REPORTER'S PRIVILEGE: LOUISIANA

The Reporters Committee for Freedom of the Press

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

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

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The Reporter's Privilege Compendium: An Introduction

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

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

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

LOUISIANA

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I. Introduction: History & Background

As a matter of state law, the reporter's privilege in Louisiana is quite strong. The reporter's shield statute applies to unpublished information as well as to confidential sources. La. R.S. 45:1451 *et seq*. In addition, the State Supreme Court has held that a reporter's privilege applies to unpublished information as a matter of state and federal constitutional law. *See In re Grand Jury Proceedings (Ronald Ridenhour)*, 520 So. 2d 372 (La. 1988). To our knowledge, reporters have not been jailed or fined for invoking the reporter's privilege in Louisiana.

II. Authority for and source of the right

A. Shield law statute

Louisiana has enacted two shield laws. The first statute dates from 1964 and protects reporters from being forced to disclose their sources. La. R.S. 45:1451-1459. "No reporter shall be compelled to disclose in any administrative, judicial or legislative proceeding or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter." La. R.S. 45:1452. Reporter is defined broadly as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news media." La. R.S. 45:1451.

Once the reporter claims the privilege, the party seeking the information may seek a judicial order to revoke the privilege by setting forth in writing why disclosure is essential to the "protection of the public interest." After a hearing with both the party seeking the order and the reporter, the court may only grant such an order if "the disclosure is essential to the public interest." La. R.S. 45:1453.

The second statute, enacted in 1989, provides protections for reporters refusing to disclose unpublished information. La. R.S. 45:1459. The party seeking the information must make a "clear and specific showing" that the news is (1) highly material and relevant; (2) critical or necessary to the maintenance of the party's claim, defense or proof of an issue material thereto; and (3) not obtainable from any alternative source. La. R.S. 45:1459.

No reported Louisiana state appellate case has ordered a reporter to disclose information under the state shield laws. *See In re Grand Jury Proceedings (Ronald Ridenhour)*, 520 So. 2d 372 (La. 1988); *In re Burns*, 484 So.2d 658 (La. 1986); *Becnel v. Lucia*, 420 So.2d 1172 (La. App. 5th Cir. 1982).

The intent of the shield law is to "encourage divulgence of news by informants who might otherwise hesitate to disclose matters of public import for fear of unfavorable publicity or the possibility of retribution." *Dumez v. Houma Municipal Fire and Police Civil Service Bd.*, 341 So.2d 1206, 1208 (La. App. 1st Cir. 1976).

The confidential source shield law, La. R.S. 45:1451 - 1454, was created by Act 211 of 1964; the sub-poena rules, La. R.S. 45:1455 - 1458 were created by Act 803 of 1987; the non-confidential privilege, La. R.S. 45:1459, was created by Act 705 of 1989.

The Louisiana Press Association was a major proponent of the state shield law.

B. State constitutional provision

The Louisiana constitutional reporter's privilege is derived from Article 1, Section 7 of the Louisiana Constitution. This Section, entitled Freedom of Expression, is closely related to the First Amendment to the U.S. Constitution. Section 7 provides: "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom." La. Const. art. 1, § 7.

In *In re Grand Jury Proceedings (Ronald Ridenhour)*, the Louisiana Supreme Court found the state and federal Constitutional guarantees to be equivalent. "For purposes of this issue [reporter's privilege], we will consider the two constitutions together. The information is either protected by both or not protected by either." 520 So. 2d at

374 n.10. *Ridenhour* found that the state and federal constitutional reporter's privilege applied to unpublished information prior to the enactment of the statutory reporter's privilege for unpublished information.

C. Federal constitutional provision

The reporter's privilege originates in the First Amendment to the U.S. Constitution which was made applicable to the states by the Fourteenth Amendment. It provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. Amend. I.

In *In re Grand Jury Proceedings (Ronald Ridenhour)*, the Louisiana Supreme Court found the state and federal Constitutional guarantees to be equivalent. "For purposes of this issue [reporter's privilege], we will consider the two constitutions together. The information is either protected by both or not protected by either." 520 So. 2d at 374 n.10. *Ridenhour* found that the state and federal constitutional reporter's privilege applied to unpublished information prior to the enactment of the statutory reporter's privilege for unpublished information.

D. Other sources

There are no other known sources of law supporting a reporter's privilege in Louisiana.

III. Scope of protection

A. Generally

Louisiana's shield law provides for a broad, yet qualified, privilege for reporters and the news media. The privilege protects not only the name of the confidential source, but any disclosure of information, including the place of employment, that would assist in identifying the source. *Burns*, 484 So.2d at 659. Furthermore, the reporter's privilege is not limited to sources and informants who give information that is published. The privilege applies to sources of nonpublished information as well. *Dumez*, 341 So.2d at 1208. In addition, Section 1459 of the Louisiana shield law outlines a qualified protection for unpublished non-confidential news. La. R.S. 45:1459.

