

REPORTER'S PRIVILEGE: KENTUCKY

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

Credits & Copyright

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.

Executive Director: Lucy A. Dalglish

Editors: Gregg P. Leslie, Elizabeth Soja, Wendy Tannenbaum, Monica Dias, Dan Bischof

Copyright 2002-2010 by The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209. Phone: (703) 807-2100 Email: rcfp@rcfp.org. All rights reserved.

Reproduction rights in individual state and federal circuit outlines are held jointly by the author of the outline and The Reporters Committee for Freedom of the Press. Rights for the collective work and other explanatory and introductory material are held by the Reporters Committee.

Educational uses. Those wishing to reproduce parts of this work for educational and nonprofit uses can do so freely if they meet the following conditions. *Educational institutions:* No charge is passed on to students, other than the direct cost of reproducing pages. *Nonprofit groups:* No fee is charged for the seminar or other meeting where this will be distributed, other than to cover direct expenses of the seminar. *Distribution:* This license is meant to cover distribution of printed copies of parts of this work. It should not be reproduced in another publication or posted to a Web site. Those needing to provide Web access can post links directly to the project on the Reporters Committee's site: <http://www.rcfp.org/privilege>

All other uses. Those wishing to reproduce materials from this work should contact the Reporters Committee to negotiate a reprint fee based on the amount of information and number of copies distributed.

Reprints. This document will be available in various printed forms soon. Please check back for updates, or contact the Reporters Committee for more information.

The Reporter's Privilege Compendium: An Introduction

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

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

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

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

Above the law?

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

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

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

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

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

KENTUCKY

Prepared by:

Jon L. Fleischaker
 Jeremy S. Rogers
 DINSMORE & SHOHL LLP
 1400 PNC Plaza
 500 W. Jefferson Street
 Louisville, Kentucky 40202
 (502) 540-2300
 jon.fleischaker@dinslaw.com
 jeremy.rogers@dinslaw.com

I. Introduction: History & Background.....	2	V. Procedures for issuing and contesting subpoenas.....	4
II. Authority for and source of the right.....	2	A. What subpoena server must do	4
A. Shield law statute	2	B. How to Quash	4
B. State constitutional provision	2	VI. Substantive law on contesting subpoenas	6
C. Federal constitutional provision	2	A. Burden, standard of proof	6
D. Other sources.....	2	B. Elements	6
III. Scope of protection	2	C. Waiver or limits to testimony.....	7
A. Generally	2	VII. What constitutes compliance?.....	8
B. Absolute or qualified privilege.....	2	A. Newspaper articles.....	8
C. Type of case	3	B. Broadcast materials	8
D. Information and/or identity of source.....	3	C. Testimony vs. affidavits.....	8
E. Confidential and/or non-confidential information	3	D. Non-compliance remedies	8
F. Published and/or non-published material.....	3	VIII. Appealing	8
G. Reporter's personal observations	3	A. Timing	8
H. Media as a party	3	B. Procedure	9
I. Defamation actions	3	IX. Other issues	10
IV. Who is covered	3	A. Newsroom searches	10
A. Statutory and case law definitions.....	3	B. Separation orders	10
B. Whose privilege is it?	4	C. Third-party subpoenas	10
		D. The source's rights and interests	10

I. Introduction: History & Background

There have been few developments in Kentucky with regard to reporter's privilege since *Branzburg v. Hayes*, which originated in Kentucky, was decided by the United States Supreme Court in 1972. Kentucky has had a shield statute since the 1930s. The statute provides limited protection, however, shielding reporters only from being forced to disclose the identities of their confidential sources. The statute has never faced constitutional challenge and is limited in this aspect only by the state court decision in *Branzburg*. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971), *aff'd sub nom.* 408 U.S. 665 (1972).

II. Authority for and source of the right

A. Shield law statute

The statute reads:

NEWSPAPER, RADIO OR TELEVISION BROADCASTING STATION PERSONNEL NEED NOT DISCLOSE SOURCE OF INFORMATION. No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected. Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001).

1.Legislative History. The statute was originally enacted in 1936. It was amended in 1952 to add radio and television stations to the list of protected media.

B. State constitutional provision

The Kentucky constitution has no express shield law provision, nor has one been read into it by state courts.

