REPORTER'S PRIVILEGE: KANSAS

The Reporters Committee for Freedom of the Press

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

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

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

Published by The Reporters Committee for Freedom of the Press.

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The Reporter's Privilege Compendium: An Introduction

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

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

In addition, many reporters don't work with attorneys who are familiar with this topic. Even attorneys who handle a newspaper's libel suits may not be familiar with the law on the reporter's privilege in the state. Because of these difficulties, reporters and their lawyers often don't have access to the best information on how to fight a subpoena. The Reporters Committee for Freedom of the Press decided that something could be done about this, and thus this project was born. Compiled by lawyers who have handled these cases an d 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 dissented 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 constitutional 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 supporting 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

KANSAS

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I. Introduction: History & Background

Kansas does not have a shield statute, although support for such a measure appears to be on the rise. The case law governing actions in the state courts is poorly developed. In the federal courts, the decisions of the United States Court of Appeals for the Tenth Circuit control. These decisions recognize and apply a relatively strong qualified privilege.

II. Authority for and source of the right

A. Shield law statute

Kansas does not have a shield statute.

B. State constitutional provision

The Kansas Constitution does not have an express shield provision, nor has any other constitutional provision been construed in a manner providing such protection.

C. Federal constitutional provision

State trial judges customarily apply the decisions of the Kansas appellate courts, even in cases involving questions of federal constitutional law. In *In re Pennington*, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 440 U.S. 929 (1979), the Kansas Supreme Court held that "a newsperson has a limited privilege of confidentiality of information and identity of news sources" based on the First Amendment. 224 Kan. At 574, 581 P.2d at 813. There have been no reported Kansas appellate decisions involving the qualified privilege since *Pennington*.

Federal judges look to the decisions of the United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit. In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) ("*Silkwood*"), the Tenth Circuit also recognized the existence of a qualified First Amendment privilege.

D. Other sources

There are no other sources of law discussing this issue.

III. Scope of protection

A. Generally

State Courts: Journalists and practitioners have struggled for many years to understand the precise parameters of the decision in *In re Pennington*, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied* 440 U.S. 929 (1979) ("*Pennington*"), the only state court appellate decision discussing the qualified privilege. It is clear that the Kansas Supreme Court intended to recognize a qualified privilege available to journalists under certain circumstances. Nevertheless, it is extremely difficult to identify what exactly the court had in mind:

> Whether a defendant's need for the confidential information or the identity of (a journalist's) source outweighs the reporter's privilege depends on the facts of each case. As a general rule, disclosure has been required only in those criminal cases where it is shown the information in possession of the news reporter is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification or gradation of the offense charged, or to mitigate or lessen the sentence imposed. When the information sought has a bearing in one of these areas, the newsperson's privilege must yield to the defendant's rights to due process and a fair trial . . .
>
> While courts recognize that a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case. If that were true, no privilege would exist for a news reporter summoned in a criminal case. Nor does the privilege evaporate be-

> cause the defendant is charged with murder. The proper test enunciated by the *Branzburg* majority is whether the information sought is relevant to the issues before the tribunal. Mr. Justice Powell's concurring opinion and the vast majority of criminal cases since *Branzburg* dealing with this issue recognize this feature as a primary requirement, but further suggest a test of balancing the need of the defendant for the information or the identity of the news source against the privilege of the news reporter. The trial court in this case stated that if the balancing test were applied, the need for the information outweighed the news reporter's privilege of confidentiality.

224 Kan. at 576.

The first paragraph quoted above appears to place at least some limit on the type of information litigants may solicit from journalists in criminal cases, i.e., it must be "material" to prove specific matters such as elements of the charged offense. The problem is that the second paragraph quoted above suggests that a litigant need only demonstrate that the information in issue is "relevant." Relevance is a qualifying standard that applies to *all* evidence. (The Kansas Code of Evidence states that "relevant evidence" includes any evidence "having any tendency in reason to prove any material fact." K.S.A. 60-401[b].) If relevance is the criteria for overcoming the privilege, journalists are essentially on the same footing as any other witness.

In short, it isn't possible under Kansas law to identify the parameters and boundaries of the qualified privilege in a predictable manner. This has led to a great deal of result-oriented jurisprudence in the state courts, including a number of decisions based on the trial judge's views with respect to "the media." On the other hand, a number of state court trial judges faced with qualified privilege issues have simply ignored *Pennington* and applied the law of the Tenth Circuit. *See, e.g.*, *Insurance Management Associates v. Miller*, 1994 WL 315808 (Kan.Dis.Ct. 1994). In the author's experience, however, this is not an outcome journalists can count on.