Thus, as a matter of state statutory and constitutional law, Louisiana's reporter's privilege is stronger than in many states.

The federal Fifth Circuit has interpreted the federal constitutional reporter's privilege more narrowly. At least in civil cases involving a confidential source, the Fifth Circuit applies a three-part test. *See Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983). The Fifth Circuit has refused, however, to extend the reporter's privilege to non-confidential sources in criminal cases. *See U.S. v. Smith*, 135 F. 3d 963 (5th Cir. 1998).

B. Absolute or qualified privilege

The reporter's privilege as recognized by the Louisiana federal and state courts is not absolute. *See, e.g., Miller*, 621 F.2d at 725; *Selcraig*, 705 F.2d at 792. According to the federal courts, the privilege at least as to confidential sources in civil cases may be overcome if the party seeking disclosure shows that the information is relevant, not available by alternative means and that the party has a compelling interest in the information. *Miller*, 621 F.2d at 726.

The Louisiana shield law defines a broader reporter's privilege, but one that is still conditional or qualified. *See* La. R.S. 45:1452, 45:1459. The party seeking the information must make a "clear and specific showing" that the news is (1) highly material and relevant; (2) critical or necessary to the maintenance of the party's claim, defense or proof of an issue material thereto; and (3) not obtainable from any alternative source. La. R.S. 45:1459. When applying the constitutional standard, state courts must balance the "public interest in having all relevant testimony with the possible 'chilling effect' the disclosure will have on the freedom of the press and the ability to gather the news" when determining whether to require disclosure. *Ridenhour*, 520 So.2d at 376.

When confidential source information is requested, the court may grant an order requiring disclosure only if "the disclosure is essential to the public interest." La. R.S. 45:1453. While not absolute, this standard is stronger than the qualified privilege for unpublished information generally.

C. Type of case

1. Civil

For federal civil cases, the reporter's privilege discussed in *Miller* applies. This privilege is not absolute and may be overcome if the party seeking disclosure proves that the information is relevant, is not available by alternative means, and that the party has a compelling interest in the information. *Miller*, 621 F.2d at 726; *see also Selcraig*, 705 F.2d at 792. The Fifth Circuit has not addressed whether reporters have a privilege not to reveal non-confidential unpublished information in civil proceedings. The Fifth Circuit has recognized that because of the public's lesser interest in the "outcome of civil litigation . . . the interests of the press may weigh far more heavily in favor of some sort of privilege" in a civil case. *Smith*, 135 F.3d at 972.

Under Louisiana state law, the provisions of the shield laws apply to any "administrative, judicial or legislative" proceeding in Louisiana, civil or criminal. La. R.S. 45:1452.

2. Criminal

In *Smith*, the Fifth Circuit held that the reporter's privilege, at least with regards to non-confidential information, is inapplicable in criminal cases. *Id.* at 972. The court distinguished *Miller* because of the public's greater interest in criminal proceedings and the non-confidential nature of the subpoenaed interview. *Id.* at 972.

Applying federal and state constitutional law, the Louisiana Supreme Court created an exemption from the reporter's privilege if the reporter witnesses criminal activity or has physical evidence of a crime. *Ridenhour*, 520 So.2d at 376.

3. Grand jury

Under the Louisiana shield law, a grand jury may not serve a subpoena upon a reporter unless the prosecutor has certified in writing that the information sought by the subpoena is "highly material and relevant; bears directly on the guilt or innocence of the accused; and is not obtainable from any alternative source." La. R.S. 45:1459(D)(1). A reporter may assert a qualified privilege and refuse to answer questions before a grand jury unless the reporter has witnessed criminal activity or has physical evidence of a crime. *Ridenhour*, 520 So.2d at 376. The party seeking information must then show that disclosure is necessary to the protection of the public interest and that the subpoena was issued in good faith and not for purposes of harassment. Once such a showing has been made, the trial judge should balance the public interest in having all relevant testimony with the possible chilling effect that disclosure will have on freedom of press and the ability to gather news. *Id.*

D. Information and/or identity of source

The Louisiana statutory reporter's privilege for sources includes not only the name of the source, but "any disclosure of information, such as place of employment, that would tend to identify him." *Burns*, 484 So.2d at 659.

E. Confidential and/or non-confidential information

In *dicta*, the Fifth Circuit explained that confidentiality may be a requirement for the reporter's privilege. *See Smith*, 135 F. 3d at 972. In *Smith*, the court refused to grant a privilege not to disclose non-confidential information in a criminal case. The court cited the source's lack of confidentiality as one ground on which to distinguish *Miller*. *Id*. The Fifth Circuit has not yet addressed whether the reporter's privilege applies to non-confidential information in a civil proceeding.

