REPORTER'S PRIVILEGE: MASSACHUSETTS

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

MASSACHUSETTS

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I. Introduction: History & Background

Massachusetts does not have a shield law, and the Supreme Judicial Court of Massachusetts has not been willing to recognize a reporter's privilege under either the Massachusetts or U.S. Constitution. Nevertheless, Massachusetts courts have been willing to use a common law balancing test based on general First Amendment principles to protect reporters' confidential sources in some circumstances.

II. Authority for and source of the right

A. Shield law statute

Although the issue has been brought before the legislature, as of the time of this writing, Massachusetts does not have an express shield statute.

In 1985, the Supreme Judicial Court dismissed a petition by the Governor's Press Shield Law Task Force for the adoption of rules establishing a qualified privilege protecting newsgatherers from compelled disclosure of confidential sources and unpublished information. *See Petition for the Promulgation of Rules*, 479 N.E.2d 154 (Mass. 1985). The court asserted that a common law approach to this area of law would be better than rulemaking by the court. *Id. The court's decision not to adopt privilege rules was motivated in part by the fact that the various media entities petitioning for a privilege could not agree on the exact contours of such a proposed privilege. Id.*

B. State constitutional provision

The Massachusetts courts do not currently recognize a reporter's privilege based in the Massachusetts State Constitution. *Commonwealth v. Corsetti*, 438 N.E.2d 805, 808 (Mass. 1982). *See also Ayash v. Dana-Farber Cancer Inst.*, 706 N.E.2d 316, 319 (Mass. App. Ct. 1999).

C. Federal constitutional provision

There is no basis for a reporter's privilege in the federal constitution. The Supreme Court has stated that it "[does] not believe that the First Amendment creates at the level of constitutional doctrine an exception [for reporters] to the 'long-standing principle that "the public . . . has a right to every man's evidence."'" *In Re Roche*, 411 N.E.2d 466, 473 (Mass. 1980), quoting from *Branzburg v.Hayes*, 408 U.S. 665, 688 (1972).

D. Other sources

The common law is the main source for a reporter's privilege in Massachusetts. Courts have recognized, through case law, that a balancing of interests is required when a journalist resists complying with a subpoena. *See Petition for the Promulgation of Rules*, 479 N.E.2d 154 (Mass. 1985) (asserting that a common law approach to this area of law would be better than rulemaking by the court). *See also In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *In re Roche*, 411 N.E.2d 466 (Mass. 1980); *Ayash v. Dana Farber Cancer Inst*, 822 N.E.2d 667, 696 (Mass. 2005).

Rules of the Court: In 1985, the Supreme Judicial Court dismissed a petition by the Governor's Press Shield Law Task Force for the adoption of rules establishing a qualified privilege protecting newsgatherers from compelled disclosure of confidential sources and unpublished information. *See Petition for the Promulgation of Rules*, 479 N.E.2d 154 (Mass. 1985). The court asserted that a common law approach to this area of law would be better than rulemaking by the court. *Id. The court's decision not to adopt privilege rules was motivated in part by the fact that the various media entities petitioning for a privilege could not agree on the exact contours of such a proposed privilege. Id.*

III. Scope of protection

A. Generally

The protection the Massachusetts's reporter's privilege affords is uncertain. The privilege derives from a judge's obligation to consider "the effect of compelled disclosure on values underlying the First Amendment." *Petition for Promulgation of Rules*, 479 N.E.2d 154, 158 (1985). A judge has the authority to prevent harassment and needless disclosure of confidential relationships but may choose whether or not to exercise that authority at his or her discretion. *Petition for Promulgation of Rules*, 479 N.E.2d 154, 158 (1985). This makes it difficult to predict the outcome in a given case because the outcome will depend both on the case's specific facts and the views of the presiding judge. The privilege is qualified and applies to protect a reporter's sources when it is determined that the reporter's interests in confidentiality outweigh countervailing interests in obtaining the evidence sought.

B. Absolute or qualified privilege

The privilege is qualified. *In Re Roche*, 411 N.E.2d 466, 472-4 (Mass. 1980).