It should be noted that since *Pennington* was decided, the Kansas Supreme Court, in two cases that did not involve journalists, has suggested that it will require a litigant seeking "confidential" information to "exhaust alternative sources of information before seeking a court's order compelling discovery." *See, Berst v. Chipman*, 232 Kan. 180, 189, 653 P.2d 107 (1982) (information generated by NCAA in infraction investigation), and *Adams v. St. Francis Regional Med. Center*, 264 Kan. 144, 160, 955 P.2d 1169 (1998) (medical peer review information). A sound argument can be made that these decisions should apply with equal force in cases involving confidential information in the possession of a journalist. Until the Kansas Supreme Court makes this clear, however, journalists can expect many state trial courts to continue to look to *Pennington* for the law in this area. Moreover, many judges have difficulty viewing the entirety of a journalist's unpublished information regarding a particular matter as "confidential," and are reluctant to treat such information in manner that would place it on a footing similar to attorney work-product.

Federal Courts: The qualified privilege available in the federal courts of Kansas is much stronger. As first described in *Silkwood* and applied in several Tenth Circuit decisions thereafter, it essentially requires a litigant attempting to overcome the privilege to demonstrate that the information in issue is crucial to the litigation and unavailable from other sources. *See, e.g.*, *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987).

B. Absolute or qualified privilege

The privilege is qualified in both state and federal courts, regardless of the nature of the information in issue.

C. Type of case

1. Civil

The qualified privilege is said to be stronger in a civil case than in a criminal case: In *Pennington*, for example, the court noted that:

> "While courts recognize that a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case. If that were true, no privilege would exist for a news reporter summoned in a criminal case."

224 Kan. at 576.

In *Silkwood*, the court noted without amplification that the "type of controversy" is a factor to consider in determining whether the qualified privilege is available in a particular case. 563 F.2d at 438.

2. Criminal

See *above*. In *Pennington*, the court stated that:

> Whether a defendant's need for the confidential information or the identity of its source outweighs the reporter's privilege depends on the facts of each case. As a general rule, disclosure has been required only in those criminal cases where it is shown the information in possession of the news reporter is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification or gradation of the offense charged, or to mitigate or lessen the sentence imposed. When the information sought has a bearing in one of these areas, the newsperson's privilege must yield to the defendant's rights to due process and a fair trial.

224 Kan. at 576.

3. Grand jury

There is no statutory or case law addressing this issue in the state courts. (Note: grand juries are rarely convened under Kansas law. A somewhat-similar procedure journalists are more likely to encounter in the state courts is the prosecutorial "inquisition." *See* K.S.A. 22-3101, *et seq.* An inquisition is essentially a discovery proceeding, in which the district attorney is authorized to issue subpoenas for testimony under oath regarding alleged violations of state law. There is no case law discussing the privilege in the context of an inquisition.)

In federal grand jury cases, the courts in Kansas (and throughout the federal system) are bound to follow the decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which involved three distinct grand jury subpoenas. Although Justice Powell's concurring opinion in *Branzburg* is cited in most decisions regarding the reporter's privilege, it is important to note that the *Branzburg* majority declined to recognize the existence of such a privilege and ordered the reporters claiming the privilege to testify.

D. Information and/or identity of source

If the qualified privilege applies, it protects the identity of a confidential source, as well as information implicitly identifying the source, under both state and federal case law.

E. Confidential and/or non-confidential information

There is no statutory or case law specifically addressing this issue. As noted above, the Kansas Supreme Court has suggested in two cases not involving journalists that a litigant seeking confidential information will be required to demonstrate that he or she has exhausted alternative sources of the information in issue. *Berst v. Chipman*, 232 Kan. 180, 189, 653 P.2d 107 (1982); *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144, 160, 955 P.2d 1169 (1998).

F. Published and/or non-published material

Although there is no statutory or case law addressing the issue, it is unlikely that a Kansas court will permit a journalist to claim the qualified privilege with respect to published information, based on the doctrine of waiver. *See* K.S.A. 60-437 and Federal Rules of Evidence § 501.

G. Reporter's personal observations

There is no statutory or case law addressing this issue. The author believes it unlikely that a state or federal court will permit a reporter to refuse to testify regarding his or her personal observations, assuming they are relevant to the matter in issue.