The Louisiana shield law provides a qualified privilege for non-confidential news. La. R.S. 45:1459.

F. Published and/or non-published material

The Fifth Circuit refused to recognize a non-confidential work product privilege for untelevised interview footage in *U.S. v. Smith*, a criminal case. 135 F.3d at 969.

The Louisiana First Circuit Court of Appeals has held that the shield law is not limited to published information. "While the statute limits the privilege to the identity of informants and the source of information, it does not restrict the privilege to identity of informants and sources of information published." *Dumez*, 341 So.2d at 1208. Furthermore, Section 1459, added to the statute in 1989, explicitly provides for a qualified privilege for "news which was not published or broadcast but was obtained or prepared by such person in the course of gathering or obtaining news." La. R.S. 45:1459(B)(1).

G. Reporter's personal observations

The Louisiana Supreme Court carved out an exception to the reporter's privilege when the reporter has witnessed any criminal activity or has physical evidence of a crime. *Ridenhour*, 520 So.2d at 376. If a reporter is a witness to a crime, he is unable to move to quash the subpoena seeking disclosure and may not refuse to answer questions. *Id.*

H. Media as a party

The Fifth Circuit refused to recognize a distinction between a non-party media witness and a media party "invoking the qualified privilege to protect himself or his publication against a libel suit." *Selcraig*, 705 F.2d at 798. Even though the reporter was not a party to the suit, the fact that he was a witness to a material fact made the *Miller* test for media parties applicable. *Id.* at 799.

No reported state court reporter's privilege decision in Louisiana has made a distinction based on the media being a party. The shield law protecting unpublished non-confidential information states that the privilege applies in "any civil or criminal proceeding." La. R.S. 45:1459(B)(1).

I. Defamation actions

Miller held that the reporter's privilege is not absolute and may have to yield in the context of a libel case. The court also found, however, a greater interest in protecting the confidentiality of journalists' sources in libel cases than in a grand jury context. *Miller*, 621 F.2d at 725. To overcome the privilege in a libel case, the party seeking disclosure of a confidential informant's identity must establish by "substantial evidence that the statement attributed to the informant was published and is both factually untrue and defamatory; that reasonable efforts have been made to learn the identity of the reporter's informant by alternative means; that no other reasonable means is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case." *Selcraig*, 705 F.2d at 792.

According to the Louisiana shield law, if the reporter's privilege is claimed in a defamation suit, the burden of proof remains with the reporter or news media to assert and sustain a legal defense of good faith. La. R.S. 45:1454. The defense of "good faith" arises in the context of the assertion of a "qualified privilege" in cases in which the defendant has an interest or duty in communicating with another person with a corresponding interest or duty. *Kennedy v. Sheriff of East Baton Rouge*, 935 So.2d 669 681 (La. 2006). In such cases, the plaintiff bears the burden of proof to establish abuse of the qualified privilege, *i.e.*, that the allegedly defamatory statements "were made with reckless disregard for whether they were true or false. *Id.* at 683, 688. Thus, La. R.S. 45:1454, which states that the burden of proof "shall be on the reporter or news media," appears to clash with the latest state Supreme Court decision concerning the good faith defense.

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Louisiana's shield law defines reporter broadly: "Any person regularly engaged in the business of collecting, writing or editing news for publication through a news media," including all "persons who were previously connected with any news media including any newspaper or other periodical issued at regular intervals and having a

paid general circulation; press associations; wire service; radio; television; and persons or corporations engaged in the making of news reels or other motion picture news for public showing." La. R.S. 45:1451.

b. Editor

Louisiana courts have broadly interpreted those who are included under the rubric of the state's statutory reporter's privilege. Since a newspaper is "engaged in the business of collecting, writing and editing news for public dissemination" and the owner-publisher is engaged in the same functions, the owner-publisher, or anyone in a similar position, is considered a reporter within the meaning of the statute. *Becnel*, 420 So.2d at 1175; *see also* La. R.S. 45:1451.

c. News

The Louisiana shield law defines news as "any written, oral, pictorial, photographic, electronic, or other information or communication, whether or not recorded, concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare." La. R.S. 45:1459(A).

d. Photo journalist

Neither the state nor federal courts in Louisiana have addressed the issue of a reporter's privilege as it relates to photo journalists. However, the shield law's definition of "reporter" includes "any person regularly engaged in the business of collecting . . . for publication through a news media," and the definition of "news media" includes television as well as persons "engaged in the making of news reels or other motion picture news." La. R.S. 45:1451. In addition, the definition of "news" includes "photographic" information. La. R.S. 45:1459(A). Moreover, photographers are expressly included within the statutory protection given to reporters and news media in their response to subpoenas for unpublished information. La. R.S. 45:1459(B)(1).

e. News organization / medium

For the purposes of the Louisiana shield law relating to sources, the statute defines news media as "any newspaper or other periodical issued at regular intervals and having a paid general circulation; press associations; wire service; radio; television; and persons or corporations engaged in the making of news reels or other motion picture news for public showing." La. R.S. 45:1451. "Reporter" is defined as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news media." *Id*. An argument can be made that a news organization is a "reporter" because it is a "person regularly engaged in the business of collecting, writing or editing news. . . ."

