

# REPORTER'S PRIVILEGE: IDAHO

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

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

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

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

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

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

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

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

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

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

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

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

### What is a subpoena?

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

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

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

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## I. Introduction: History & Background

Idaho does not have a shield statute. Attempts to invoke the protections of the reporter's privilege have been based on constitutional and common law grounds and Idaho courts have developed a very unsettled relationship with the reporter's privilege. In the earliest consideration of the privilege following the U.S. Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Idaho Supreme Court rejected the privilege, stating that no such privilege had been recognized by the U.S. Supreme Court in *Branzburg*. *Caldero v. Tribune Publishing Company*, 98 Idaho 288, 562 P.2d 791 (1977). Some years later, the Idaho Supreme Court expressly disavowed its prior rejection of the privilege and held that such a privilege did exist, in certain circumstances, based in part upon the federal constitution, in part upon the Idaho constitution and in part upon common law. *In re Wright*, 108 Idaho 418, 700 P.2d 40 (1985). In its most recent examination of the privilege, the Idaho Supreme Court has again indicated a hostility toward the privilege and strictly limited the ruling in *Wright*, and indicated that future consideration of the privilege will turn heavily on the facts and require a strong showing of a potential "chilling effect" in order for the privilege to be recognized. *State v. Salsbury*, 129 Idaho 307, 924 P.2d 208 (1996).

*The first edition of this work was written by Ronald E. Bush*

## II. Authority for and source of the right

### A. Shield law statute

Idaho does not have a shield statute. No attempt has been made to obtain legislative approval of such a statute in recent decades.

### B. State constitutional provision

There is no express shield law type language in the Idaho Constitution. However, the Idaho Constitution has been relied upon in the most significant Idaho decision recognizing a limited reporter's privilege. In *In re Wright*, 108 Idaho 418, 700 P.2d 40 (1985), three of the four justices in the majority agreed that Art. 1, § 9 of the Idaho Constitution provides a basis for the reporter's privilege. Art. 1, § 9 is the "free speech/free press" provision of the state constitution. Even so, the discussion of the state constitution's support for the privilege has been cryptic and primarily is premised upon its similarity to the language of the First Amendment in the federal constitution.

### C. Federal constitutional provision

Idaho initially rejected, and later recognized, a reporter's privilege based on the First Amendment. In *Caldero v. Tribune Publishing Company*, 98 Idaho 288, 562 P.2d 791 (1977), the Idaho Supreme Court announced that its reading of *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) was that "no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version." *Caldero*, 98 Idaho at 294, 565 P.2d at 797. In *Caldero*, the Idaho Supreme Court refused to recognize a privilege that would protect a reporter from disclosing confidential sources in a libel suit brought against the reporter and his newspaper by the subject of a story.

However, the absolutist position taken by the *Caldero* court was first softened and then somewhat repudiated by later, differently configured, panels of the Idaho Supreme Court. Three years later, in *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103 (1980), the court stated that the *Caldero* holding still had validity in cases in which the unpublished or confidential information was sought from a media defendant that was a defendant in the lawsuit. *Sierra Life*, 101 Idaho at 800, 623 P.2d at 108. However, the court also instructed that some sort of judicial scrutiny of the attempted discovery was nonetheless required—beginning with answering the question of whether the subject of the discovery (in *Caldero* and in *Sierra Life*, the identify of unnamed sources) was *relevant* to the case. *Sierra Life*, 101 Idaho at 801, 623 P.2d at 109. In doing so, the *Sierra Life* court encouraged judicial scrutiny of the nature of the request, in order to weigh the interest of the press in maintaining the secrecy of the identity of confidential sources, but couched its ruling in the terms of a discovery "relevancy"

requirement. The decision reads as though the court recognized the importance of the press interests, but was unwilling to overrule *Caldero*.

In 1983, the court again considered a reporter's privilege case, in which it again refused to apply the reporter's privilege to protect a reporter under contempt orders from a trial court for refusal to identify the identities of confidential sources and related unpublished information in a child custody/*habeas corpus* proceeding. *Marks v. Vehlow*, 105 Idaho 560, 671 P.2d 473 (1983).

In *Marks*, the court was preoccupied with the facts of the case, which involved a reporter's refusal to answer questions about the location of a child abducted by a parent in a custody dispute. In such a setting, the court ruled that the press interests were outweighed by the interests in ensuring the safety of the child and maintaining the sanctity of the writ of *habeas corpus*. In doing so, the court said that the relevancy and materiality considerations set out in *Sierra Life* still came into play, but the court also went further in endorsing a federal constitution based rationale for a reporter's privilege than it had done in the past, and said that it was in agreement with a statement in a federal circuit case that "...[c]ompelling a reporter to disclose the identity of a source may significantly interfere with his newsgathering ability...." *Marks*, 105 Idaho at 568, 671 P.2d 473, 481.