H. Media as a party

Kansas does not have a shield statute and, thus, there is no statutory language indicating whether different privilege rules apply in cases in which a journalist and his or her employer are defendants in a defamation, privacy or other tort case. There is case law suggesting the rules do change, and that journalists may pay a price for claiming

the privilege, at least in defamation cases in which proof of actual malice is an essential element. *See, e.g., Gleichenhaus v. Carlyle*, 226 Kan. 167, 170, 597 P.2d. 611 (1979), and *Herbert v. Lando*, 441 U.S. 153 (1979). In *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987), however, a somewhat unusual non-media First Amendment privilege case, the Tenth Circuit "refuse(d) to adopt a *per se* rule that a plaintiff waives his First Amendment privileges simply by bringing suit." 825 F.2d at 1467.

I. Defamation actions

See *preceding section*. There have been no state or federal decisions which specifically discuss penalties for non-compliance with discovery obligations in defamation cases.

IV. Who is covered

There are no state decisions defining "reporter," "news" or similar terms. The decision in *Silkwood*, which involved the privilege claim of a documentary film maker, suggests that the Tenth Circuit will define these terms somewhat liberally, to the extent it is necessary to define them. Indeed, in the subsequent case of *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987), the court recognized the qualified First Amendment privilege rights of an individual who did not claim to be a news gatherer or representative of any communications medium.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

There is no statutory or case law addressing this issue.

b. Editor

There is no statutory or case law addressing this issue.

c. News

There is no statutory or case law addressing this issue.

d. Photo journalist

There is no statutory or case law addressing this issue.

e. News organization / medium

There is no statutory or case law addressing this issue.

2. Others, including non-traditional news gatherers

There is no statutory or case law addressing this issue although, as noted above, the *Silkwood* and *Grandbouche* decisions suggest that the Tenth Circuit is not inclined to limit the availability of the qualified privilege to traditional media.

B. Whose privilege is it?

There is no statutory or case law addressing this issue.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There is no specific limitation under either state or federal civil procedural rules requiring a litigant causing a subpoena to be issued to obtain service within a specified period in advance of the hearing or deposition; however, the rules provide that a court may award sanctions in connection with the issuance of a subpoena if the litigant

responsible "fails to allow reasonable time for compliance." K.S.A. 2006 Supp. 60-245(c)(3)(A)(i) and Rule 45(c)(3)(A)(i), Fed.R.Civ.P.

2. Deposit of security

State law does not require the litigant issuing a subpoena to deposit security, although the payment of a modest witness fee and mileage, by way of check served with the subpoena, is required. K.S.A. 60-245(b).

3. Filing of affidavit

There is no statute or decision requiring the party causing the subpoena to be issue to make a sworn statement of any kind in order to obtain the reporter's testimony.

4. Judicial approval

There are no circumstances in which a judge or magistrate must approve a subpoena prior to service

5. Service of police or other administrative subpoenas

State criminal procedure includes provisions for prosecutorial "inquisitions." *See*, K.S.A. 22-3101, *et seq*. Inquisition subpoenas are served in the same manner as other subpoenas.

B. How to Quash

1. Contact other party first

The law does not require a reporter to contact the party issuing the subpoena prior to filing a motion to quash. It is a good idea to do so anyway, as this may permit a reporter to learn the reason for the issuance of the subpoena, i.e., the nature of the information in which the litigant is interested, which will be useful in preparing a well-targeted motion.

2. Filing an objection or a notice of intent

State courts do not require the filing of a notice of intent to quash a subpoena before the filing of the actual motion to quash. Objections and/or the motion to quash should be filed within at least 14 days of services. The filing of objections, as opposed to a motion to quash, will be sufficient and, indeed, is probably preferable in cases in which only documents are sought. If objections are made, the burden is on the party issuing the subpoena to demonstrate that he or she is entitled to documentary material in issue. *See* K.S.A. 2006 Supp. 60-245a(b). The burden of proof is allocated differently in connection with a motion to quash, i.e., the burden is on the party seeking an order quashing the subpoena to demonstrate that he or she is entitled to that relief.