C. Federal constitutional provision

In *Lexington Herald-Leader v. Beard*, 690 S.W.2d 374, 11 Media L. Rep. 1376 (Ky. 1984), the Kentucky Supreme Court followed the lead of *Branzburg*, 408 U.S. 665 (1972), and refused to recognize a reporter's privilege grounded in the First Amendment. *See also Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971).

D. Other sources

There are no other sources of reporter's privilege in Kentucky.

III. Scope of protection

A. Generally

The protection afforded under the reporter's privilege is fairly narrow in Kentucky despite its shield statute. Although the statute provides absolute protection, it does so only with regard to sources' identities. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971), *aff'd sub nom.* 408 U.S. 665 (1972). The statute generally does not protect reporters from being forced to disclose other types of information, including unpublished information. Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001). On the other hand, there is no reported case which strictly interprets the statute or limits its protection.

B. Absolute or qualified privilege

The protection provided for sources' identities is absolute. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971), *aff'd sub nom.* 408 U.S. 665 (1972). Reporters, however, may be required to divulge other information unless that in-

formation would identify a source. Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001). However, there is no reported decision that so limits the protection of the statute.

C. Type of case

The nature of the privilege, at least under the statute, is the same in both the criminal and civil contexts. KRS. 421.100 is quite explicit in providing that protection is afforded "in any legal proceeding." Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001); *see Maddox v. Williams*, 23 Media L. Rptr. 2118 (Ky. Cir. Ct. 1995).

D. Information and/or identity of source

The privilege specifically protects the identity of a source as well as information that may implicitly identify a source. *See Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky. 1971), *aff'd sub nom.* 408 U.S. 665 (1972).

E. Confidential and/or non-confidential information

Neither the privilege statute nor Kentucky case law has squarely addressed the issue of whether the privilege protects confidential information differently than non-confidential information.

F. Published and/or non-published material

The Kentucky statute protects only the sources of published information. Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001); *Lexington Herald-Leader v. Beard*, 690 S.W. 2d 374, 11 Media L. Rep. 1376 (Ky. 1984). This issue, however, to our knowledge, has not been litigated in Kentucky under the statute.

G. Reporter's personal observations

The issue of whether reporters who are eyewitnesses to the matter on which they reported can claim the privilege was squarely addressed in *Pound*. There, Branzburg, a newspaper reporter for the Louisville Courier Journal, witnessed two men making hashish. Branzburg had been allowed to observe the men pursuant to an agreement not to disclose their identities. He was summoned to appear before a grand jury and was ordered to disclose the identity of the two men. The court held that KRS 421.100 did not extend to confer upon Branzburg a privilege from disclosing the identity of the perpetrators, reasoning that the source of the information was Branzburg's personal observation and not the identity of the two men. *Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky. 1971), *aff'd sub nom.* 408 U.S. 665 (1972).

H. Media as a party

Whether the media is a party to the lawsuit makes no difference with regard to the privilege.

I. Defamation actions

Libel cases are treated no differently than other cases, both with respect to penalties for noncompliance and applicability of the privilege. *See Lexington Herald-Leader v. Beard*, 690 S.W. 2d 374, 11 Media L. Rep. 1376 (Ky. 1984).

IV. Who is covered

Neither the shield statute nor Kentucky case law define relevant terms such as "news" and "reporter".

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Neither the shield statute nor Kentucky case law define "reporter". KRS 421.100 does, however, limit covered persons to those engaged or employed by or connected with a newspaper, television or radio broadcasting station. Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001).

b. Editor

Neither the shield statute nor Kentucky case law define an "editor". However, courts in Kentucky have not tried to limit the privilege to reporters. The privilege has been accepted when asserted by an editor, reporter or publisher.

c. News

Neither the shield statute nor Kentucky case law define "news".

d. Photo journalist

Neither the shield statute nor Kentucky case law define "photojournalist".

e. News organization / medium

KRS 421.100 protects only those persons employed or engaged by or connected with a newspaper, radio or television station. Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001).

2. Others, including non-traditional news gatherers

No reported decisions.

B. Whose privilege is it?

Although there have been no reported decisions on the issue, only members of the media have asserted the privilege. *Maddox v. Williams*, 23 Media L. Rptr. 2118 (Ky. Cir. Ct. 1995); *Lexington Herald-Leader v. Beard*, 690 S.W. 2d 374, 11 Media L. Rep. 1376 (Ky. 1984); *Branzburg v. POUND*, 461 S.W.2d 345, 347 (Ky. 1971), *aff'd sub nom.* 408 U.S. 665 (1972); *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Kentucky has adopted no special rules, including time requirements, for serving a subpoena on a member of the press. Press subpoenas are treated the same as would be any other subpoena. Ky. R. Civ. P. 45.01, 45.02; Ky. R. Crim. P. 7.02.

