidential information including information provided on an off-the-record basis. Confidential information was reviewed under the same standard as confidential sources in *Waterloo/Cedar Falls Courier*. In that case, the promise not to use the information provided by the confidential sources extended to a statement to the court in the underlying open meetings action that the information would not be used in the litigation. That

promise appears to have helped to persuade the court that the journalist should not be ordered to disclose the information the obtained on the off-the-record basis.

F. Published and/or non-published material

Iowa cases clearly protect unpublished information, including outtakes and reporter's notes, from compelled disclosure. The same test utilized in a confidential source case is used to determine whether the reporter's privilege should be subordinated so that the journalist would be compelled to disclose unpublished information and provide copies of his/her notes and outtakes. Specifically, in *Bell v. City of Des Moines*, 412 N.W.2d 585, 14 Med. L. Rptr. 1729 (Iowa 1987), the Court reversed a lower court order compelling a television station news director to provide raw footage of a suicide. The Court said that an order requiring the preservation of that evidence would be sustained and that before disclosure of the information the subpoenaing party must meet the substantial need and exhaustion tests of *Lamberto*. In *Waterloo/Cedar Falls Courier* and *Lamberto*, reporter's notes were an issue and in both instances, the journalists were deemed to be shielded under the state and federal constitutions from compelled disclosure of those notes.

G. Reporter's personal observations

No Iowa case law specifically addresses a reporter's obligation to testify as to events personally witnessed. In *Bell*, the court stated, in dicta, that information obtained in a news gathering process by a reporter is presumptively privileged but this "does not mean that a reporter may raise the privilege to avoid testifying, as any other citizen, to observations made as an eyewitness." 412 N.W.2d at 588 (citing *Branzburg*, 408 U.S. at 685-86, 92).

H. Media as a party

In no Iowa case has the individual person entitled to reporter's privilege protection been a party to the underlying action. In *Waterloo/Cedar Falls Courier*, a media organization was a party to the underlying action but its editors, from whom the privileged information was sought, were not. 646 N.W.2d 97 (Iowa 2002). The court held the reporter's privilege is personal to the reporter and is not automatically waived when his or her news organization becomes a party to litigation. As to cases in which a reporter asserting privilege is a party the court has repeatedly stated that "in civil cases where a reporter asserting the privilege is a party to the lawsuit and his actions, motivations or thought processes are integral elements of the claim, disclosure is often compelled." *Id.* at 102 (quoting *Lamberto v. Bown*, 326 N.W.2d at 307 (stating that this reasoning applies most aptly to libel cases).

I. Defamation actions

Iowa has no "libel exception" to reporter's privilege, but in defamation actions where the reporter is a party, the reporter's privilege presumption is likely to be rebutted. *Lamberto v. Bown*, 326 N.W.2d at 307. In *Lamberto*, the Court stated that that "in civil cases where a reporter asserting the privilege is a party to the lawsuit and his actions, motivations or thought processes are integral elements of the claim, disclosure is often compelled. The most notable examples are libel cases." *Id.* Thus, it is anticipated that the Iowa court would utilize a *Herbert v. Lando*, 441 U.S. 153, 4 Med. L. Rptr. 2575 (1979), analysis in determining that the reporter's privilege afforded by the Iowa constitution would yield to an actual malice libel case against the journalist. No reported decision discusses the sanctions that would be imposed for failure to disclose privileged information in a libel suit.

IV. Who is covered

The reporter's privilege is available if the party resisting production "falls within the class of persons qualifying for the privilege" and the information sought to be protected was obtained in the "news gathering process." *Bell*, 412 N.W.2d at 587. The phrases "class of persons" and "news gathering process" are not defined by the case law. In *Waterloo/Cedar Falls Courier*, the court held that the privilege belonged to the editors and not the newspaper that employed them. 646 N.W.2d 97, 102 (Iowa 2002).