In federal court, there is authority for the proposition that a motion to quash a deposition subpoena is premature if filed prior to the deposition itself. According to the court responsible for this authority, "ordinarily a person must first appear for his deposition and then raise any objection to the testimony or documents sought . . . (T)his would enable the parties to develop background information regarding the information or documents at issue . . . (t)he court believes the deposition should proceed prior to judicial intervention." *Weathers vs. American Family Insurance*, 1989 U.S. Dist. LEXIS 18300, 17 Med. L. Rep. 1534 (1989).

3. File a motion to quash

a. Which court?

A motion to quash a subpoena issued in a state court action should be filed in the district court hearing the case in which the subpoena is issued.

b. Motion to compel

A media party should not wait for the party issuing the subpoena to file a motion to compel before filing a motion to quash.

c. Timing

A motion to quash should be filed prior to the date and time for compliance with the subpoena, and in no event, more than 14 days after service.

d. Language

There is no preferred text or stock language that is required in connection with a motion to quash a subpoena.

e. Additional material

It is unclear whether the filing of additional material documenting the burdensome nature of subpoenas is helpful in connection with the filing of a motion to quash.

4. In camera review

a. Necessity

The law does not require a court to conduct an *in-camera* review of materials or interview the reporter prior to deciding a motion to quash although, in the author's experience, such a review is frequently undertaken.

b. Consequences of consent

There is no statutory or case law addressing this issue.

c. Consequences of refusing

If the reporter or publisher does not consent to a request for an *in-camera* review, the likely consequence is a denial of the motion to quash and a possible contempt ruling.

5. Briefing schedule

There is no standard briefing schedule for a motion to quash in Kansas.

6. Amicus briefs

Appellate courts routinely accept amicus briefs. They are filed infrequently at the trial level, as a result of which it is impossible to say whether they are "routinely" accepted. Potential sources of amicus briefs include the Kansas Professional Chapter of the Society of Professional Journalists and the Kansas Press Association (785-271-5304).

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

In state court cases, there is no statutory or case law specifically addressing this issue, although, as noted earlier, there are two decision in non-journalist cases that suggest a party seeking "confidential" information must demonstrate that it is unavailable from other sources. In federal cases, the burden is on the litigant seeking to overcome the privilege claim to demonstrate that the information in issue is crucial to his or her case and that it is unavailable from other sources.

B. Elements

1. Relevance of material to case at bar

The material or testimony subject to a subpoena must be relevant to the case at bar.

2. Material unavailable from other sources

As noted, it is unclear under the *Pennington* decision whether this is a requirement in state court cases. It clearly is a requirement in federal cases.

a. How exhaustive must search be?

There is no statutory or case law specifically addressing this issue, nor is it clear that state law requires a party issuing a subpoena to undertake a search. There have been unpublished decisions rendered by United States Magistrates in Kansas holding that a litigant has demonstrated unavailability, but these have not discussed where

the bar will be set in terms of how far the litigant must go in seeking other means of access to the information. *See, e.g., United States v. Foote*, 2002 U.S. Dist. LEXIS 14818, 30 Med. L. Rep. 2469 (D. Kan. 2002).

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

There is no statutory or case law addressing this issue, nor is it clear that state law requires a party issuing a subpoena to undertake a search.

c. Source is an eyewitness to a crime

There is no statutory or case law addressing this issue.

3. Balancing of interests

There is language in the *Pennington* decision suggesting that state courts should balance the interest of the litigant and the reporter in determining whether to quash the subpoena. This may represent dicta.

4. Subpoena not overbroad or unduly burdensome

Both the state and federal rules of civil and criminal procedure require the court considering objections and/or a motion to quash to determine whether the subpoena is overbroad or unduly burdensome. If it is, the reporter is entitled to relief in the form of a protective order.

5. Threat to human life

There is no statute or case requiring the court to weigh separately whether the information subpoenaed involves a threat to human life.

6. Material is not cumulative

As noted above, it is unclear to what extent a state court must consider the availability of the information in issue from another source in assessing a reporter's privilege claim. Federal courts in Kansas are clearly required to engage in such an assessment and, if the information in issue is available from another source, quash the subpoena.

7. Civil/criminal rules of procedure

The state and federal rules of civil and criminal procedure contain rules permitting a non-party witness to seek a protective order with respect to a frivolous or unduly burdensome subpoena.

8. Other elements

There is no statutory or case law addressing this issue.

C. Waiver or limits to testimony

As noted above, K.S.A. 60-437 provides that a witness who would otherwise be in a position to claim a privilege with respect to his or her testimony will be deemed to have waived the privilege if the witness "without coercion, or without any trickery, deception, or fraud practiced against him or her, and with knowledge of the privilege, made disclosure of any part of the matter or consented to such a disclosure made by anyone."