While no Louisiana state court has addressed directly the reporter's privilege as it relates to a news organization, it appears that the privilege may be invoked by a newspaper or other news medium. *See Becnel*, 420 So.2d at 1175 ("The statutes define reporter as '*any person* regularly engaged in the *business* of collecting, writing and editing news for publication through a news media.' . . . Without a doubt, a newspaper is engaged in the business of collecting, writing and editing news for public dissemination.")(emphasis in original).

2. Others, including non-traditional news gatherers

A Louisiana Court of Appeal relied on *Ridenhour*'s interpretation of the state's shield law to grant a qualified reporter's testimonial privilege to an investigative nonfiction book author. *Louisiana v. Fontanille*, 1994 La. App. LEXIS 191, *7 (La. App. 5th Cir. 1994).

B. Whose privilege is it?

According to Louisiana law, the reporter's privilege belongs to the reporter, news organization, photographer, custodian of records, or any other media representative upon whom the subpoena seeking disclosure is served and may be asserted by that person. La. R.S. 45:1459(B). In every reported Louisiana state case, the subpoena was served on the reporter directly. *See Ridenhour*, 520 So.2d at 373; *Burns* 484 So.2d at 658; *Dumez* 341 So.2d at 1207; s*ee also Becnel* 420 So.2d at 1175 (owner-publisher). In *Smith*, because subpoenas were issued to the reporter and his television station employer, the Fifth Circuit analyzed the reporter's privilege as applied to both collectively. 135 F.2d at 966. There is no case law in Louisiana regarding whether the privilege also may be asserted by the source.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

A subpoena issued to any news media organization, reporter, custodian of records, photographer, or other representative, shall be served at least ten days prior to the return date specified in the subpoena unless otherwise ordered by the court, upon a showing of good cause. Any person served with the subpoena is able to seek an order continuing the return date or quashing the subpoena because of the need for additional time in order to respond. La. R.S. 45:1456.

2. Deposit of security

Upon receipt of a subpoena, the news media party must notify the party requesting the subpoena of the "reasonable cost of compliance with the subpoena and the method of calculating the cost." La. R.S. 45:1457. After receiving notification of the cost, the party requesting the subpoena must deposit money into the court's registry to cover the costs not less than two days prior to the return date specified in the subpoena. If the money is not timely deposited, the subpoenaed party may file an affidavit explaining that fact and the party will be excused from further compliance with the subpoena. *Id*.

The cost of compliance calculated by the subpoenaed party shall be presumed reasonable unless the party requesting the subpoena requests a hearing. If the court finds after the hearing that the cost is not reasonable, the court shall make the necessary adjustment. The court also may grant attorneys' fees and expenses to the prevailing party in this hearing. La. R.S. 45:1457.

3. Filing of affidavit

Louisiana's shield law exempts the subpoenaed media party from appearing or testifying in response to a subpoena in order to confirm the circulation or broadcast audience of the news media organization or to confirm the publication or broadcast of specified materials if the media party provides the court with an affidavit. La. R.S. 45:1455. The statute also outlines the substantive requirements of the affidavit. La. R.S. 45:1455(B).

The statute does not require that the party serving the subpoena execute an affidavit.

4. Judicial approval

There is no provision in the statutes or case law for prior "judicial approval" of subpoenas.

5. Service of police or other administrative subpoenas

The provisions relating to the service of subpoena apply to subpoenas issued "in connection with all legislative hearings, administrative proceedings, grand jury hearings" as well as subpoenas to appear in front of the attorney general and district attorneys. La. R.S. 45:1458.

B. How to Quash

1. Contact other party first

If the subpoenaed party wishes to quash the subpoena, he must serve written objection specifying the grounds for his objection upon the attorney designated in the subpoena within ten days after service, or on or before the time directed in the subpoena, if compliance is required within fewer than ten days. La. R.S. 45:1459(C). Other than the service of written objection, there is no requirement that the other party be contacted.

2. Filing an objection or a notice of intent

The subpoenaed party must serve written objection specifying the grounds for his objection upon the attorney seeking the subpoena within ten days after service, or on or before the time directed in the subpoena, if compliance is required within fewer than ten days. La. R.S. 45:1459(C). A "notice of intent" to quash is not required.

3. File a motion to quash

a. Which court?