C. Type of case

1. Civil

The protection of the privilege is not dependant on whether the reporter has been subpoenaed in a civil or criminal case. Either way, application of the privilege depends on a balancing of the interests. For civil cases in which the privilege has been discussed, *see, e.g., Russo v. Geagan*, 35 Fed. R. Serv. 2d 1403 (D. Mass. 1983) (discussing Massachusetts law); *Sinnott v. Boston Retirement Bd.*, 524 N.E.2d 100 (1988); *Wojcik v. Boston Herald, Inc.*, 803 N.E.2d 1261; *Ayash v. Dana Farber Cancer Inst.*, 822 N.E.2d 667 (Mass. 2005).

2. Criminal

The protection of the privilege is not dependant on whether the reporter has been subpoenaed in a civil or criminal case. Either way, application of the privilege depends on a balancing of the interests. For criminal cases in which the privilege has been discussed, *see, e.g., Commonwealth v. Bui*, 645 N.E.2d 689 (Mass. 1995); *Commonwealth v. Corsetti*, 438 N.E.2d 805 (Mass. 1982); *Massachusetts v. McDonald*, 6 Med. L. Rep. 2230 (Mass. Super. Ct. Nov. 12, 1980).

3. Grand jury

The standards for the privilege do not differ for grand jury subpoenas. *See In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

D. Information and/or identity of source

The privilege does not appear to distinguish between protecting the identity of a source and information that implicitly identifies a source of information.

E. Confidential and/or non-confidential information

The privilege provides more protection for confidential information than non-confidential information. *See Russo v. Geagan*, 35 Fed. R. Serv.2d 1403 (D. Mass. 1983) (federal magistrate judge upheld subpoena for unaired video of a protest where the production would not require the revelation of any confidential source. Because the rally was visible to the public at large, none of the information required was obtained under a pledge of confidentiality.). *See also Astra USA, Inc. v. Bildman*, 13 Mass. L. Rep. 300 (Mass. 2001).

F. Published and/or non-published material

There does not appear to be any case law discussing whether material that has been published or broadcast is covered by the reporter's privilege. Unpublished materials may be covered when a balancing of interests favors non-disclosure. *See Astra USA, Inc. v. Bildman*, 13 Mass. L. Rep. (Mass. 2001) (A reporter spent six months investigating claims of sexual harassment in a company. The court did not afford any special protection to documents exchanged between the reporter and the company that were not published as part of the resulting article.). *See also Petition for the Promulgation of Rules,* 479 N.E.2d 154 (Mass. 1985).

G. Reporter's personal observations

In *In re Pappas*, 266 N.E.2d 297 (Mass. 1971), the court rejected a claim that the First Amendment entitled a reporter to refuse to appear before a grand jury investigating criminal activity of which the reporter had personal knowledge. *See also In re Roche*, 411 N.E.2d 466 (Mass. 1980). "Requiring a newsman to testify about facts of his knowledge does not prevent their publication or circulation of information. Any effect on the free dissemination of news is indirect, theoretical, and uncertain, and relates at most to the future gathering of news." *In re Pappas*, 266 N.E.2d at 302.

H. Media as a party

The balancing required by the privilege is the same for cases where the media is a party and where it is not. Nevertheless, the balance is likely to tip towards disclosure where the media is a party and the evidence sought goes to the heart of the case. *See Dow Jones & Co. v. Superior Court*, 303 N.E.2d 847 (Mass. 1973)(the same common law balancing test applied when a news journal, which was party to a libel suit, claimed reporter's privilege to protect the identity of a confidential source.); *Ayash v. Dana-Farber Institute*, 443 Mass. 367 (Mass. 2005)(Defendant reporter and newspaper were ordered to reveal the identity of a confidential source, and the court found that the plaintiff's interest in obtaining the source's identity outweighed any potential damage to the free flow of information.).

I. Defamation actions

The same balancing is required to determine whether a reporter's sources are protected in a libel case as in other cases. In a libel case in which the media is a party, disclosure will most likely be compelled. *See Dow Jones & Co. v. Superior Court*, 303 N.E.2d 847 (Mass. 1973); *Ayash v. Dana-Farber Institute*, 443 Mass. 367 (Mass. 2005).

However, this is not always the case. *See Wojcik v. Boston Herald*, 803 N.E.2d 1261 (Mass. App. 2003). In *Wojcik*, Court did not compel disclosure of the identities of confidential sources in a libel action where "the identities of the sources [were] largely irrelevant to [the plaintiff's] defamation claim." *Wojcik*, 803 N.E.2d at 1266.