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

No definition of "reporter" is provided by case law and no appellate cases addresses the issue. In *Stanfield v. Polk County*, 18 Med. L. Rptr. 1262, 1265-66 (Iowa Dist. Ct., No. CE 34-20125 (1990)), the trial court relied on the *Von Bulow v. Von Bulow*, 811 F.2d 136, 13 Med. L. Rptr. 2041 (2nd Cir. 1987), decision to determine that a freelance writer qualified for the privilege.

b. Editor

No definition of "editor" is provided by case law and no case addresses the issue. It is clear after *Waterloo/Cedar Falls Courier* that both an editor and managing editor qualified for the privilege because they engaged in the news gathering process.

c. News

Information sought to be protected must have been obtained in the "news gathering process." *Bell*, 412 N.W.2d at 587. No definition of "news gathering process" is provided by the case law. In *Waterloo/Cedar Falls Courier*, the party requesting disclosure asserted that the editors were not engaged in the news gathering process at the time they spoke with their confidential informants, therefore, they were not entitled to the protection of the reporter's privilege. 646 N.W.2d 97 (Iowa 2002). The requesting party, a community college, argued that the editors were seeking fodder for the paper's lawsuit against the college for violating open meetings laws, and were not engaged in the news gathering process. The Court determined that the editors were investigating the meeting and found that at least one article resulted from that investigation. *Id.* The Court found that the editors were engaged in the news gathering process and were entitled to reporter's privilege protection. *Id.* The Court has not, thankfully, substituted its definition of news for that of the journalist.

d. Photo journalist

No definition of "photojournalist" is provided by case law and no case addresses the issue. *Bell v. City of Des Moines*, 412 N.W.2d 585, 14 Med. L. Rptr. 1729 (Iowa 1987), protected outtakes and, thus, would provide support for protection of work product of photographers and videographers.

e. News organization / medium

The terms media, news organization, and news medium are not defined by statute or case law and no case relates to the issue.

2. Others, including non-traditional news gatherers

No appellate case addresses this issue. One district court has extended the scope of the reporter's privilege in Iowa to freelance journalists. *See Stanfield*, 18 Med. L. Rptr. at 1265.

B. Whose privilege is it?

The privilege belongs to the reporter. In *Waterloo/Cedar Falls Courier*, the Court stated that "the Courier is not the holder of the reporter's privilege, but the privilege is strictly held by the editors and is subject to waiver only by their actions." 646 N.W.2d 97, 102 (Iowa 2002)(citing *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980)(stating that the privilege belonged to the news organization (CBS) and the privilege can only be waived by its holder)); *Los Angeles Mem'l Coliseum Comm. v National Football League*, 89 F.R.D. 489, 494 (D.C. Cal. 1981)(stating that the privilege belongs to the journalist alone and the journalist is the only person capable of waiving it); *Diaz v. Eighth Judicial Dist. Ct. ex rel. County of Clark*, 993 P.2d 50, 57 (Nev. 2000)(holding that the privilege belongs to the journalist). News organizations have successfully asserted the privilege in practice but all appellate cases involve a named reporter, editor, or news director.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Iowa imposes no special procedures or deadlines for service of a subpoena on journalists. There are no state regulations that parallel the U.S. Department of Justice guidelines for subpoenaing journalists. Rule 1.1701 of the Iowa Rules of Civil Procedure does not state a minimum time between service of the subpoena and the date of the testimony. Rule 1.1701(2) states that a reasonable time must be given or the subpoena will be quashed.

2. Deposit of security

The party serving the subpoena is not required to deposit any security. However, the subpoenaed party is entitled to receive, upon demand, his/her traveling fees to and from the court and the witness fee for one day. Iowa Code § 622.74. If these fees are demanded at the time of service but not paid by the subpoenaing party, the subpoenaed party is not obligated to accept service. This fees rule, in practice, is used by some journalists to decline acceptance of a state court subpoena where fees are not contemporaneously tendered. This practice requires the journalist to ask for the fees and not receive them. It applies only to state court subpoenas.

3. Filing of affidavit

The subpoenaing party is not required to serve or file an affidavit.

4. Judicial approval

Judicial approval is not required for the issuance of a subpoena. Iowa Code § 622.63. A clerk's subpoena or attorney's subpoena often are used.