2. Deposit of security

Kentucky does not require that the subpoenaing party deposit security to procure the testimony or materials of the reporter. Ky. R. Civ. P. 45.01, 45.02; Ky. R. Crim. P. 7.02.

3. Filing of affidavit

Kentucky does not require that the subpoenaing party make any sworn statement in order to procure the reporter's testimony or materials. Ky. R. Civ. P. 45.01, 45.02; Ky. R. Crim. P. 7.02.

4. Judicial approval

Kentucky does not require that a judge or magistrate approve a subpoena to the press before service. Ky. R. Civ. P. 45.01; Ky. R. Crim. P. 7.02.

5. Service of police or other administrative subpoenas

Kentucky has no special rules regarding the use and service of other administrative subpoenas. Ky. R. Civ. P. 45; Ky. R. Crim. P. 7.02.

B. How to Quash

1. Contact other party first

Kentucky does not require that the subpoenaing party be contacted prior to moving to quash. Ky. R. Civ. P. 45; Ky. R. Crim. P. 7.02. Doing so, however, is recommended and has proven to be a successful means of avoiding subpoenas.

2. Filing an objection or a notice of intent

Kentucky does not require that the party seeking to quash the subpoena file a notice of intent to do so before filing the motion to quash itself. Ky. R. Civ. P. 45; Ky. R. Crim. P. 7.02.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the same court as the court that is hearing the case at issue. *See* Ky. R. Civ. P. 45; Ky. R. Crim. P. 7.02; *see also* Fed. R. Civ. P. 45(c)(3)(a).

b. Motion to compel

The media party should not wait for the subpoenaing party to file a motion to compel before filing a motion to quash.

c. Timing

Kentucky Rules of Civil and Criminal Procedure provide only that a motion to quash must be made "promptly and in any event at or before the time specified in the subpoena for compliance therewith." Ky. R. Civ. P. 45.02; Ky. R. Crim. P. 7.02(3).

d. Language

There is no particular stock language or preferred text that should be included in a motion to quash. *But see* 12 Leslie W. Abramson, Kentucky Practice §74.7 (2006).

e. Additional material

No additional materials need be attached to a motion to quash when the issue of burdensomeness is raised.

4. In camera review

a. Necessity

Kentucky law does not require an in camera review or interview with the reporter prior to deciding on a motion to quash.

b. Consequences of consent

If a reporter consents to in camera review, a stay pending appeal is not automatic in the event of an adverse ruling. In fact, there is no right of appeal. Orders granting subpoenas have been held to be "purely interlocutory" and therefore, not appealable. Parties who have suffered an adverse judgment must proceed through a writ of prohibition. *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1984) (citing *Claussner Hosiery Co. v. City of Paducah*, 120 S.W.2d 1039 (Ky. 1938)).

c. Consequences of refusing

If the reporter does not consent to in camera review, she faces losing her motion to quash and being ordered to produce the documents at issue.

5. Briefing schedule

The briefing schedule for a motion to quash is the same as any other motion. After a motion to quash is filed, the opposing party may file his or her response within 10 days after he or she was served with the motion or within a timeframe provided by the court. Ky. R. Civ. P. 76.34; Ky. R. Crim. P. 1.10.

6. Amicus briefs

Amicus briefs are rarely filed at the trial court level and there is no procedure for doing so. At the appellate level, they may be filed at the discretion of the court. They must be timely served, meaning they must be filed at the same time the party for whom they support files its brief. The Kentucky Press Association files amicus briefs, but does so infrequently.

Kentucky Press Association
Kentucky Press Service
Kentucky Journalism Foundation
101 Consumer Lane
Frankfort, Kentucky 40601
(502) 223-8821
Administration Fax:
(502) 226-3867

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Once a member of the media demonstrates that he or she is a covered person under KRS 421.100, it appears, at least under *Maddox*, that the burden shifts to the subpoenaing party to prove both (1) that the information sought goes "to the heart of the matter" (2) that the information sought is not available from other sources. *Maddox v. Williams*, 23 Media L. Rptr. 2118 (Ky. Cir. Ct. 1995) (citing *Zerilli v. Smith*, 656 F.2d 705 (D.C.Cir., 1981)).