In other cases, application of the privilege depends on the outcome of the balancing test. *See Ayash v. Dana-Farber Institute,* 706 N.E.2d 316 (Mass. App. 1999); *Ayash v. Dana-Farber Institute*, 30 Media L. Rep. 1825 (Mass. Super. Ct. 2001); *Astra USA, Inc. v. Bildman*, 13 Mass. L. Rep. 300 (Mass. 2001); *Hanify v. Jacobs*, News Media and the Law, June-July 1982, p. 35 (Mass. Super. Ct. 1982); *Summit Technology, Inc. v. Healthcare Capital Group, Inc.*, 141 F.R.D. 381 (D. Mass. 1992).

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Courts have not laid out a definition of who is a "reporter" for purposes of the privilege.

In *Summit Technology, Inc. v. Healthcare Capital Group, Inc.*, 141 F.R.D. 381 (D. Mass. 1992), the court held that an investment analyst who had written a report on a company could invoke the reporter's privilege. The court said:

> "Whether or not Roberts [the analyst] is a member of the "organized press" per se, it appears that he is engaged in the dissemination of investigative information to the investing business community. It further appears that the "speech" at issue (the Roberts' article) relates to "matters of public concern" as opposed to "matters of private concern" and, therefore, is accorded higher First Amendment protection ... In short, in this instance, Roberts is entitled to raise the claim of privilege with respect to his confidential source as would any other media reporter."

Summit, 141 F.R.D. at 384.

b. Editor

Courts have not defined "editor," for purposes of the privilege.

c. News

Courts have not defined what "news" is, for purposes of the privilege.

However, in *Summit Technology, Inc. v. Healthcare Capital Group, Inc.*, 141 F.R.D. 381, 384 (D. Mass. 1992), the court held that an investment analyst's written report on a company could be the basis of a claim of the reporter's privilege.

d. Photo journalist

Courts have not defined "photojournalist," for purposes of the privilege.

e. News organization / medium

Courts have not defined the media, for purposes of the privilege.

However, in *Summit Technology, Inc. v. Healthcare Capital Group, Inc.*, 141 F.R.D. 381, 384 (D. Mass. 1992), the court held that an investment analyst who had written a report on a company, though not a member of the "organized press" per se, could invoke the reporter's privilege.

2. Others, including non-traditional news gatherers

There is no case law on the application of the privilege to non-traditional news gatherers such as authors, freelancers, students, and unpaid news gatherers. However, in *Summit Technology, Inc. v. Healthcare Capital Group, Inc.*, 141 F.R.D. 381, 384 (D. Mass. 1992), the court held that an investment analyst who had written a report on a company, though not a member of the "organized press" per se, could invoke the reporter's privilege. For an argument in favor of expanding the reporter's privilege to non-traditional members of the media, *see* Mary-Rose Papandrea, Citizen Journalism and the Reporter's Privilege, 91 Minn. L. Rev. 515 (2007).

B. Whose privilege is it?

There is no case law on this issue.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special requirements for service of a subpoena on a member of the news media. For rules relating to service of subpoenas, *see* Mass. R. Civ. P. 45; Mass. R. Crim. P. 17; M.G.L.A. §§ 1, 2.

2. Deposit of security

For rules relating to service of subpoenas, *see* Mass. R. Civ. P. 45; Mass. R. Crim. P. 17.

3. Filing of affidavit

For rules relating to service of subpoenas, *see* Mass. R. Civ. P. 45; Mass. R. Crim. P. 17.

4. Judicial approval

For rules relating to service of subpoenas, *see* Mass. R. Civ. P. 45; Mass. R. Crim. P. 17.

5. Service of police or other administrative subpoenas

Administrative agencies are bodies within the executive branch that are created by legislative enactment to undertake certain specific tasks. An administrative subpoena is a command from the agency directing an individual to give information to the agency. 38 Mass. Practice § 142. However, the power to issue an administrative subpoena is not inherent to the agency; in Massachusetts, an agency may only issue a subpoena if it is given the power to do so by statute. Mass. Comm. Against Discrimination v. Liberty Mut. Ins. Co., 356 N.E.2d 236, 238

(1976 Mass.). Where a Massachusetts agency is governed by the Massachusetts Administrative Procedure Act, M.G.L.A c. 30A, §12., the subpoena will be served in accordance with the same rules that apply the subpoenas issued by civil courts.

B. How to Quash

1. Contact other party first

The law does not appear to require that the subpoenaing party be contacted prior to moving to quash.