Two years later, the court had a less factually troublesome case in which to consider the reporter's privilege. In *In re Wright*, 108 Idaho 418, 700 P.2d 40 (1985), a reporter was subpoenaed in a criminal case to testify about the identity of a confidential source interviewed in the course of writing an article about marijuana growers. The prosecution sought the reporter's testimony in order to obtain corroboration testimony against a defendant marijuana grower who had been charged based on the testimony of an accomplice. Under Idaho law, such corroboration testimony is a required element of the prosecution's burden of proof. In *Wright*, the Idaho Supreme Court again analyzed the potpourri of opinions in the *Branzburg* case, as it had done in *Caldero*. However, this time the court concluded that *Branzburg* did provide some First Amendment protection to news gathering and that the balancing test proposed by Justice Stewart in his *Branzburg* dissent was an appropriate starting point. *Wright*, 108 Idaho 418, 421, 700 P.2d 40, 43. The case was remanded to the trial court for scrutiny of the applicability of the privilege under Justice Stewart's *Branzburg* balancing test. *Id.*, 108 Idaho at 423, 700 P.2d at 45. Importantly, the *Wright* court abandoned the attempt in earlier decisions to try to explain away the questionable holding in *Caldero*: "[to] the extent that *Caldero* holds that under no circumstances is there a qualified newsperson's privilege in Idaho which is protected by the First Amendment of the U.S. Constitution, we decline to follow it as precedent." *Wright*, 108 Idaho at 422, 700 P.2d at 44.

#### **D. Other sources**

A concurring opinion in the *In re Wright* decision emphasized the common law in concluding that a limited reporter's privilege exists in Idaho. Justice Bistline concluded that the issue presented in *Wright* could be decided on non-constitutional grounds, by studying the justification for evidentiary privileges in the common law and recognizing that such historical justifications also supported recognition of a reporter's privilege in contemporary society because of the critical importance of the press in maintaining an informed citizenry. *Wright*, 108 Idaho at 424-428, 700 P.2d at 50-54.

Additionally, although not a source of support for the privilege, special heed should be paid in Idaho to the limitations upon the scope of discovery found in the discovery rules. The Idaho decisions have given special emphasis to such limitations primarily, or so it would appear, to avoid the draconian holding in *Cardoza*, as a means of limiting the discovery directed at reporters, without having to invoke the reporter's privilege.

### **III. Scope of protection**

#### **A. Generally**

As the prior discussion of the Idaho cases indicates, the reporter's privilege has received uneven and often hostile treatment from the Idaho appellate courts. A precise identification of the scope of protection is, therefore, somewhat of a challenge.

In the *Wright* case, the *Branzburg* balancing test was adopted to apply to a reporter who had been subpoenaed to testify as a third-party witness in a criminal case as to the identity of confidential sources used in preparing a news story. The majority decision in *Wright* also discussed the various circumstances in which a reporter might be called upon to provide testimony, without expressly stating that any one circumstance absolutely allowed compelled testimony, or absolutely called for application of the privilege to protect against compelled testimony. Rather, the *Wright* court focused upon the individual, case-specific, application of the *Branzburg* test. In doing so, however, the *Wright* court said that the test "may be applied in both a criminal and a civil context..." thereby leaving room to argue that the reporter's privilege recognized in the *Wright* case is not limited to the criminal case, third-party, types of proceedings involved in that case. *Wright*, 108 Idaho at 422-423, 700 P.2d at 44-45.

However, consistent with the prior shifting sands of the Idaho Supreme Court's handling of the privilege, the only reported decision dealing with the privilege since *Wright* appears to be intended to partially shut the door the *Wright* court had tried to open. In *State v. Salsbury*, 129 Idaho 307, 924 P.2d 208 (1996), the Idaho Supreme Court refused to allow the reporter's privilege sought by a television station to protect against the compelled production of aired and unaired footage of the scene of a fatal automobile accident. The videotape was sought by the prosecutor in a criminal case brought against a reporter from a local newspaper, who had been arrested and charged with resisting and obstructing a police officer when the reporter refused to leave the scene of the accident after being ordered to do so by police on the scene.

In *Salsbury*, an entirely different membership of the court from that which had considered the *Wright* case, again took up the application of the reporter's privilege. The court held that the reporter's privilege did not apply to the case because the videotape sought by the prosecutor did not involve a "confidential source nor any form of confidential information." *Salsbury*, 129 Idaho at 312-313, 924 P.2d at 213-214. The *Salsbury* court nonetheless went through the exercise of evaluating the facts under the *Branzburg* test, and concluded that the trial judge had correctly concluded that compelled disclosure of the videotape would have little, if any, "chilling" effect on the press and that the interest of the press must give way to the prosecutor's right to disclosure of the information. *Id.*

The dissent in *Salsbury* contended that the *Branzburg* test should be applied in the case and had not been satisfied, emphasizing that the prosecutor had admitted that he had not attempted to contact any of the numerous other witnesses at the scene to determine if they could provide an alternative source for the information the prosecutor hoped to obtain from the videotape. *Salsbury*, 129 Idaho at 313, 924 P.2d at 214.

Since the *Salsbury* decision was rendered, three of the five justices (including the dissenter) have gone off of the court. Therefore, it remains a guessing game to anticipate the next ruling of the Idaho Supreme Court on the reporter's privilege. Because Idaho does not have a shield law, each case that comes to the Idaho appeal courts (which include the Idaho Supreme Court and an intermediate Court of Appeals) takes on heightened importance.

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

To the extent that the reporter's privilege has been recognized and applied in Idaho, it is a qualified privilege.

## **C. Type of case**

### **1. Civil**

Two of the reported Idaho decisions (*Caldero* and *Sierra Life*) involved civil cases. However, both were civil cases in which the reporter was a defendant. Both cases found that no reporter's privilege existed, but each decision also emphasized the fact that the discovery was directed at proof needed by the plaintiff in order to prosecute the plaintiff's case. And, at least in the case of *Caldero*, the precedential value is questionable, because of the disavowal of the *Caldero* decision in the *Wright* case.