B. Elements

For a member of the news media to establish a privilege under the KRS 421.100, he or she must demonstrate that the information containing the source: (1) is sought for disclosure (2) at a legal proceeding or trial before any court, grand or petit jury, tribunal, the General Assembly or any committee thereof, any city or county legislative body or any committee thereof, or elsewhere (3) was procured by him or her and (4) has been published in a newspaper or by a radio or television station by which he or she is employed or engaged or with which he or she is connected in some way. Ky. Rev. Stat. Ann. §421.100 (Baldwin 2001).

1. Relevance of material to case at bar

The material sought must be central to the case. *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1984); *Maddox v. Williams*, 23 Media L. Rptr. 2118 (Ky. Cir. Ct. 1995) (granting reporters' motions to quash on the ground that the information sought, i.e. when, where and to whom a source disclosed information was irrelevant to the case).

2. Material unavailable from other sources

The material must be unavailable from other sources. *Maddox v. Williams*, 23 Media L. Rptr. 2118 (Ky. Cir. Ct. 1995) (holding that where information was available from other sources, including nonpress sources such as the defendant himself and a large medical library, the subpoenaing party failed to meet the second prong of the *Zerilli* test, that the information be unavailable from alternative sources).

a. How exhaustive must search be?

Although Kentucky courts have not directly addressed this issue, *Maddox* adopts the test articulated in *Zerilli* for determining whether disclosure is required. That test requires a subpoenaing party to exhaust "every reasonable alternative source of information." Although the *Zerilli* court terms the obligation to discover alternative sources "very substantial," the court recognizes that there may be limits to this requirement. For example, it may be reasonable to take as many as 60 depositions, but unreasonable to depose all of United Mine Workers of America's employees. See *Maddox v. Williams*, 23 Media L. Rptr. 2118 (Ky. Cir. Ct. 1995) (citing *Zerilli v. Smith*, 656 F.2d 705 (D.C.Cir., 1981)).

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

No reported decisions.

c. Source is an eyewitness to a crime

In *Branzburg v. Pound*, the reporter himself was an eyewitness to a crime. He was therefore deemed to be the source. Because Kentucky's shield law prevents only disclosure of the source, the information obtained by the

reporter (the identity of the men making hashish) was not held to be unavailable. The court reasoned that the men's identities were not the source of the information. *Branzburg v. POUND*, 461 S.W.2d 345, 347 (Ky. 1971), *aff'd sub nom.* 408 U.S. 665 (1972). There is no reason to believe that the outcome would be any different if a third party was the eyewitness source.

3. Balancing of interests

Although the privilege statute does not require a judicial balancing of interests in determining whether to quash a subpoena, the Kentucky Supreme Court has recognized that balancing a "litigant's right to disclosure with due regard for the importance of freedom of the press" is an important part of the overall equation. *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1984).

4. Subpoena not overbroad or unduly burdensome

Although there is no case law on point, an overly broad or burdensome subpoena to the press would be dealt with as any other overly broad or burdensome subpoena would. Rule 45.02 provides that a subpoena may be quashed or modified if it is "unreasonable and oppressive". Ky. R. Civ. P. 45.02. Ky. R. Crim. P. 7.02(3).

5. Threat to human life

No reported decisions.

6. Material is not cumulative

No reported decisions.

7. Civil/criminal rules of procedure

Subpoenas that are oppressive or unduly burdensome may be quashed or modified. Ky. R. Civ. P. 45.02; Ky. R. Crim. P. 7.03(3).

8. Other elements

No other elements are required to be met before the privilege can be overcome.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Lexington Herald Leader suggests that the privilege against disclosure of a confidential source may be waivable by publication. *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374 (Ky. 1984).

