

# REPORTER'S PRIVILEGE: MARYLAND

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

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

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

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

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

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

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

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

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

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

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

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

### What is a subpoena?

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

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

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

MARYLAND

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## I. Introduction: History & Background

Maryland's Shield Law was most recently amended in 1988, in response to the decision in *Tofani v. State*, 465 A.2d 413, 9 Media L. Rep. 2193 (Md. 1983). *Tofani* concerned a journalist who had written and published several articles about sexual assaults in prison. 465 A.2d at 414. The journalist quoted and identified several of the victims and assailants. *Id.* When the journalist was subpoenaed to testify before a grand jury regarding the accuracy of her articles, she refused to disclose the names of her sources, on the basis of Maryland's Shield Law. *Id.* Denying the journalist's motion to quash, the Court held that the journalist waived her privilege by publishing those names in the press. *Id.* at 417-18. In response, the Maryland legislature added a broad anti-waiver provision to other 1988 amendments, absolutely prohibiting the compelled disclosure of the identity of sources, even if their identities have been published. See Md. Cts. & Jud. Proc. Code Ann. § 9-112(e). The 1988 amendments also raised the standard of proof applicable in seeking to overcome the statutory qualified privilege against compelled disclosure of "news or information," requiring proof by "clear and convincing evidence." Md. Cts. & Jud. Proc. Code Ann. § 9-112(d)(1).

## II. Authority for and source of the right

### A. Shield law statute

Md. Cts. & Jud. Proc. Code Ann. § 9-112.

### B. State constitutional provision

Md. Dec. of R. Art. 40 (2001) — *WBAL-TV Division, The Hearst Corp. v. State*, 477 A.2d 776, 10 Media L. Rep. 2121 (Md. 1984) — The court assumed, but did not decide that Article 40 of the Maryland Declaration of Rights gives members of the news media a constitutionally-based qualified privilege to withhold unpublished material obtained during the newsgathering process from prosecutorial summons. Court applied essentially the same test as that codified in Maryland's shield law, Md. Cts. & Jud. Proc. Code Ann. §9-112. See also, *Prince George's County v. Hartley*, 822 A.2d 537, 31 Med. L. Rep. 1679 (Md. App. 2003), refusing to determine whether a state constitutionally-based privilege exists.

### C. Federal constitutional provision

U.S. Const. amend. I — *Tofani v. State*, 465 A.2d 413, 425, 9 Media L. Rep. 2193 (Md. 1983) (holding that the First Amendment may not serve as a basis for refusing to testify before a grand jury, absent a showing that the jury acted in bad faith or outside the legitimate scope of its inquiry). See also, *Prince George's County v. Hartley*, 822 A.2d 537, 31 Med. L. Rep. 1679 (Md. App. 2003), refusing to decide whether there is a First Amendment-based privilege.

### D. Other sources

Public Policy — See *Telnikoff v. Matusevitch*, 702 A.2d 230, 25 Media L. Rep. 2473 (Md. 1997) (discussing Maryland's strong commitment to freedom of the press).

## III. Scope of protection

### A. Generally

The protection afforded under Maryland's Shield Law is broad. The statute absolutely precludes the compelled disclosure of the source of any news or information, regardless of the media's publication of the source's identity. The statute qualifiedly protects against the compelled disclosure of unpublished news or information, and the qualified privilege may only be overcome by clear and convincing evidence that one of the statutory exceptions applies.

## B. Absolute or qualified privilege

Absolute — Md. Cts. & Jud. Proc. Code Ann. § 9-112(c)(1) — The reporter's statutory privilege is absolute in precluding the compelled disclosure of "the source of any news or information procured by the person while employed by the news media, whether or not the source has been promised confidentiality."

Qualified — Md. Cts. & Jud. Proc. Code Ann. § 9-112(d)(1) — Pursuant to state statute, a court may compel disclosure of news or information listed under § 9-112(c)(2) if the court finds that the party seeking disclosure "has established by clear and convincing evidence that (i) [t]he news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas; (ii) [t]he news or information could not, with due diligence, be obtained by any alternate means; and (iii) [t]here is an overriding public interest in disclosure."