2. Filing an objection or a notice of intent

State courts do not require that a notice of intent to quash be filed before the motion to quash.

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.

b. Motion to compel

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

c. Timing

The motion to quash should be filed before the return date on the subpoena.

d. Language

There is no stock language or preferred text that should be included in a motion to quash.

e. Additional material

The Reporters Committee for Freedom of the Press often recommends that a copy of "Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media," its biennial survey of the incidence of news media subpoenas, be attached to a motion to quash based on the reporter's privilege.

4. In camera review

a. Necessity

The law does not direct a court to conduct an in camera review of materials or interview with the reporter prior to deciding on a motion to quash.

b. Consequences of consent

There is no statutory or case law on this issue.

c. Consequences of refusing

There is no case law on this issue, but courts have broad powers to hold people in contempt for failing to obey a court order.

5. Briefing schedule

There are no Massachusetts rules on this issue. Generally, courts may set briefing schedules.

6. Amicus briefs

For rules relating to amicus briefs, *see* Mass. R. App. P. 17.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The party seeking to quash the subpoena has the burden of showing that the subpoena is unreasonable and oppressive. Mass. R. Civ. P 45(b).

B. Elements

1. Relevance of material to case at bar

Relevance is certainly a factor that is considered in the balancing by a court considering a claim of privilege. *See, e.g., In re Roche*, 411 N.E.2d 466 (Mass. 1980); *Summit Technology, Inc. v. Healthcare Capital Group, Inc.,* 141 F.R.D. 381 (D. Mass. 1992).

In cases of criminal contempt, the Massachusetts courts have adopted the Federal courts' interpretation of the analogous federal subpoena rule, Fed. R. Crim. P. 17 (c). "[T]he party moving to subpoena documents to be produced before trial must establish good cause, satisfied by showing '(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application [was] made in good faith and is not intended as a general "fishing expedition."'" *Commonwealth v. Lam*, No. SJC-09322 (MA 5/13/2005) (MA, 2005), citing *United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

2. Material unavailable from other sources

Whether the material is available from other sources is a factor that is considered in the balancing performed by a court considering a claim of privilege. *See, e.g., Summit Technology, Inc. v. Healthcare Capital Group, Inc.,* 141 F.R.D. 381 (D. Mass. 1992); *Massachusetts v. McDonald*, 6 Med. L. Rep. 2230, 2231 (Mass. Super. Ct. 1980).

a. How exhaustive must search be?

There is no case law on this issue.

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

There is no case law on this issue.

c. Source is an eyewitness to a crime

There is no case law on this issue.

3. Balancing of interests

The Massachusetts reporter's privilege requires a judicial balancing of interests in determining whether to quash the subpoena.

This balancing test was first explored in *In Re Pappas*, 266 N.E.2d 297 (Mass. 1971) . In *Pappas*, the court evaluated whether "the need for information from the news gatherer as a witness outweighs . . . the possible harm to his ability to obtain new and to the reporting ability of the press." 266 N.E.2d at 300. *Petition for Promulgation of Rules*, 479 N.E.2d 154, 159 (Mass. 1985) also "recognize[d] the desirability of striking 'the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.'"

Typical interests include First Amendment rights, the defendant/litigant's constitutional rights or interests, and the public's interest. As a federal district court said, summarizing Massachusetts's reporter's privilege, "the balancing test requires '... weighing (a) the public interest in having every person's evidence available against (b) the public interest in the free flow of information.'" *Summit Technology, Inc. v. Healthcare Capital Group, Inc.,* 141 F.R.D. 381, 384 (D. Mass. 1992) (internal citation omitted); *see also Wojcik v. Boston Herald*, 803 N.E.2d 1261, 1264-5 (Mass. Ct. App. 2004); *Ayash v. Dana Farber Cancer Inst.*, 706 N.E.2d 316, 319 (Mass. Ct. App. 1999); *Massachusetts v. McDonald*, 6 Med. L. Rep. 2230, 2231 (Mass. Super. Ct. 1980).

4. Subpoena not overbroad or unduly burdensome

A subpoena may be quashed for being "unreasonable or oppressive." Mass. R. Civ. P. 45; Mass. R. Crim. P. 17. The burden of the subpoena is evaluated by balancing the interests of the reporter in keeping sources confidential and the party moving for the subpoena in the identities of the sources.

5. Threat to human life

There is no case law on this issue.