2. Elements of waiver

a. Disclosure of confidential source's name

Although there are no reported decisions on the issue of whether disclosure of a confidential source's name constitutes waiver of the privilege, at least with regard to attorney/client privilege, Kentucky Rules of Evidence make clear that disclosure of a confidential source's name to one's lawyer does not constitute waiver of the privilege. Ky. R. Evid. 503(b). *Cf.* Ky. R. Evid. 509 (excluding from the rule of waiver by voluntary disclosure disclosures that are themselves privileged, as defined by the Rules of Evidence. These include lawyer-client, husband-wife, religious, and counselor/therapist-client privilege).

b. Disclosure of non-confidential source's name

It is uncertain whether the statute protects non-confidential sources' names. However, the issue of waiver would be treated the same as the issue of waiver by disclosure of the name of a confidential source.

c. Partial disclosure of information

Although there are no reported decisions on point, it is common for a journalist to testify as to the accuracy of information without there being a claim that the privilege has been waived. *Cf.* Ky. R. Evid. 509 (waiving privileges conferred in the context the Rules of Evidence only for *significant* disclosures concerning the privileged matter).

d. Other elements

No reported decisions.

3. Agreement to partially testify act as waiver?

There are no reported decisions on point. As a practical matter, however, it is common for a journalist to testify as to the accuracy of information without there being a claim that the privilege has been waived.

VII. What constitutes compliance?

A. Newspaper articles

Reporters are not required to testify that a particular article actually appeared in the newspaper. Newspapers, books and periodicals are self-authenticating. Ky. R. Evid. 902(6).

B. Broadcast materials

Although there are no reported cases on the issue, Kentucky cases suggest, at least in the context of recorded material, that the person responsible for the factual matter contained within such material is required to appear to authenticate it. *Brock v. Commonwealth*, 947 S.W.2d 24 (Ky. 1997).

C. Testimony vs. affidavits

When done pursuant to an agreement between the parties, a sworn affidavit can take the place of in-court testimony, particularly for purposes of authentication. *See* Ky. R. Evid. 901 (b)(1).

D. Non-compliance remedies

The normal remedies for failure to comply with a valid court order apply equally to reporters. A reporter who does not comply with a valid, upheld subpoena in a civil matter is subject to contempt of court in which the action is pending. Ky. R. Civ. P. 45.06. In a criminal proceeding, a reporter who, without adequate excuse, fails to obey a valid subpoena is subject to even harsher sanctions. A judge may hold the reporter in contempt or issue a bench warrant for their arrest when immediate attendance is compelled. Ky. R. Crim. P. 7.02(7).

1. Civil contempt

a. Fines

Fines for contempt are not capped. Ky. Rev. Stat. Ann. §432.260 (Baldwin 2001) (repealed 1976). There are no recent examples of fines being levied against reporters who have refused to comply with subpoenas.

b. Jail

There are no statutorily imposed limits on jail sentences for contempt. Ky. Rev. Stat. Ann. §432.260 (Baldwin 2001) (repealed 1976). However, Kentucky courts have held that incarceration for contempt is extraordinary and subject to limitation. *Lewis v. Lewis*, 875 S.W.2d 862 (Ky.1993). There are no examples of reporters going to jail rather than disclosing confidential sources.

2. Criminal contempt

No reported decisions.

3. Other remedies

No reported decisions.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Denials of motions to quash are interlocutory and are not immediately appealable in Kentucky. Parties who have suffered an adverse judgment must proceed through a writ of prohibition. *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1984) (citing *Claussner Hosiery Co. v. City of Paducah*, 120 S.W.2d 1039 (Ky. 1938)).

2. Expedited appeals

There are no special considerations that affect news media subpoenas with regard to expedited appeals. An attorney seeking an expedited appeal would need to know the rules for requesting a writ of prohibition.

B. Procedure

1. To whom is the appeal made?

There are four levels of courts in Kentucky. The district courts comprise the first level, the circuit courts the second, the courts of appeals the third and the Supreme Court the fourth. Appeals proceed from one level to the next, so that generally the next highest court accepts appeals from the court immediately beneath. Ky. R. Civ. P. 73.01. Rule 74.02, however, provides that if an appeal is from a circuit court, any party may file a motion for transfer to the Supreme Court. Such motion, however, will generally be granted only upon a showing that the case is "of great and immediate public importance." Ky. R. Civ. P. 74.02. This rule appears to apply only to appeals, not applications for a writ of prohibition.

2. Stays pending appeal

After a notice of appeal or a motion for discretionary review has been filed, a party may move for intermediate relief in the appellate court. The party must show that if such relief is not granted, he or she will suffer immediate and irreparable injury before a hearing is had upon the motion. Ky. R. Civ. P. 76.33. When the appeal is to the United States Supreme Court, Rule 76.44 provides that such filing does not affect the finality of an opinion or final order. A stay may be granted, however, as may reasonably be required to enable the writ to be obtained. The stay, however, cannot exceed 90 days. Ky. R. Civ. P. 76.44. The fact that the appeal may address an issue which involves a violation of a constitutional right does not affect what standard is applied or whether a stay will be granted. Ky. R. Civ. P. 76.33, 76.44.