5. Service of police or other administrative subpoenas

Administrative agency subpoenas may be served by agencies pursuant to Iowa Code § 17A.13 or individual agency enabling statutes. Agency subpoenas are enforced by bringing district court proceedings, so a contempt citation can only follow disobedience of the court order, not simply the agency subpoena. Police subpoenas are not normally available or utilized.

B. How to Quash

1. Contact other party first

A letter or phone call to the subpoenaing attorney is often enough to dissuade the request, provided the reporter or news organization is not a party to the suit. Such contact is not required by law.

2. Filing an objection or a notice of intent

Within 14 days of service of a subpoena to permit inspection and copying of documents, the person subpoenaed may serve a written objection. Iowa R.C.P. 1.1701(2)(b). If objection is made the subpoenaing party is not entitled to an inspection and copying of the documents unless that party first seeks a court order to compel their production.

3. File a motion to quash

a. Which court?

A motion to quash a subpoena should be filed with the court that issued it. Iowa R.C.P. 1.1701(2)(c)(1).

b. Motion to compel

A journalist need not wait until a motion to compel is filed before filing a motion to quash but if he/she has objected to the subpoena duces tecum, he/she may elect to do so. Once the subpoenaing party is served with written objection, it may move to compel production at any time. Iowa R.C.P. 1.1701(2)(b).

c. Timing

The subpoenaed party must object in writing to the subpoena within 14 days of its receipt, or before the time specified in the subpoena if such is less than 14 days. Iowa R.C.P. 1.1701(2)(b). After an objection is made, the subpoenaing party may file a motion to compel at any time. Iowa R.C.P. 1.1701(2)(b). If a motion to compel is filed, a motion to quash and alternative motion for protective order should be filed immediately along with a resistance to the motion to compel.

d. Language

No uniform rules or forms exist for making an objection or filing a motion to quash.

e. Additional material

A motion should be accompanied by a memorandum of law, and may be delivered to the court and opposing counsel along with copies of cases.

4. In camera review

a. Necessity

An *in camera* inspection of materials must be conducted prior to disclosure to the party seeking the privileged information. *Lamberto v. Bown*, 326 N.W.2d 305, 8 Med. L. Rptr. 2525 (Iowa 1982). In *Lamberto*, the Court noted that an *in camera* inspection of materials partially destroys the reporter's privilege; therefore, prior to an *in camera* inspection, the judge must make a threshold showing as to the compelling need of the information and whether other, less obtrusive, means of discovery have been exhausted. *Lamberto*, 326 N.W.2d at 308-09. If the court determines that the requesting party has a substantial need for the information and has exhausted other means of discovery an *in camera* examination of the evidence should be ordered. *Id.* at 309. The *in camera* inspection will be to determine if the evidence is necessary and is likely to be admissible, thereby imposing another barrier to disclosure to the requesting party.

b. Consequences of consent

No reported cases address this issue.

c. Consequences of refusing

Refusal to appear or testify constitutes contempt of court and the refusing individual may be subject to an attachment writ. An individual found in contempt is subject to fines and possibly jail time. Iowa Code § 665.2. If a journalist is found in contempt, the court may issue a mittimus directing the jailer to detain the journalist until the journalist complies with the courts order. In *Lamberto* 326 N.W.2d at 306, the journalist was found in contempt and sentenced to jail until he complied with the courts order requiring disclosure of privileged information. The court delayed the mittimus to allow the journalist to seek appellate review in which the journalist succeeded. A party found in contempt may also be liable to the subpoenaing party for consequences of the failure to obey the subpoena plus \$50.00 in additional damages. Iowa Code § 622.76.

5. Briefing schedule

Once a party serves and files the motion to quash, then any party resisting the motion has 10 days to file and serve a written resistance to the motion. Iowa R. Civ. P. 1.431(4). Within the seven days following service of the resistance, the moving party may file and serve a reply. Iowa R. Civ. P. 1.431(5). The court should rule on the motion within 30 days unless it extends the deadline for reasons stated on the record. Iowa R. Civ. P. 1.431(7).

6. Amicus briefs

Amicus participation is unusual in Iowa district courts but would probably be allowed. State court rules do not directly address such participation.

Amicus participation at the appellate level is allowed provided that the amici serves and files its brief within the time allowed the party whose position as to affirmance or reversal the brief will support. Iowa R.A.P. 6.18.