Additionally, because of the repeated emphasis of the Idaho courts on a case-by-case balancing test, civil cases have the potential for coming out more favorably on balance because of the lesser "compelling and overriding interest" in the information ordinarily found in a civil case as compared to a criminal case, where a defendant's liberty interest is often at stake. The decision in *Wright* also made special mention of the fact that the balancing test might well be differently resolved in a civil setting, as opposed to a criminal case. *Wright*, 108 Idaho at 422, 700 P.2d at 44.

## 2. Criminal

There is no direct indication in the Idaho case law that an effort to compel testimony or other disclosure of information from a reporter will be treated differently in a criminal case than in a civil case. In the *Wright* case, which stemmed from a criminal prosecution, the Idaho Supreme Court emphasized that the adoption of the *Branzburg* test "will not adversely affect a criminal or civil trial or even a grand jury process." *Wright*, 108 Idaho at 423, 700 P.2d at 45. However, in the most recent decision of the court in *Salsbury*, the court refused to apply the reporter's privilege in a misdemeanor criminal case, even though the facts indicated that there were obvious alternative sources, other than the television station's videotape, for the information sought by the prosecutor.

## 3. Grand jury

None of the Idaho decisions has considered the assertion of a reporter's privilege in a grand jury context. However, as noted above, the *Wright* court specifically stated that the analysis of the privilege should be the same regardless of the case setting.

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

Although the Idaho decisions create somewhat of a moving target, it is apparent that most of the decisions have focused, in large part, upon whether the fact pattern involves a confidential source or information. In *Caldero*, *Sierra Life*, *Marks* and *Wright*, the court was faced with circumstances in which a reporter had been asked to reveal the identity and/or substance of confidential, or at least unpublished, sources and information. *Caldero*, *Sierra Life* and *Marks* refused to recognize a privilege that would protect against the disclosure of a confidential source or information. However, the *Wright* decision clearly holds that upon those types of facts, the privilege can be invoked and it is up to the trial court to apply the *Branzburg* balancing test and determine whether the privilege carries the day or not.

Notably, the *Wright* court went further in its decision and discussed the application of the privilege in other contexts as well, although in doing so it created a debate as to whether the court had created a more overarching privilege or simply indulged in crafting wishful dicta. The *Salsbury* court apparently concluded the latter, as it took pains to limit the holding in *Wright* to its specific facts, which did involve confidential and unpublished information.

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

See discussion in regard to paragraph III, D above.

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

See discussion in regard to paragraph III, D above.

### G. Reporter's personal observations

See discussion in regard to paragraph III, D above. In addition, the *Salsbury* case involved videotape made at a post-accident scene at which a newspaper reporter was arrested for resisting and obstructing a police officer, after he refused to leave the scene of an automobile accident. The trial court, and the Idaho Supreme Court, were obviously hostile to the suggestion in that case that a reporter should have any rights greater than any other citizen in trying to resist providing testimony in a judicial proceeding.

### H. Media as a party

In both the *Caldero* and *Sierra Life* decisions, the reporter was a defendant in a civil lawsuit. That fact appears to have influenced the decisions of the Idaho Supreme Court in which it was ruled that there was no reporter's privilege. Similarly, it caused the court in the *Sierra Life* case to emphasize the traditional scope of discovery analysis as a means of weighing the respective interests of the parties, in the absence of a reporter's privilege. The decisions seem to indicate that the balancing test will be weighed more heavily in favor of disclosure in cases in which the media entity, or reporter, is a party.

### I. Defamation actions

See discussion in paragraph III, H above. In defamation actions, substantive and negative consequences may result from a decision by a reporter or media entity to stand on principle and refuse to disclose sources or information, even if the privilege is determined to be unavailable or, after balancing, determined to give way to a greater interest served by disclosure. In *Sierra Life*, the trial court entered default against the media defendants on all liability issues—including those of falsity, malice and causation on which the plaintiff had the burden of proof—leaving only the issue of the amount of damages for trial. The default was entered as a sanction for the media defendants' refusal to answer discovery seeking the identity of confidential sources consulted in the preparation of newspaper articles about the plaintiff insurance company.

On appeal, the Idaho Supreme Court reversed and remanded with instructions for the trial court to consider more carefully the arguments of the media defendants that the identity of the sources was irrelevant because the articles were truthful and because the confidential sources had not provided any information actually used in the news stories. The court held that a dispute over discovery into confidential sources should not, by itself, preclude the trial court from considering an otherwise dispositive motion that did not depend upon the discovery of the confidential sources:

Finally we consider the newspaper's contention of error on the part of the trial court in tabling the newspaper's motion for summary judgment. If it is determined that there is no triable issue of fact as to any issue upon which the newspaper as a matter of law would be entitled to prevail, and such is an issue the proof of which is essential to Sierra's case, the motion should be granted even though factual dispute on some other issue might otherwise prevent the entry of judgment.

*Sierra Life*, 101 Idaho at 801, 623 P.2d at 109.

Significantly, the *Sierra Life* court stopped short of holding that the trial court's entry of default against the media defendants was improper regardless of the pending dispositive motion based on truth. Instead, the decision generally endorsed the concept that the trial court has discretion to impose sanctions for discovery abuse, which can include the imposition of a default judgment in some settings. *Sierra Life*, 101 Idaho at 799-801, 623 P.2d at 107-109.