The state reporter's privilege statute does not address the issue of proper venue for filing a motion to quash. When the reporter claims the statutory privilege, the party seeking to revoke the privilege may apply to the district court of the parish in which the reporter resides to seek an order revoking the privilege. If the reporter resides outside of Louisiana, the application should be made to the district court of the parish where the matter in which the information is sought is pending. La. R.S. 45:1453. By analogy, this provision suggest that the proper venue for a motion to quash may be in the district court of the parish in which the reporter resides or in the district court of the parish where the matter in which the information is sought is pending.

b. Motion to compel

Once an objection is made, the party serving the subpoena is not entitled to compliance except by an order of the court from which the subpoena was issued. The party serving the subpoena may, after objection is made, move for an order compelling compliance with the subpoena. La. R.S. 45:1459(C).

In order for the court to compel compliance with the subpoena, the court must find that the party seeking the information has made a "clear and specific showing that the news is highly material and relevant; is critical and necessary to the maintenance of a party's claim; and is not obtainable from any alternative source." La. R.S. 45:1459(B).

Decided one year before Section 1459 of the shield law was codified, *Ridenhour* outlined the process for compelling compliance with a subpoena. Once the reporter moves to quash a subpoena, the party seeking information regarding a source must show that the disclosure is essential to the public interest. *Ridenhour*, 520 So.2d at 374. If the subpoena seeks other unpublished information, the party seeking the information must show that the disclosure is necessary to the protection of the public interest and that the subpoena was issued in good faith and not to harass. *Id*. at 376. After this showing is made, the judge must balance the public interest in having the testimony with the potential "chilling effect" that disclosure will have on the freedom of the press and the ability to gather news. Special attention should be paid to ensure that the information is not a "mere fishing expedition" and more weight should be given to the reporter's interest when the information relates to an investigation or criticism of the government. *Id*.

c. Timing

A party planning to file a motion to quash should try to file it as soon as possible if the subpoena deadline is near.

d. Language

There is no "stock language" or "preferred text" for a motion to quash.

e. Additional material

Affidavits and other exhibits attached to a motion to quash indicating the burdensome of subpoenas addressed to the press could be helpful because courts often find it hard to accept the burdensomeness argument.

4. In camera review

The Fifth Circuit has applied the reporter's privilege equally to disclosures made *in camera* to the court. Before requiring *in camera* disclosure, the party seeking disclosure must pass the *Miller* test by demonstrating the party's compelling interest in the information; that the information cannot be obtained from another source; and that the information is relevant. *Selcraig*, 705 F.2d at 798-99.

However, in *Cinel*, the District Court held that Section 45:1459 of the Louisiana shield law does not apply to information sought by the court for sealed, *in camera*, inspection. *Cinel v. Connick*, 792 F. Supp. 492, 499 (E.D. La. 1992). The court balanced the need for the information against the "chilling effect" that such "extremely limited disclosure" could have on the media's First Amendment rights as defined in *Ridenhour*. Because the media defendants could not prove such disclosure would "chill" freedom of the press, the Court held that the privilege did not prevent *in camera* and under seal disclosure of inventories of unpublished information. *Id*. at 500.

a. Necessity

The Louisiana reporter's privilege statute does not require *in camera* review.

b. Consequences of consent

In Louisiana state courts, a stay pending appeal is automatic regardless of whether the reporter consents to *in camera* review. La. R.S. 45:1459(E).

c. Consequences of refusing

5. Briefing schedule

There is no set briefing schedule for a motion to quash. In civil court, the uniform local rules provide that opposition memoranda are to be filed eight days prior to a hearing date, but subpoena motions (either to compel or to quash) often are filed so close to the hearing date, that the general rule likely would not be honored in most instances.

6. Amicus briefs

All levels of courts can accept amicus briefs, but it is extremely rare at the district court level. At the appellate level, the Louisiana Press Association is most likely to file or join an amicus brief in support of a reporter's privilege being invoked. The contact person would be Pam Mitchell-Wagner, Executive Director, 404 Europa Street, Baton Rouge, LA 70802, 225-344-9309.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

Once a news media member demonstrates that he is covered under the privilege, the burden of proof lies on the party seeking the information. La. R.S. 45:1459(B)(1). The burden of proof rests on the subpoenaing party to make a "clear and convincing showing" that the privilege does not apply. *Id.*

B. Elements

The party seeking an order to override the privilege protecting disclosure of sources shall set forth in writing the reason why the disclosure is essential to the protection of the public interest. La. R.S. 45:1453. The court will grant the order only when the court finds that the disclosure "is essential to the public interest." *Id.* To compel the disclosure of unpublished information generally, the party that has issued the subpoena must demonstrate that the information "(a) is highly material and relevant; (b) is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto; and (c) is not obtainable from any alternative source." La. R.S. 45:1459(B)(1).