6. Material is not cumulative

The cumulative nature of the potentially privileged material is a relevant consideration evaluating the burden of the subpoena. *Summit Technology, Inc. v. Healthcare Capital Group, Inc.,* 141 F.R.D. 381 (D. Mass. 1992).

7. Civil/criminal rules of procedure

A subpoena may be quashed for being "unreasonable or oppressive." Mass. R. Civ. P. 45; Mass. R. Crim. P. 17.

8. Other elements

Courts have not provided a definitive list of elements that must be met before the privilege can be overcome. Thus, any and all considerations may be included in the balancing test evaluated by courts faced with claims of privilege.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There is no case law on the issue of waiver, although the Massachusetts Supreme Court opinion in *Petition for the Promulgation of Rules*, 479 N.E.2d 154 (Mass. 1985), mentioned waiver as an issue to be resolved by courts in developing the privilege.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no case law on this issue.

b. Disclosure of non-confidential source's name

There is no case law on this issue.

c. Partial disclosure of information

There is no case law discussing waiver of the privilege.

d. Other elements

There is no case law discussing waiver of the privilege.

3. Agreement to partially testify act as waiver?

There is no case law discussing waiver of the privilege, but reporters have agreed to testify while asserting the privilege not to disclose confidential sources, with varying results. *See Commonwealth v. Corsetti,* 438 N.E.2d 805 (Mass. 1982); *In re Roche*, 411 N.E.2d 466 (Mass. 1980); *Superior Court*, *Dow Jones & Co. v.* 303 N.E.2d 847 (Mass. 1973); *In re Pappas*, 266 N.E.2d 297 (Mass. 1971); *Hanify v. Jacobs*, News Media and the Law, June-July 1982 (Mass. Super. Ct. 1982).

VII. What constitutes compliance?

A. Newspaper articles

Only newspaper articles deposited in libraries are self-authenticating. M.G.L.A. 233 § 79D. Other newspaper articles must be authenticated in court.

B. Broadcast materials

Broadcast materials are not self-authenticating and, therefore, must be authenticated in court.

C. Testimony vs. affidavits

Generally, evidence must be authenticated by in-court testimony or by circumstantial evidence of authenticity.

D. Non-compliance remedies

1. Civil contempt

Reporters in Massachusetts have been held in civil contempt to compel compliance, with the proverbial keys to the cell in their own pockets.

To establish a complaint for civil contempt, the complainant must establish, by preponderance of the evidence,: 1)clear and undoubted disobedience 2) of a clear and unequivocal command. *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 278 N.E.2d 716 (1972).

In *Ayash v. Dana-Farber Cancer Inst.*, a judge ordered the media defendants to pay $100 per day, with that amount increasing by $100 for each successive week. The Massachusetts Appeals Court vacated that order and remanded so the court could employ the balancing test required for a reporter's privilege claim. 706 N.E.2d 316 (1999). On remand, the trial court determined that the plaintiff's need for the information should prevail. The court found the journalists in civil contempt after they continued to refuse to disclose their sources. *Ayash*, 443 Mass. 367 (Mass. 2005).

A reporter was also found in civil contempt in *In re Roche*, 411 N.E.2d 466 (Mass. 1980).

The procedures for bringing a complaint for civil contempt are carefully laid out in Mass. R. Civ. P. 65.3.

a. Fines

Although courts cannot impose fines that are wholly punitive in nature in cases of civil contempt, fines intended to compensate the complainant for actual loss and reasonable expenses are permissible. *Town of Manchester v. Dept. of Environmental Quality Engineering*, 409 N.E.2d 1054 (Mass. 1980); *Allen v. School Committee of Boston*, 508 N.E.2d 605 (1987).

b. Jail

Although there is no precedent of reporters being sentenced to jail for civil contempt, there is some precedent of jail time for civil contempt in other contexts. *See e.g.*, *Mahoney v. Commonwealth*, 612 N.E.2d 1175 (Mass. 1993).

2. Criminal contempt

Reporters in Massachusetts have been adjudged in criminal contempt.

In *Commonwealth v. Corsetti*, a reporter was held in contempt under Mass. R. Crim. P. 43, which authorizes summary findings of criminal contempt. 438 N.E.2d at 809-10. The court rejected the reporter's argument that Rule 43, which is aimed at punishing for disorderly conduct in the courtroom, did not apply to his claim of privilege. *Id.*

A reporter was also found in criminal contempt under Rule 43 in *Massachusetts v. McDonald*, 6 Med. L. Rep. 2230 (Mass. Super. Ct. 1980). There, the court said: "The Court possesses inherent power summarily to investigate and punish those committing acts tending to obstruct the administration of justice." *Id.* at 2231.