#### **IV. Who is covered**

The Idaho decisions do not attempt to define "reporter" or come up with any other particular definition of the person or entity eligible to invoke the reporter's privilege.

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

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

Because the Idaho decisions have involved traditional journalists, engaged in reporting for newspapers or television, it is clear that the reporter's privilege—to whatever extent it exists under Idaho law—applies to the activities of traditional news gatherers.

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

The Idaho cases do not attempt to define "reporter."

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

The Idaho cases do not attempt to define "editor."

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

The Idaho cases do not attempt to define "news."

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

The Idaho cases do not define "photojournalist." However, the *Salsbury* case involved television videotape and the decision makes no distinction between a photojournalist (or, videographer) and a press reporter.

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

The Idaho cases do not attempt to define the news organization or news media eligible to claim the privilege. However, the *Caldero* court, even though rejecting adoption of a reporter's privilege, defined the "press" in expansive terms in its discussion of the value of the First Amendment. In stating that obtaining the "truth" is critically important in our society, the court said that "[t]he only reliable source of that truth is a 'press' (which is to say everyone—pamphleteers, nonconformists, undergrounders) which is free to publish that truth without government censorship." *Caldero*, 98 Idaho at 298, 562 P.2d at 801.

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

See discussion in paragraph IV, A, 1, e above.

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

The Idaho cases do not attempt to identify "ownership" of the privilege; however, the cases consider instances in which it has been invoked by the reporter and/or the reporter's employer. Thus, the cases indicate that the privilege can properly be invoked by reporters and their employers and imply that the privilege "belongs" to them. In the instance of other testimonial privileges, to which the reporter's privilege has sometimes been compared, the privilege sometimes belongs to the ostensible "source," such as with the attorney-client privilege.

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

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

There are no peculiar requirements for the service of subpoenas upon reporters or other similar witnesses; they will be treated the same as all other individuals. Compliance with the pertinent court rules, both as to nature and form of the subpoena and as to the service of the subpoena (including witness fees) is required. These requirements vary slightly if the witness is also a party to the lawsuit. *See* Idaho Rule of Civil Procedure 45; Idaho Criminal Rule 17.

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

There are no restrictions upon the time for service of the subpoena for a witness to appear in court, but Idaho Rule of Civil Procedure 45(b) provides that a subpoena compelling a person to produce or allow inspection of documents must be given thirty (30) days to comply. Idaho Rule of Civil Procedure 45(d) further provides that a witness subject to a subpoena may bring a motion to quash if the subpoena "fails to allow time for compliance."

#### **2. Deposit of security**

Idaho Rule of Civil Procedure 45(e)(1) provides that "witness fees and expenses in the district court and the magistrate division thereof shall be in the amounts provided for under Rule 54(d)(1)." Idaho Rule of Civil Procedure 54(d)(1) provides that witnesses are entitled to \$20 per day plus their travel expenses, calculated at \$.30 per mile, one way, from the place of residence. Idaho Rule of Civil Procedure 45(e)(2) provides that "[w]hen the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered."

#### **3. Filing of affidavit**

The server must return the subpoena with an affidavit of service, unless he or she is an officer authorized by law to serve process. *See* Idaho Rule of Civil Procedure 45(e)(2).

#### **4. Judicial approval**

No prior judicial approval is required. The clerk of the court may issue a subpoena, in blank, to a party requesting it or an attorney licenses in Idaho may issue and sign a subpoena. *See* Idaho Rule of Civil Procedure 45(a); Idaho Criminal Rule 17(a).

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

There is no special treatment of police or other administrative subpoenas under Idaho state court rules. However, the United States Attorney for the District of Idaho generally follows Department of Justice guidelines on issuance of subpoenas upon media witnesses.

## **B. How to Quash**

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

Because of the unstable footing of the reporter's privilege in Idaho resulting from its uneven treatment in Idaho appellate decisions, it is generally recommended that the party issuing the subpoena be contacted prior to filing of a motion to quash. Often, the party serving the subpoena is unaware of possible limitations upon the party's ability to compel the testimony of a media witness. As a result, after "educating" the opposing party, it is sometimes possible to convince the opposing party to withdraw the subpoena, or to narrow the scope of the subpoena. Such contact with the other party is not required by statute or the court rules, or the case law, but is often the most effective means of obtaining a result that might not be possible to obtain from the court.

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

There is no requirement that an "objection" or "notice of intent" be filed.

### **3. File a motion to quash**

The motion to quash is the only certain means of seeking protection against a subpoena. *See* Idaho Rule of Civil Procedure 45(d); Idaho Criminal Rule 17(b). Some parties will wait until the time of the compelled appearance, whether it be in a deposition or in a court appearance, and assert the privilege in response to questions posed at that time. Doing so, however, at least in Idaho state court, runs the risk (but not necessarily the certainty) of having the court rule that the privilege has been waived.

#### **a. Which court?**

Ordinarily, the motion to quash is filed in the same court as that in which the case is filed, or in the same court from which the subpoena has issued, if different.

#### **b. Motion to compel**

The best practice is to raise the issue by way of motion to quash, rather than wait for the opposing party to seek to compel the testimony after an initial refusal to do so, or a non-appearance. By raising the issue in the context of a motion to quash, the risk of being found in contempt and suffering the resulting monetary or imprisonment penalties prior to a judicial ruling on the substantive issues is greatly reduced.