Organizations that may submit such briefs include: Iowa Freedom of Information Council; Iowa Newspaper Association; Iowa Broadcasters Association; Iowa Broadcast News Association and local SDX/SPJ Chapters.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

If the subpoenaed party falls into the protected class of journalists, his or her information is deemed presumptively privileged. Thereafter, the burden falls on the requesting party to show, by a preponderance of the evidence, a substantial need for the information and that other means of attaining the information have been exhausted. *Lamberto*, 326 N.W.2d at 309.

B. Elements

The elements necessary to subordinate the reporter's privilege for an *in camera* review by the court, are: (1) the requesting party has a substantial need for the information and (2) the requesting party has exhausted all other means of attaining said information. *Lamberto*, 326 N.W.2d at 308. Before disclosure can be made to the requesting party, the court must conclude, based on its *in camera* review, that the information is necessary, relevant and likely admissible.

1. Relevance of material to case at bar

The requesting party's need for the information must be substantial before the reporter's constitutional rights will be subordinated. *Lamberto*, 326 N.W.2d at 308. The requesting party is subject to a "strict showing of necessity ... to avoid fishing expeditions by litigants." *Id.*

2. Material unavailable from other sources

In order to subordinate the reporter's privilege, the requesting party must have exhausted other means of attaining the information. *Lamberto*, 326 N.W.2d at 308. Seeking information from a reporter "should be the end, and not the beginning of the inquiry." *Id.*

a. How exhaustive must search be?

Courts have not adopted a standard for what constitutes exhaustion. In *Lamberto*, the Court stated that seeking information from a reporter "should be the end, and not the beginning of the inquiry." 326 N.W.2d at 308. In *Waterloo/Cedar Falls Courier*, the Court addressed the exhaustion element by stating: "Moreover, the College knows precisely which trustees and other employees were present at the meetings. There remain for the College many unexplored avenues of discovery for the sought after material. The College has not attempted to find out what was said and what occurred at the meetings from anyone other than the Courier's editors. The College must exhaust these resources before going after the editor's privileged information." 646 N.W.2d 97, 104 (Iowa 2002).

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

The requesting party must show by a preponderance of the evidence that he or she reasonably exhausted other sources, such as by taking depositions of other persons with knowledge. *See Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97 (Iowa 2002).

c. Source is an eyewitness to a crime

No case or statute addresses this issue, but if the requesting party is a criminal defendant, compelled discovery is more likely. *Denk*, 20 Med. L. Rptr. at 1455 (states that burden to overcome reporter's privilege is lower in criminal cases).

3. Balancing of interests

Judicial evaluation of what constitutes a compelling need "involves a weighing of competing interests and a determination of relevancy." *Lamberto*, 326 N.W.2d at 309. The court must ask whether the requesting party's need for the information outweighs the corresponding impairment on the reporter's First Amendment rights. *See Winegard*, 258 N.W.2d at 851.

4. Subpoena not overbroad or unduly burdensome

The court is not required to make a determination whether the subpoena is overly broad but the party resisting production may move to quash the subpoena because it is unduly burdensome. Iowa R. Civ. P. 1.1701(2)(c).

5. Threat to human life

No reported cases or statutory authority address the issue, but if the evidence sought is cumulative, any balancing of competing interests would be affected by this less critical need and the reduced likelihood of admissibility.

6. Material is not cumulative

No reported cases or statutory authorities address the issue.

7. Civil/criminal rules of procedure

Rule 1.1701(2)(c)(1)(3) of the Iowa Rules of Civil Procedure provides that a subpoena requiring disclosure of privileged information will be quashed by the court or modified to protect against disclosure of the privileged information. Rule 1.1701(2)(c)(1)(4) provides that an unduly burdensome subpoena will be modified or quashed by the court. Rule 1.1701(2)(a) of the Iowa Rules of Civil Procedure provides that the attorney responsible for the issuing of a subpoena must take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. Rule 1.504 of the Iowa Rules of Civil Procedure provides that a party from whom impermissible discovery is sought may seek, and for good cause be granted, a protective order stopping the burdensome discovery request. In *Waterloo/Cedar Falls Courier*, the Court directed that just such a protective order be entered on remand. 646 N.W.2d 97. Rule 2.15(2) of the Iowa Rules of Criminal Procedure provides that a subpoena that is unreasonable or oppressive will be dismissed by the court upon motion for the same. Rule 2.14(6)(a)(3) allows the court to regulate discovery and issue protective orders to prohibit compelled disclosure of privileged information. The subpoenaed party may file a motion to quash based on any of the above-mentioned rules.