1. Relevance of material to case at bar

Under state law, the material must be "highly material and relevant" to the case at bar. La. R.S. 45:1459(B)(1)(a). In *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983), the United States Fifth Circuit held that "knowledge of the identity of the informant must be necessary to proper presentation and preparation of the case before the privilege can be overcome."

2. Material unavailable from other sources

Under the state reporter's privilege statute, the unpublished material being sought must not be "obtainable from any alternative source." La. R.S. 45:1459 (B)(1)(c). Appellate courts have remanded cases to determine if the material is truly unavailable. In *Harvey v. Elder*, 626 So.2d 372, 374 (La. App. 4th Cir. 1993), a news station contended on appeal that plaintiffs had failed to make a "clear and specific showing" in the trial court that the materials being sought were not obtainable from any alternative source. The case was remanded because the record did not contain a transcript of an evidentiary hearing before the trial court, prohibiting the appellate court from determining whether the requisite showing had been made. *Id.*

In *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), the Fifth Circuit held that the reporter's privilege was overcome because the information sought was the only way that the defendant could establish malice to prove his case for defamation.

a. How exhaustive must search be?

There is no statutory language or Louisiana case law addressing this issue.

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

There is no specific test that the subpoenaing party must pass to demonstrate that they have already conducted a search for the material outside of subpoenaing the news media member. However, the court will look to see if the "information is not obtainable from any alternative source." La. R.S. 45:1459 B(2)(b).

c. Source is an eyewitness to a crime

There is no statutory language or Louisiana case law addressing this issue.

3. Balancing of interests

In *Ridenhour*, the Supreme Court of Louisiana stated that once a showing has been made by the party seeking the information that the disclosure is necessary to the protection of the public interest, the trial judge should balance the public interest in having all relevant testimony with the possible "chilling effect" the disclosure will have on the freedom of the press and the ability to gather news. *Id.* The Court stated that consideration should be given to insure that the party seeking the information is not "attempting to annex the journalistic profession as an investigative arm of the government . . . Consideration should also be given to the idea that the press' most important function is to question and investigate the government. Therefore, additional weight should be given to the reporter's interest when the information concerns his investigation of or criticism of the government." *Id.*

In *Smith*, the United States Fifth Circuit stated that the "public has much less of an interest in the outcome of civil litigation than in criminal litigation. In civil cases, the interests of the press may weigh far more heavily in favor of some sort of privilege." *Smith*, 135 F.3d at 972.

4. Subpoena not overbroad or unduly burdensome

The court in which an action is pending "in its discretion may vacate or modify the subpoena [duces tecum] if it is unreasonable or oppressive." La. Code Civ. Proc. 1354.

In *Smith*, the United States Fifth Circuit stated that the press has a case-specific "relevant and protectible interest in not being unduly burdened, as for example, by overly broad subpoenas for large amounts of data of dubious relevance." *Id.* at 970.

5. Threat to human life

There is no statutory language or Louisiana case law addressing this issue.

6. Material is not cumulative

Under the shield law, the party seeking unpublished information must show that the material is not "obtainable from any alternative source." La. R.S. 45:1459(B)(1)(c).

In *Smith*, the United States Fifth Circuit found that the requested evidence concerning a defendant's guilt was not considered cumulative even though the government already possessed the defendant's statements because "multiple contradictory stories told by a defendant can demonstrate a consciousness of guilt." *Smith*, 135 F. 3d at 972.

7. Civil/criminal rules of procedure

The general practice is to contest a frivolous or unduly burdensome subpoena with a motion to quash.

8. Other elements

The court shall order disclosure only of such portion of unpublished information sought as to which the three-part showing is made and "shall support such order with clear and specific findings made after a contradictory hearing." La. R.S. 45:1459.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

In *Becnel v. Lucia*, 420 So.2d 1173, 1174 (La. App. 5th Cir. 1982), the court stated that "an owner-publisher or anyone similarly situated must be considered a 'reporter'" thereby enabling that person to claim the reporter's privilege. Therefore, disclosure of a confidential source's name to an editor should not be considered a waiver of the privilege because an editor can claim the privilege for himself.

There is no other statutory language or Louisiana case law indicating whether the reporter's privilege may be waived by the reporter.

2. Elements of waiver

a. Disclosure of confidential source's name

In *Pressey v. Patterson*, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990), the Fifth Circuit expressed "doubts" about whether a district court was correct in enforcing a reporter's privilege for interview tapes and mentioned in *dicta* that the nonconfidential source "had expressly waived the reporter's privilege."