#### **c. Timing**

As a general rule, the time periods for motion practice, including motions to quash, are governed by the general motion provisions of the particular rules of the court. In Idaho state court, the pertinent rules are I.R.C.P. 6(d) and 7(b)(3). Idaho's state court rules can be accessed from the Idaho State Judiciary website. *See*, <http://www2.state.id.us/judicial/judicial.html>. In federal court for the District of Idaho, the general motion provisions of the Federal Rules of Civil Procedure apply, as well as the local rules of the district, which can be found online at the federal court website for the District of Idaho. *See*, <http://www.id.uscourts.gov>. Similarly, the rules should be consulted for provisions dealing with the setting of hearings. In Idaho state court and federal court, hearing dates are generally arranged by contacting the calendar clerk assigned to work with the particular judge assigned to the case.

However, in many instances, the receipt of the subpoena in relation to the time set for the appearance of the reporter or other media witness does not allow sufficient time to meet the general time periods of the particular court rules. In those circumstances, a motion to shorten time should be filed along with the motion to quash. As a practical matter, the motion and its supporting documents should be filed sufficiently in advance of the hearing, if at all possible, so as to allow the court a reasonable period of time to consider the documents prior to the hearing. *See, e.g.*, Idaho Rule of Civil Procedure 45(d) ("The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith" may quash or modify a subpoena).

#### **d. Language**

There is no particular language required for the motion to quash. It should, however, clearly set out the relief sought by the motion, particularly if the motion seeks to preclude some portion of the requested testimony, or requested documents, rather than the entirety of what may be sought in the subpoena or subpoena duces tecum. See, generally, Rule 45 of the Idaho Rules of Civil Procedure and Rule 17 of the Idaho Criminal Rules.

#### **e. Additional material**

There are no prohibitions upon the nature of material that might be attached to support the motion to quash, other than the general requirement that it be admissible for purposes of consideration by the court. Idaho federal court rules limit the length of briefs submitted in support of motions; however, there is no express limitation upon appendices and the like. (Local practice generally dictates that the appendices or other supporting material be filed as attachments to an affidavit, rather than simply appended to a motion or brief.) The concerns are more practical than rule-driven—i.e., the busy judge may be more annoyed than grateful for the book length appendix dumped on his or her desk a few days before a hearing on a motion to quash.

### **4. In camera review**

One can ask for an in-camera review as part of the court's consideration of the motion to quash, or the court might independently require such a review.

#### **a. Necessity**

There is no requirement that a court conduct an in-camera review.

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

There is no special treatment of the motion to quash in a reporter's privilege case as it may pertain to an automatic stay or other similar request.

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

A refusal to permit an in-camera review potentially exposes the reporter or other media witness to contempt orders or other sanctions. In Idaho, the inherent right of the trial court to enforce its orders through contempt orders has been expressly recognized by the Idaho Supreme Court in many cases, including a case in which a reporter was fined and jailed for refusal to disclose a confidential source. *Marks v. Vehlow*, 105 Idaho 560, 671 P.2d 473 (1983).

### **5. Briefing schedule**

See discussion in response to paragraph V, 4, c above.

### **6. Amicus briefs**

Amici appearances in Idaho appellate courts are governed by Rule 8 of the Idaho Appellate Rules, by which the appeal court may allow an amicus in its direction. There is no similar rule in the trial court rules, but amici appearances are nonetheless allowed upon motion in some instances. Ordinarily, the court—whether at the trial level or at the appellate level—is asked to grant express permission to file an amicus brief. In that request, the potential amicus should make out a substantive case for the purpose of an amicus brief, the nature of the position to be taken by the amicus in the case and the time period sought for the purpose of completing and filing such a brief.

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

Because Idaho does not have a shield law, the substantive law governing efforts to contest a subpoena is drawn entirely from the Idaho decisions discussed earlier in this outline and from those federal cases that discuss the privilege as it may exist based upon the First Amendment. Therefore, the argument of the reporter seeking to invoke the privilege should pay careful heed to the nuances of the Idaho cases and highlight the parallel facts supporting the privilege and the distinguishing facts that make the case inapposite to the Idaho decisions that have held no privilege exists. Similarly, the party seeking to thwart an attempt to quash the subpoena should emphasize

the similarities with the Idaho cases ruling against application of the privilege and should also try to discount any claim that the reporter's activities in the future might be chilled as a result of forcing his or her testimony in the current case.

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

The Idaho cases do not discuss the burden of proof. However, as a practical matter and by analogy to other testimonial privileges, the reporter will bear the burden in the first instance of convincing the court that the reporter's privilege is properly considered upon the particular facts, as a matter of law. At that point, the burden should presumably shift to the party seeking to compel the reporter's testimony to prove that the elements of the *Branzburg* test adopted by the Idaho Supreme Court in the *Wright* case support overcoming the presumed protection afforded by the privilege against compelled disclosure. In other words, the party seeking the testimony or information ought to carry the burden of proof on establishing that the reporter has information clearly relevant to a specific probable violation of law; that the information cannot be obtained by alternative means less destructive of First Amendment rights and that there is an overriding and compelling interest to be served by requiring the reporter to provide such information. See, *In re Wright*, 108 Idaho 418, 421, 700 P.2d 40, 43 (1985).

Nonetheless, as a practical matter, the more proof the reporter can offer to demonstrate that the test cannot be satisfied, the more likely that the subpoena will be quashed, regardless of where the court assigns the burden.