8. Other elements

No other elements must be met before the privilege can be overcome.

C. Waiver or limits to testimony

The reporter's privilege can be waived only by the privilege holder. *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97 (Iowa 2002).

1. Is the privilege waivable at all?

The reporter's privilege protection can be waived only by the privilege holder. *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97 (Iowa 2002). In *Waterloo/Cedar Falls Courier*, the subpoenaing college asserted that the editors had waived the privilege when their newspaper sued the college. The Court responded that "the Courier is not the holder of the reporter's privilege, but the privilege is strictly held by the editors and is subject to waiver only by their actions." 646 N.W.2d 97 (Iowa 2002)(citing *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980)(stating that the privilege belonged to the news organization (CBS) and the privilege can only be waived by its holder); *Los Angeles Mem'l Coliseum Comm. v National Football League*, 89 F.R.D. 489, 494 (D.C. Cal. 1981)(stating that the privilege belongs to the journalist alone and the journalist is the only person capable of waiving it); *Diaz v. Eighth Judicial Dist. Ct. ex rel. County of Clark*, 993 P.2d 50, 57 (Nev. 2000)(holding that the privilege belongs to the journalist). The Court continued that even if the editors were a party to the action, "their mere status as litigants is not sufficient to constitute a waiver of the privilege." *Id.* If the editors were a party to the action and they placed the privileged materials at issue by relying on it to pursue their claim, the privilege would be waived. *Id.* The editors avoided placing the privileged materials at issue by not using it in the litigation.

2. Elements of waiver

No case details the elements of waiver of the reporter's privilege. In *Waterloo/Cedar Falls Courier*, the Court stated that the privilege could be waived by placing the privileged information at issue in the litigation. 646 N.W.2d 97 (Iowa 2002).

a. Disclosure of confidential source's name

No reported cases address this issue.

b. Disclosure of non-confidential source's name

No reported cases address this issue.

c. Partial disclosure of information

No reported cases address this issue.

d. Other elements

No reported cases address this issue.

3. Agreement to partially testify act as waiver?

No reported cases address this issue.

VII. What constitutes compliance?

A. Newspaper articles

Under the Iowa Rules of Evidence 5.902, printed newspapers and periodicals are self-authenticating.

B. Broadcast materials

Broadcast materials are not self-authenticating under Iowa Rules of Evidence 5.902. Authentication is a condition precedent to admissibility. Iowa Rules of Evidence 5.902. Authentication of an item can be accomplished by testimony of a person with knowledge that the item is what it is claimed to be. Iowa Rules of Evidence 5.902. The parties may stipulate as to the authenticity of the item, negating the need for testimony.

C. Testimony vs. affidavits

The parties may stipulate as to the authenticity of the item, negating the need for testimony. In practice, affidavits merely to confirm that an article was true and accurate as published are offered by journalists and sometimes are accepted by the parties. Where one party objects on hearsay grounds, the self-authentication argument often can prove successful.

D. Non-compliance remedies

Refusal to appear or testify following valid subpoena constitutes contempt of court. Iowa Code § 665.2.

1. Civil contempt

Civil contempt is remedial, meaning that the penalties are only imposed to enforce compliance with a court order. *See Knox v. Municipal Court*, 185 N.W.2d 705, 707 (Iowa 1971). In the reporter's privilege context, the court may issue a mittimus order detaining the journalist until he or she complies with a discovery order. *See Lamberto*, 326 N.W.2d at 306.

a. Fines

The maximum fines for contempt of court are: "1. In the supreme court or the court of appeals, by a fine not exceeding one thousand dollars...; 2. Before district judges, district associate judges, and associate juvenile judges by a fine not exceeding five hundred dollars...; and 3. Before judicial magistrates, by a fine not exceeding one hundred dollars..." Iowa Code § 665.2.

b. Jail

Possible jail sentences for contempt are: "1. In the supreme court or the court of appeals ... imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment; 2. Before district judges, district associate judges, and associate juvenile judges ... imprisonment in a county jail not exceeding six months or by both such fine and imprisonment; and 3. Before judicial magistrates ... imprisonment in a county jail not exceeding thirty days." Iowa Code § 665.2.