1. Is the privilege waivable at all?

There is no statutory or case law specifically addressing this issue, although K.S.A. 60-237 suggests that the privilege can be waived.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no statutory or case law addressing this issue. Pursuant to the statute noted above, however, the author believes that most state courts would view this as a waiver of the privilege.

b. Disclosure of non-confidential source's name

There is no statutory or case law addressing this issue. Pursuant to the statute noted above, however, the author believes that most state courts would view this as a waiver of the privilege.

c. Partial disclosure of information

There is no statutory or case law specifically addressing this issue. Based on the privilege statute quoted above, however, the author believes that most state courts would view a partial disclosure as partial waiver of the privilege, at a minimum.

d. Other elements

There is no statutory or case law addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law addressing this issue.

VII. What constitutes compliance?

A. Newspaper articles

There is no statutory or case law specifically addressing the issue of whether newspapers are self-authenticating. If a court requires testimony authenticating a copy of the newspaper in issue, a librarian or archivist should be able to furnish the needed testimony consistent with the requirements of state law.

B. Broadcast materials

Unless waived, a representative of the broadcaster must appear to furnish testimony authenticating the video tape. There are no specific rules identifying who the representative should be.

C. Testimony vs. affidavits

An affidavit can take the place of in-court testimony only if the litigants agree.

D. Non-compliance remedies

1. Civil contempt

a. Fines

There is no statutory or case law specifically addressing the issue of whether fines are capped. There are no recent examples of fines being levied against reporters who refuse to comply.

b. Jail

There is no statutory or case law discussing the issue of whether jail sentences in connection with contempt citations against reporters are limited. There have been no recent examples of reporters who went to jail rather than disclose the names of confidential sources or information. The case law generally applicable in contempt cases suggests that imprisonment until the court's order is obeyed is appropriate. In re *Conservatorship of McRoy*, 19 Kan. App.2d 31, 861 P.2d 1378 (1993).

2. Criminal contempt

There is no statutory or case law addressing this issue. The author is unaware of any instance in which a criminal contempt conviction against a reporter has been pursued after a civil contempt finding was dissolved.

3. Other remedies

There is no statutory or case law specifically addressing the issue of what other remedies might be available. As noted above, however, there is reason to believe that both state and federal courts will impose media-specific sanctions in cases in which the media representative is a defendant.

VIII. Appealing

A. Timing

1. Interlocutory appeals

There is no statutory or case law addressing this issue, although generally speaking, it is likely that Kansas courts would require a reporter to be held in contempt prior to pursuing an appeal. Requests for interlocutory appeals in civil cases must be filed within ten days of the entry of the order appealed from. Kansas Supreme Court Rule 4.01. Acceptance of many such requests is discretionary.

2. Expedited appeals

The rules pertaining to expedited appeals apply only in a limited class of cases, not including those involving journalists.

B. Procedure

1. To whom is the appeal made?

Appeals from municipal courts are made to district courts, where the proceedings are *de novo*. Appeals from an adverse decision in a district court are pursued in the Kansas Court of Appeals and/or the Kansas Supreme Court. Many constitutional issues are resolved in the Kansas Supreme Court in the first instance.

2. Stays pending appeal

A reporter affected by an adverse decision is required to seek a stay in the trial court. The fact that a constitutional issue is involved does not change the standard applied in determining whether to grant a stay, which is ordinarily a matter of trial court discretion.

3. Nature of appeal

The appeal will be similar to any other appeal from a contempt conviction.

4. Standard of review

Contempt convictions are generally reviewed pursuant to an abuse of discretion standard. *State v. William*, 20 Kan. App.2d 185, 884 P.2d 755 (1994). As a practical matter, the review focuses on whether the records show conduct constituting contempt.

5. Addressing mootness questions

There is no statutory or case law addressing this issue.

6. Relief

A reporter's attorney should seek a reversal of the contempt conviction and a discharge.

IX. Other issues

A. Newsroom searches

The Privacy Protection Act has not been applied in connection with a newsroom search in Kansas, to the author's knowledge.

B. Separation orders

There is no statutory or case law addressing this issue.

C. Third-party subpoenas

There is no statutory or case law addressing this issue.

D. The source's rights and interests

There is no statutory or case law addressing this issue.