### **B. Elements**

The elements of the reporter's privilege in Idaho are entirely those that are described in the appellate decisions discussed in this outline. Although there is no specific enumeration of the elements in any of the cases, they include at a minimum:

1. Proof that the reporter was engaged in newsgathering activities in connection with the information sought by the party seeking his or her testimony;
2. Proof the information sought is of such a nature as to justify consideration of the reporter's privilege. In other words, because the Idaho cases have seemed to focus upon the fact of confidential sources or information as a necessary predicate for the invocation of the reporter's privilege, if those facts exist, they should be emphasized. If not, the reporter needs to demonstrate, presumably drawing upon the holding in the *Wright* case, that the privilege is still available.
3. Proof (or failure of proof, depending upon where the court assigns the burden) that the qualified privilege is not overcome by competing interests.

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

If the material sought by the subpoena is not relevant to the case, then the first challenge from the reporter ought to be based upon the limitations imposed upon non-relevant discovery under the applicable court rules. This is the approach developed and endorsed by the Idaho Supreme Court in the *Sierra Life* case.

If the reporter's privilege is deemed by the court to apply to the facts of the case, then the relevance of the material is also significant under the various prongs of the *Branzburg* test. The first prong of that test requires that the information sought be "clearly relevant" to a specific probable violation of the law.

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

Under the *Branzburg* test adopted by the *Wright* court, the reporter's testimony cannot be compelled unless "the information sought cannot be obtained by alternative means less destructive of First Amendment rights." *Wright*, 108 Idaho at 421, 700 P.2d at 43. However, this element of the test received scant attention in the *Salsbury* case, the most recent privilege case decided in Idaho. Although the *Salsbury* court based its rejection of the privilege upon the fact that there were no confidential sources or information involved in the case, the court also discussed the application of the *Branzburg* test to the facts of the case. The court concurred with the trial court that disclosure would be required even if the three-pronged test were applied. This was despite the fact, as the dissent pointed out, that there had been numerous bystanders and onlookers at the site of the accident, none of whom had been

interviewed by the prosecutor, and "the onlookers and bystanders may well have satisfied the very need for which the prosecutor said he needed the video tape." *Salsbury*, 129 Idaho at 312-313, 924 P.2d at 213-214.

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

There is no indication in the Idaho cases as to how "exhaustive" a search must be conducted in order to demonstrate the absence of alternative sources for the information sought.

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

If the *Branzburg* test is literally applied, the subpoenaing party should be required to prove that the information sought cannot be obtained by alternative means less destructive of First Amendment rights. Ordinarily, one expects that such proof would come in the form of "I looked but could not find" evidence, even though this particular prong of the test does not specifically call for a "search." However, the Idaho Supreme Court in *Salsbury* simply disregarded the fact that the subpoenaing party in that case—the county prosecutor—had made *no* search for an alternative source for the information. *Id.*

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

There is no specific discussion of the application of the privilege to situations in which the source is an eyewitness to a crime. However, the videotape sought in the *Salsbury* case was sought because the prosecutor alleged that it would contain footage of the actions of the defendant newspaper reporter that led to his being arrested for obstruction of a police officer.

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

The *Branzburg* balancing test adopted by the Idaho Supreme Court in the *Wright* case calls for a balancing of interests in determining whether the reporter's privilege holds sway.

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

The court is not required to make a *sua sponte* analysis of the subpoena to determine whether it is overly broad or burdensome. The reporter should certainly analyze the subpoena and challenge it as overly broad or burdensome, under the pertinent discovery standards. As described previously, the Idaho Supreme Court has focused upon scope of discovery standards as providing protection against disclosure of confidential or unpublished information in lieu of a constitutionally based privilege. *See, Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103 (1980).

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

There is no requirement that the court weight whether the information sought involves a threat to human life. Presumably, however, such a threat would have heightened significance in the balancing prescribed under the *Branzburg* test.

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

If the information sought is merely cumulative, that fact should be emphasized as an indication that the party seeking the information cannot satisfy the second prong of the *Branzburg* test, *i.e.*, that the party can obtain the information from alternative means and therefore it is unnecessary to compel the testimony of the media witness. *In re Wright*, 108 Idaho at 121, 700 P.2d at 43.

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

Idaho civil and criminal court rules contemplate the filing of a motion to quash or modify a subpoena contended to be unreasonable or oppressive.

### **8. Other elements**

Not applicable.

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

The Idaho cases do not describe any peculiar application of the general "waiver" rule as it pertains to the reporter's privilege. It can be expected that Idaho courts would consider waiver arguments in the same manner as with other testimonial privileges. In such settings, if a witness testifies to matters that would otherwise be subject to the privilege, the privilege may be waived for all purposes, or some more limited purpose. Such a waiver is expressly required by the Idaho Rules of Evidence, which provide that a testimonial privilege is waived if "the person...voluntarily discloses or consents to disclosure of any significant part of the matter or communication..." I.R.E. 510.

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

See discussion at paragraph C above.

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

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

See discussion at paragraph C above.

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

See discussion at paragraph C above.

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

See discussion at paragraph C above.

#### **d. Other elements**

See discussion at paragraph VI, C above.

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

It is unlikely that, in the absence of a shield statute, an Idaho court will ever rule that the reporter's privilege protects against a requirement that a media witness confirm that a particular story was printed, or a particular broadcast was made. Therefore, it is similarly unlikely that such testimony would be construed to waive the privilege as to such matters that the court might contemporaneously rule are covered by the privilege.