Rule 43 allows punishment in the form of imprisonment up to three months or a fine of $500. Rule 44 of the criminal procedure rules covers criminal contempt procedures for non-summary contempt findings.

3. Other remedies

Massachusetts Rule of Civil Procedure 37(b)(2) lists remedies the court may use when a party fails to comply with a discovery order. They include: ordering that the matters regarding which the order was made be taken to be

established; refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action, or rendering a judgment by default against the disobedient party; treating as a contempt of court the failure to obey any orders; and/or requiring the party to pay reasonable expenses, including attorney's fees, caused by the failure. Mass. R. Civ. P. 37(b)(2).

In *Ayash v. Dana Farber Cancer Inst.*, 30 Med. L. Rep. 1825 (Mass. Super. Ct. 2001), the court entered a default judgment against the *Boston Globe* for failing to comply with a discovery order. The *Globe* was also found in contempt in that case.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Under Massachusetts Rules of Criminal Procedure 43 and 44, a person adjudged in criminal contempt may only apply to the Massachusetts Appeals Court for relief. For rules related to the timing of an appeal, *see* Mass. R. App. P. 4, 14; Mass. R. Crim. P. 15.

An adjudication of civil contempt against a nonparty is an appealable final judgment. *In re Roche*, 411 N.E.2d 466, n. 1 (Mass. 1980).

2. Expedited appeals

Massachusetts does not have an explicit procedure for expediting appeals. Massachusetts Rules of Appellate Procedure Rule 2, entitled "Suspension of the Rules," states: "In the interest of expediting decision, or for other good cause shown, the appellate court or a single justice may ... suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. Such suspension may be on reasonable terms." For more on expedited appeals procedures, *see* Davalene Cooper, "Possible But Not Likely: Expedited Appeals in Massachusetts," 4 Journal of Appellate Practice and Process 235 (Spring, 2002).

B. Procedure

1. To whom is the appeal made?

Under Massachusetts Rules of Criminal Procedure 43 and 44, a person adjudged in criminal contempt may only apply to the Massachusetts Appeals Court for relief. Mass. R. Civ. P. 43(c).

Massachusetts procedure allows litigants to appeal directly to the Supreme Judicial Court in some cases. *See* Mass. Gen. L. ch. 211A § 10.

2. Stays pending appeal

In *In re Roche*, an application was made to Justice Brennan, sitting Circuit Justice, to stay an order by the Massachusetts high court adjudicating a reporter in contempt. Brennan stayed enforcement of the order, pending a petition for cert to the U.S. Supreme Court. *In re Roche*, 101 S. Ct. 4 (1980).

For procedures relating to stays pending appeal, *see* Massachusetts Rule of Appellate Procedure 6.

3. Nature of appeal

The appeal is an ordinary appeal.

4. Standard of review

The abuse of discretion standard of review was applied in *Wojcik v. Boston Herald*, 803 N.E.2d 1261, 1264 (Mass. Ct. App. 2004); *Sinnott v. Boston Retirement Bd.,* 524 N.E.2d 100 (Mass. 1988); and *In re Roche,* 411 N.E.2d 466 (Mass. 1980).

5. Addressing mootness questions

A case in which a reporter was held in contempt for refusing to testify to the grand jury was dismissed as moot when the grand jury session expired. *See Commonwealth v. Corsetti,* 438 N.E.2d 805, 810 (Mass. 1982).

Massachusetts courts will hear appeals of cases when the issue is "capable of repetition but evading review." *See, e.g., Cohen v. Bolduc*, 760 N.E.2d 714 (Mass. 2002).

6. Relief

An appellate court has broad discretion in fashioning relief.

IX. Other issues

A. Newsroom searches

The federal Privacy Protection Act (42 U.S.C. 2000aa), which drastically limits searches of newsrooms, has not been used in reported case law in Massachusetts. There are there no similar provisions under state law.

B. Separation orders

There appears to be no Massachusetts law on this issue.

C. Third-party subpoenas

There appears to be no Massachusetts law on this issue.

D. The source's rights and interests

There appears to be no Massachusetts law on this issue.