There is no other statutory language or Louisiana case law addressing whether disclosure of a confidential source's name waives the reporter's privilege.

b. Disclosure of non-confidential source's name

There is no statutory language or Louisiana case law addressing this issue.

c. Partial disclosure of information

In *Cinel v. Connick*, the court held that "a court-initiated order for a sealed, *in camera*, production of information," does not waive the reporter's privilege. 792 F. Supp. at 498.

There is no other statutory language or Louisiana case law addressing whether the partial disclosure of information waives the privilege.

d. Other elements

There is no statutory language or Louisiana case law addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory language or Louisiana case law addressing this issue.

VII. What constitutes compliance?

A. Newspaper articles

La. R.S. 45:1455 provides that "it shall not be necessary for the news media organization, the reporter, the custodian of records, the photographer, or the representative thus subpoenaed to appear or testify in response to the subpoena . . . to confirm the publication or broadcast of specified materials, if the reporter, custodian of records, photographer, or other representative of the news media organization delivers by registered mail or by hand, before or at the time specified in the subpoena, an affidavit . . . together with any documents or records described in the subpoena to the clerk of the court or other tribunal, or . . . with respect to a deposition subpoena, to the party requesting the issuance of the subpoena." The affidavit shall state the name of the proceeding and docket number; the name of the affiant and business title; the dates of publication or broadcast records searched and the dates of publication or broadcast of the documents or records actually produced; a statement that the documents or records produced were published or broadcast by the news media organization; if requested, a statement summarizing the

circulation or broadcast audience of the news media organization; if requested, a statement describing the placement of an article within a publication; and an itemization of the costs of complying with the subpoena. La. R.S. 45:1455(B).

B. Broadcast materials

The same rules apply for broadcast materials as for newspaper articles. See § VII.A above and R.S. 45:1455.

C. Testimony vs. affidavits

A sworn affidavit can take the place of in-court testimony to confirm that an article was published, *see* La. R.S. 45:1455, but not to confirm that the article was true and accurate as published.

D. Non-compliance remedies

"A person who, without reasonable excuse, fails to obey a subpoena may be adjudged in contempt of the court which issued the subpoena. The court may also order a recalcitrant witness to be attached and brought to court forthwith on a designated day." La. Code Civ. Proc. art. 1357; *see also* La. Code Civ. Proc. art. 223 ("A person who has committed a direct contempt of court may be found guilty and punished therefor by the court forthwith, without any trial other than affording him an opportunity to be heard orally by way of defense or mitigation. The court shall render an order reciting the facts constituting the contempt, adjudging the person guilty thereof, and specifying the punishment imposed."); La. Code Civ. Proc. art. 224 ("Wilful disobedience of any lawful judgment, order, mandate, writ or process of the court constitutes a constructive contempt of court."); La. Code Civ. Proc. art. 225 ("A person charged with committing a constructive contempt of a court of appeal may be found guilty thereof and punished therefore after receiving a notice to show cause, by brief, to be filed not less than forty-eight hours from the date the person receives such notice, why he should not be found guilty of contempt and punished accordingly. The person so charged shall be granted an oral hearing on the charge if he submits a written request to the clerk of the appellate court within forty-eight hours after receiving notice of the charge . . . if the person charged with contempt is found guilty the court shall render an order reciting the facts constituting the contempt, adjudging the person charged with contempt guilty thereof, and specifying the punishment imposed.").

1. Civil contempt

a. Fines

"The supreme court, the courts of appeal, the district courts . . . may punish a person adjudged guilty of contempt of court . . . for any contempt of court [other than that of direct contempt committed by an attorney, contempt for disobeying a lawful restraining order, or preliminary or permanent injunction, or contempt for deliberate refusal to perform an act which is within the power of the offender to perform] by a fine of not more than five hundred dollars, or imprisonment for not more than three months." La. R.S. 13:4611(1)(d).

We are not aware of recent examples of fines being levied against reporters who refused to comply with a valid, upheld subpoena.

b. Jail

"The supreme court, the courts of appeal, the district courts . . . may punish a person adjudged guilty of contempt of court . . . for a deliberate refusal to perform an act which is yet within the power of the offender to perform, by imprisonment until he performs the act." La. R.S. 13:4611 (1)(c).

"When a contempt of court consists of the omission to perform an act which is yet in the power of the person charged with contempt to perform, he may be imprisoned until he performs, and in such a case this shall be specified in the court's order." La. Code Civ. Proc. art. 226.

We are not aware of recent examples in Louisiana of reporters going to jail who refused to comply with a valid, upheld subpoena. In *Burns*, the Louisiana Supreme Court vacated a district court judgment imprisoning a reporter for refusing to identify the place of employment of a confidential source. *Burns*, *supra*.

2. Criminal contempt

In *Burns*, a reporter was held in contempt of court and imprisoned for refusing to answer questions about the source of his information which related to the existence and details of a confession by a murder defendant. *Burns*, 484 So.2d at 658. The Supreme Court vacated the judgment of the district court.