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

As a general matter, compliance is determined by reference to the scope of the subpoena, as that scope may or may not be adjusted by the ruling of a court upon a motion to quash or other assertion of privilege. The nature of the compliance may also be determined by agreement between the parties that a production, or testimony, of information less than the actual scope of the subpoena, or subpoena duces tecum, will satisfy the opposing party.

### **A. Newspaper articles**

In Idaho, the recipient of a subpoena will often attempt to seek agreement that testimony limited to confirmation of the fact of publication of a newspaper story, and confirmation of the accuracy of the information contained in the story, will suffice to comply with the subpoena. Such an agreement avoids the need to testify concerning confidential or unpublished information. Based upon the nature of the privilege as recognized by Idaho courts, it is unlikely that an Idaho court will ever apply the reporter's privilege to protect a media witness from having to appear in response to a subpoena, or from having to, at a minimum, confirm the fact of the publication of a news story and the accuracy of the information contained in the story.

### **B. Broadcast materials**

See discussion at paragraph A above. The same general rule applies to broadcasts, in that the media witness will almost certainly be required to confirm the fact of the broadcast and the accuracy of the information contained in the broadcast. Ordinarily, the media witness will try to obtain an agreement that will allow for such testimony but will eliminate the requirement that the reporter bring outtakes, notes and other types of non-aired information.

### C. Testimony vs. affidavits

If the information sought is needed by the opposing party for motion practice in the particular proceeding, an agreement can sometimes be reached by which the opposing party will agree to use of an affidavit in lieu of testimony. In the ordinary case, that will not be acceptable if the subpoena is for trial or other courtroom testimony.

### D. Non-compliance remedies

In Idaho, trial courts have broad contempt powers to exercise in their discretion to enforce judicial orders. The use of such powers in enforcing orders compelling testimony from reporters has been considered and implicitly approved by the Idaho Supreme Court. *See, Marks v. Vehlow*, 105 Idaho 560, 671 P2d 473 (1983). Such powers include the use of civil fines and imprisonment. Idaho has had statutory provisions, since its territorial days, outlining the types of acts that are properly deemed contempts of the authority of the court. *See*, Title 7, Chapter 6, Idaho Code. However, although such statutory provisions are referenced in various of the Idaho decisions addressing the contempt power, Idaho courts have also drawn upon constitutional powers and common-law contempt powers in justifying the exercise of such power in particular cases. Nonetheless, the statutory provisions should be consulted for possible particular application to the facts in any contempt order circumstance.

#### 1. Civil contempt

##### a. Fines

See discussion at paragraph D above. There is no statutory or rule-made cap upon fines imposed as part of a civil contempt order. The amount and duration of such fines are reviewable, however, as with other aspects of a contempt order, by the appellate courts. Ordinarily, in Idaho, such a review is sought by the filing of a Writ of Review with the Idaho Supreme Court, under its original jurisdiction powers. A comprehensive summary of the use of the Writ of Review can be found in the chapter on extraordinary proceedings contained in the Idaho Appellate Handbook published by the Idaho Law Foundation.

##### b. Jail

There is no statutory or rule-made limit upon jail sentences imposed as part of a contempt order. However, the specifics of such sentences are reviewable by the appellate courts. Ordinarily, in Idaho, such a review is sought by the filing of a Writ of Review with the Idaho Supreme Court, under its original jurisdiction powers. A comprehensive summary of the use of the Writ of Review can be found in the chapter on extraordinary proceedings contained in the Idaho Appellate Handbook published by the Idaho Law Foundation.

#### 2. Criminal contempt

No known cases have resulted in criminal contempt convictions for disobedience of a subpoena.

#### 3. Other remedies

The court also has the power to impose sanctions against the party that has refused to provide testimony or information. These sanctions, which are left to the discretion of the court under the court rules, can range from striking a particular defense to striking all defenses and entering judgment against the party on all liability issues. Such sanctions were imposed by the trial court in the *Sierra Life* case, but were reversed by the Idaho Supreme Court on grounds unrelated to the issue of whether the trial court had the power to impose such sanctions. *See, Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103 (1980).

## VIII. Appealing

In the ordinary case, Idaho courts have said that there is no appeal of right from a contempt order. It is not included in the listing of appealable judgments and orders contained in Rule 11 of the Idaho Appellate Rules. Similarly, contempt orders are deemed "final and conclusive" by statute. Idaho Code § 7-616. However, the Idaho Supreme Court has ruled that it has plenary power to review contempt orders and although it has not gone so far as to say it will absolutely not consider a traditional "appeal" of a contempt order, it has said on several occasions

that the writ of review is the most appropriate means by which to seek appellate review of a contempt order. *See, e.g., Marks v. Vehlow*, 105 Idaho 560, 671 P.2d 473 (1983).

### **A. Timing**

Appeal from a final judgment must be filed with 42 days. A petition for a writ of review is subject to different rules and statutes. No specific time period is described for the filing of special writs, such as a writ of review, which are generally governed by provisions of Rule 43 of the Idaho Appellate Rules.

#### **1. Interlocutory appeals**

If a course other than a writ of review is pursued for some extraordinary reason, such as an interlocutory appeal, then the motion for permission to appeal an interlocutory contempt order or denial of a motion to quash must be filed within 14 days from entry of the order being appealed. Permission is initially sought from the trial court; in the event the trial court denies the motion, a motion for permissive appeal may still be filed with the Idaho Supreme Court. As a practical matter, however, it is unlikely the Idaho Supreme Court will grant a motion for permissive appeal if the same has already been denied by the trial court. Ultimately, the appeal court must still decide on its own to grant the permissive appeal, even where the motion has been granted by the trial court.