2. Criminal contempt

Criminal contempt is punitive and "serves to vindicate the authority of the court and does not terminate upon compliance with a court order." *Knox*, 185 N.W.2d at 707. No reported Iowa case involves a journalist being cited for criminal contempt.

3. Other remedies

Failure to obey a subpoena also subjects the individual to civil liability. Iowa Code § 622.76 states: "For a failure to obey a valid subpoena without a sufficient cause or excuse, or for a refusal to testify after appearance, the delinquent is guilty of a contempt of court and subject to be proceeded against by attachment. The delinquent is also liable to the party by whom the delinquent was subpoenaed for all consequences of such delinquency, with fifty dollars additional damages."

VIII. Appealing

A. Timing

1. Interlocutory appeals

A party aggrieved by an interlocutory ruling or decision, such as the denial of a motion to quash, may apply to the Iowa Supreme Court for review in advance of final judgment. Iowa Rule of Appellate Procedure 6(1). The appeal must be sought within 30 days of the order's entry. Iowa Rule of Appellate Procedure 6.5. The appeal will be granted if "(1) the ruling or decision involves substantial rights; (2) the ruling or decision will materially affect the final decision; and (3) a determination of its correctness before trial on the merits will better serve the interests of justice." Iowa Rule of Appellate Procedure 6.2.

2. Expedited appeals

The order granting the appeal may also provide that it is advanced for prompt submission. Iowa Rule of Appellate Procedure 6.2. Iowa Rule of Appellate Procedure 6.17 provides special rules for expedited appeals involving certain children's issues and lawyer disciplinary proceedings. Otherwise, no special rules apply to expedited appeals.

B. Procedure

1. To whom is the appeal made?

Appeals from final decisions of district courts may be made as a matter of right to the Iowa Supreme Court. The Iowa Supreme Court may refer the case to the Iowa Court of Appeals for appellate review or retain jurisdiction over the appeal. If a case is referred to the Iowa Court of Appeals, the Supreme Court may choose to review it on an application for further review.

2. Stays pending appeal

An order granting an interlocutory appeal stays further proceedings below. Iowa Rule of Appellate Procedure 6.2.

3. Nature of appeal

Review in the Iowa Supreme Court is by standard appeal under the state rules of appellate procedure.

4. Standard of review

Review is *de novo*. The weighing of conflicting interests involved in a reporter's privilege case is a matter of law, not fact, and lower courts findings are not binding on the appellate court. *Lamberto*, 326 N.W.2d at 309.

5. Addressing mootness questions

No case law or statutory authority addresses the issue.

6. Relief

Generally, an appeal can result in a decision that the information need not be disclosed, that the information must be disclosed, or that the lower court must reconsider or remand in light of the appellate decision.

IX. Other issues

A. Newsroom searches

This author is unaware of any post- *Zurcher v. Stanford Daily*, 436 U.S. 547, 3 Med. L. Rptr. 2377 (1978) searches occurring in Iowa newsrooms. Iowa has no specific statutory provisions regarding searches of newsrooms. In *Lambert v. Polk County*, 723 F. Supp. 128, 16 Med. L. Rptr. 2414 (S.D. Iowa 1989), police officers seized a video tape of a fight in which a fatality occurred made by a home videographer. The police obtained the video by representing that the tape would be returned to the home videographer within two days. *Id.* The U.S. District Court found it likely that the seizure was not voluntary because of this misrepresentation and therefore violated the videographer's right to due process. *Id.*

B. Separation orders

No reported cases or statutory authority address this issue.

C. Third-party subpoenas

No cases or statutory authority address this issue.

D. The source's rights and interests

No cases or statutory authority address this issue.