3. Nature of appeal

A party which wishes to appeal a denial of a motion to quash must proceed through a writ of prohibition. Orders denying such motions are interlocutory and cannot be immediately appealed. *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1984). The reporter against whom the subpoena is granted can have the decision subjected to appellate review by disobeying the order and being held in contempt. If he or she is held in criminal contempt, the appeal would no longer be regarded as interlocutory and thus could be immediately appealed. *Nye v. U.S.*, 313 U.S. 33, 85 (1941). If, however, the contempt is civil in nature, the order is considered to be part of the ongoing civil case and is thus interlocutory and not immediately appealable.

4. Standard of review

Issues with regard to a lower court's treatment of a subpoena are reviewed for abuse of discretion. A lower court's decision to uphold or quash a subpoena should not be disturbed unless it is arbitrary. *International Union of Operating Eng'rs v. Bryan*, 255 S.W.2d 471 (Ky. 1953). The abuse of discretion standard is applied whether or not the litigant presents questions affecting constitutional rights. See *McLaughlin v. Service Employees Union, AFL-CIO, Local 280*, 880 F.2d 170 (9th Cir. 1989).

5. Addressing mootness questions

Kentucky courts have not addressed mootness in the context of subpoenas issued to reporters which expired upon dismissal of the grand jury for which they were issued. The Kentucky Supreme Court has, however, discussed the issue in a case involving subpoenas issued to a church which sought disclosure of church records containing privileged communications between parishioners and one of its priests. In *Commonwealth v. Hughes*, a Roman Catholic Diocese obtained a writ of prohibition from the court of appeals that prevented the respondent from enforcing its order that certain documents from the church archives be submitted to a grand jury. *Hughes*, 873 S.W.2d 828, 829 (Ky. 1994). The Commonwealth of Kentucky appealed. The Court held that the controversy was rendered

moot by dismissal of the grand jury which issued the subpoena for the protected documents. *Id.* Additionally, the Court found that the facts presented did not provide grounds for reviewing the case under the exception to the mootness doctrine for matters that are capable of repetition but which evade review. *Id.* at 830-831. The Court found that the action failed both prongs of the test articulated in *In re Commerce Oil Co.* 847 F.2d 291, 293 (6th Cir.1988), saying:

With respect to the first prong [whether the challenged action is "too short in duration to be fully litigated prior to its cessation or expiration,"] ... [t]here is no reason to assume that a different grand jury seeking to discover the same material would be formally discharged before resolution of the privilege issue could be obtained. Even if one were to argue that a grand jury empanelled for a one-month time period involves a process "too short in duration" for this question to be fully litigated, there is nothing to prevent empanelment of a special grand jury of indefinite duration, with the ability, therefore, to litigate this discovery matter to whatever extent necessary.

The above observations also resolve the second prong of the analysis. The very fact that makes this controversy moot (i.e., that the Grand Jury which issued the subpoena has been discharged) is the fact that precludes a reasonable expectation that the "same complaining party" will again be subject to denial of the discovery materials sought. If this scenario is repeated, it will be because a different grand jury has been impaneled and decides to re-open the presently concluded investigation.

Id. at 831.

6. Relief

In terms of relief, an appellate court is empowered to reverse the lower court's decision, order a rehearing or dissolve the contempt.

IX. Other issues

A. Newsroom searches

The Privacy Protection Act is not used in this state to prevent newsroom searches. There are no similar provisions under state law.

However, we are aware of no instances of newsroom searches in Kentucky.

B. Separation orders

There is no protection either through statute or case law that limits the scope of separation orders issued against reporters who are both trying to cover a trial and who are on a witness list. Reporters, however, have had some success gaining protection by arguing that the separation order, acting in conjunction with a subpoena, effectively violates his or her right to cover the trial.

C. Third-party subpoenas

There have been no instances in Kentucky of subpoenas being issued to third parties in attempts to discover a reporter's source.

D. The source's rights and interests

There have been no instances in Kentucky of sources being allowed to intervene anonymously to halt disclosure of their identities. Nor have there been instances where sources have been allowed to sue over disclosure after the fact.