#### **2. Expedited appeals**

There is no particular procedure for expedited appeals, although expedited attention to the matter may be requested by motion. Ordinarily, the most expeditious manner of obtaining review of a contempt order is to seek immediate scrutiny by the Idaho Supreme Court in the form of an extraordinary writ of review, under the Idaho Supreme Court's original jurisdiction. However, in a writ of review the primary question is whether or not the trial court exceeded its jurisdiction in issuing the contempt order, so careful attention should be paid to the nature of the challenge to be made to the contempt order. *See, Marks v. Vehlow*, 105 Idaho at 564, 671 P.2d at 477; Idaho Code § 7-208 (2002).

### **B. Procedure**

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

Appeals from rulings of a magistrate judge are made to the next trial court level, the district court. Appeals from the district court are made to the Idaho Supreme Court. The Idaho Supreme Court has the option of assigning the appeal to the Idaho Court of Appeals. Decisions of the Idaho Court of Appeals may be submitted to the Idaho Supreme Court for further appellate review, but such appeals are only accepted in the discretion of the Idaho Supreme Court. If the contempt order is challenged through a Writ of Review, then the petition seeking the writ is filed directly with the Idaho Supreme Court, under that court's original jurisdiction.

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

A stay may be sought either from the district court, acting in an appeal from magistrate court, or from the Idaho Supreme Court. Such stays are granted in the discretion of the court. In some instances, the issuance of the stay may be contingent upon the posting of a bond or other affirmative action from the party seeking the stay. *See*, Rule 13 of the Idaho Appellate Rules. A temporary stay may be obtained *ex parte*, provided that a demonstration of immediate and irreparable injury, loss or damage is established in a verified petition seeking the temporary stay. *See*, Rule 13.1 of the Idaho Appellate Rules.

#### **3. Nature of appeal**

An appeal taken in the ordinary course, under the usual appeal procedure, will proceed as with any other appeal. There will be a time for settling the record, an order from the appeal court setting out a briefing schedule and then the case may or may not be set for argument, with a decision to follow. In the use of extraordinary writs, the process is generally more truncated and speedier, subject to the particular rules of the appeal court dealing with the use of its original jurisdiction. *See*, I.A.R. 43.

#### **4. Standard of review**

In almost all instances, the appeal court will review the decision to use the contempt power as a review of a matter of law, in which the appeal court exercises complete review. However, because the issuance of a contempt order is considered in Idaho to be within the inherent power of the court to enforce its general orders, the particulars of such orders, such as the amount of a fine or the nature of imprisonment, are reviewed under an abuse of discretion.

### **5. Addressing mootness questions**

Idaho courts have not considered whether an appeal of a contempt sanction may be pursued under the "capable of repetition but evading review" doctrine, after the relevant trial or grand jury session may have concluded.

### **6. Relief**

The reviewing court should be asked to vacate or dissolve the contempt order, or such lesser relief as may be particularly warranted in the facts of the case. Because most contempt orders are reviewed under the Idaho Supreme Court's original jurisdiction, which encompasses use of the so-called extraordinary writs, special attention should also be given to whether other of the extraordinary writs—such as mandamus or prohibition—are appropriate for the circumstances.

## **IX. Other issues**

### **A. Newsroom searches**

The federal Privacy Protection Act (42 U.S.C. 2000aa) has not been implicated in any reported Idaho decisions. Given the hostility of the Idaho Supreme Court to the reporter's privilege generally, and its specific endorsement of the ruling in *Stanford Daily v. Zurcher*, 436 U.S. 547 (1978) (the case which gave rise to the passage of the Privacy Protection Act) in the *Caldero* case, it is unlikely that there would be any protection against newsroom searches in Idaho but for the protections afforded under the Privacy Protection Act. There are no similar state statutes.

### **B. Separation orders**

There are no known judicial decisions in Idaho considering the issue of whether a reporter covering a trial can be forced to remain outside of the courtroom because the reporter is on a witness list. A party is entitled under Idaho court rules to ask the court to exclude all witnesses from the courtroom. If a reporter is on such a witness list, and a party seeks his or her exclusion, then the reporter should ask the court to modify the exclusion order so as to allow the reporter to remain in the courtroom. The argument on such a request presumably would focus upon the direct chilling effect caused by the exclusion.

### **C. Third-party subpoenas**

There are no known Idaho cases addressing the issue of whether a reporter has the right to intervene in efforts to use third-parties, such as telephone companies, to obtain information that might disclose the identity of a confidential source. Because the reporter's privilege in Idaho appears to be personal to the media witness, rather than the source, it is unlikely that Idaho courts would rule that the reporter's privilege extends in such a manner as would prohibit discovery from other parties, or that would prohibit use of such information in the judicial proceeding.

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

There are no known Idaho cases in which a confidential source has attempted to intervene in a proceeding involving attempts to compel testimony concerning the confidential source. Depending upon the nature of the promise made to the source (*e.g.*, was the promise of confidentiality an unconditional promise, or one in which the promisor is released from the promise if ordered to testify), the source may have a claim for a breach of contract. There has been no reported breach of contract/confidential source cases in Idaho.