3. Other remedies

"A person who, without reasonable excuse, fails to obey a subpoena may be adjudged in contempt of the court which issued the subpoena. The court may also order a recalcitrant witness to be attached and brought to court forthwith or on a designated day." La. Code Civ. Proc. 1357.

If the reporter's privilege is claimed in a defamation suit and "a legal defense of good faith has been asserted by a reporter" with respect to an issue upon which the reporter alleges to have obtained information from a confidential source, the burden of proof shall be on the reporter to sustain this defense. La. R.S. 45:1454.

VIII. Appealing

A. Timing

1. Interlocutory appeals

An order revoking the privilege, ordering disclosure, or compelling compliance with a subpoena is appealable under Code of Civil Procedure Article 2083. La. R.S. 45:1453, 45:1459(E).

Article 2083 states "an appeal may be taken from a final judgment rendered in cases in which appeals are given by law whether rendered after hearing or by default, and from an interlocutory judgment which may cause irreparable injury."

The delay for taking a devolutive appeal (one which does not suspend the judgment) is sixty (60) days; the delay for taking a suspensive appeal (one which does suspend the judgment) is thirty (30) days. La. Code Civ. Proc. 2087, 2123.

2. Expedited appeals

Because the reporter's privilege remains in full force and effect pending any appeal, *see* La. R.S. 45:1453, 1459(E), there is no need for an expedited appeal by a reporter.

B. Procedure

1. To whom is the appeal made?

"An appeal is taken by obtaining an order, within the delay allowed, from the court which rendered the judgment." La. Code Civ. Proc. art. 2121. "An order of appeal may be granted on oral motion in open court, on written motion or on petition. The order should show the return day of the appeal in the appellate court." *Id.* There are five intermediate courts of appeal in Louisiana; each district court is assigned to one of these five circuit courts of appeal.

2. Stays pending appeal

In case of any appeal of an order to comply with the subpoena or to disclose information, the qualified protection of the privilege shall remain in full force and effect during the pendency of the appeal. La. R.S. 45:1453, 45:1459(E). In *Burns*, the court stated that "§1453 gives reporters the right to appeal the ruling without fear of a contempt conviction or imprisonment." *Burns*, 484 So. 2d at 658.

3. Nature of appeal

An order compelling disclosure is appealable under Code of Civil Procedure Article 2083. La. R.S. 45:1453, 45:1459(E). Article 2083 states "an appeal may be taken from a final judgment rendered in cases in which appeals are given by law whether rendered after hearing or by default, and from an interlocutory judgment which may cause irreparable injury."

4. Standard of review

The United States Fifth Circuit has upheld a district court's finding that alternative means had been exhausted because it was "not clearly erroneous." *Miller*, 621 F. 2d at 725. In Louisiana, the shield law does not address the standard of appellate review. Presumably, findings of fact are subject to a clearly erroneous standard and conclusions of law are subject to a *de novo* standard.

5. Addressing mootness questions

In *Burns*, the "informant voluntarily identified himself when he learned of the contempt proceedings." *Burns*, 484 So.2d at 658. The Supreme Court of Louisiana nevertheless held that the "trial court erred in holding the reporter's privilege inapplicable." *Id.* Thus, disclosure of a source's name does not necessarily moot the issue.

6. Relief

If adjudged in contempt, a reporter may request that the contempt citation be set aside. *See State of Louisiana v. Fontanille*, 93-KH-935 (La. App. 5th Cir. 1/24/94) La. App. LEXIS 191, *7. In *Fontanille*, the Appellate Court set aside a contempt decree the district court issued against an investigative nonfiction book author who refused to answer questions about his interview with a criminal defendant. *Id.* The appellate court found that the author was constitutionally entitled to a qualified journalist's testimonial privilege and remanded the case to the trial court for the trial court to determine if the privilege should be upheld. *Id.*

Similarly, in *Burns*, the reporter sought reversal of the trial court's contempt citation imprisoning the reporter. *Burns*, 484 So.2d at 659. The Supreme Court of Louisiana found that the reporter's privilege applied and stated that "while a remand to determine whether disclosure of a reporter's source is essential to the public interest might be required in some cases, the informant in this case voluntarily identified himself when he learned of the contempt proceedings." *Id.* The court vacated the trial court's judgment and reversed the conviction and sentence. *Id.*

IX. Other issues

A. Newsroom searches

The Federal Privacy Protection Act has not been used in Louisiana to our knowledge and there are not any similar provisions under Louisiana law.

B. Separation orders

There is no statutory language or Louisiana case law addressing this issue.

C. Third-party subpoenas

There is no statutory language or Louisiana case law addressing this issue.

D. The source's rights and interests

There is no statutory language or Louisiana case law addressing this issue.