## C. Type of case

No distinction is made between civil cases and criminal cases and grand jury proceedings with respect to the assertion of the privilege. *Bilney v. The Evening Star Newspaper Co.*, 406 A.2d 652, 658, 5 Media L. Rep. 1931 (Md. Ct. Spec. App. 1979) ("The Maryland statute makes no distinction, either explicitly or implicitly, between civil and criminal actions; it applies to 'any legal proceeding.' Whatever arguments on the plane of public policy may be offered in support of a distinction — one way or another — that policy has been clearly set and stated by the General Assembly; and we are not at liberty to create, on our own a distinction for which there is no underlying basis in the law."). (*Bilney* interpreted the phrase "any legal proceeding," in prior statutory law; that phrase does not appear in the current statute, however, the policy underlying the decision in *Bilney* still appears relevant to the type of proceedings governed by the Shield Law.)

## D. Information and/or identity of source

Md. Cts. & Jud. Proc. Code Ann. § 9-112(c)(1).

*Lightman v. State*, 294 A.2d 149 (Md. Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Md. 1972), *cert. denied*, 411 U.S. 951 (1973) — The newsman may not be compelled to answer questions aimed, directly or indirectly, at determining the source's identity.

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

Md. Cts. & Jud. Proc. Code Ann. § 9-112(c)(1).

*Lightman v. State*, 294 A.2d 149 (Md. Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Md. 1972), *cert. denied*, 411 U.S. 951 (1973) — "The statute, on its face, does not purport to protect a newsman from disclosing *only* such sources of news or information published by him [which were] received in the course of a confidential newsman-informant relationship. On the contrary, while the Legislature may have enacted the statute with the primary purpose in mind of protecting the identity of newsmen's confidential sources, we think the statutory privilege broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not." *Id.* at 156.

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

Md. Cts. & Jud. Proc. Code Ann. § 9-112(c)(2)(i) — (vi) — The Shield Law qualifiedly protects against compelled disclosure of "[a]ny news or information procured by the person while employed by the news media, in the course of pursuing professional activities, for communication to the public but *which is not so communicated*, in whole or in part, including: (i) [n]otes; (ii) [o]uttakes; (iii) [p]hotographs or photographic negatives; (iv) [v]ideo and sound tapes; (v) [f]ilm; and (vi) [o]ther data, irrespective of its nature, not itself disseminated in any manner to the public." (emphasis added).

Md. Cts. & Jud. Proc. Code Ann. § 9-112(e) — Waiver — "If any person employed by the news media disseminates a source of any news or information, or any portion of the news or information procured while pursuing professional activities, the protection from compelled disclosure under this section is not waived by the individual."

## G. Reporter's personal observations

*Lightman v. State*, 294 A.2d 149, 156 (Md. Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Md. 1972), *cert. denied*, 411 U.S. 951 (1973) ("Where a newsman, by dint of his own investigative efforts, personally observes conduct constituting the commission of criminal activities by persons at a particular location, the newsman, and not the persons observed, is the 'source' of the news or information in the sense contemplated by the statute. . . [and the newsman] can lawfully be directed to disclose [the information he observed because] these questions do not go to the 'source' of the [newsman's] publication and they must be answered."). *See also, Prince George's County v. Hartley*, 822 A.2d 537, 31 Med. L. Rep. 1679 (Md. App. 2003), stating that neither constitutional nor statutory privilege applies to reporter's eyewitness observations of a transitory event.

#### **H. Media as a party**

Assertion of the privilege when the media is a party to the suit does not appear to be any different than if the media is not a party. *Bilney v. The Evening Star Newspaper Co.*, 406 A.2d 652, 656, 5 Media L. Rep. 1931 (Md. Ct. Spec. App. 1979) (authors of one of the offending articles successfully asserted the privilege in declining to reveal the identity of the source of the information about appellants' poor academic standing).

#### **I. Defamation actions**

There are no cases on this issue.

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

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

*Miscellaneous*: The reporter's privilege does not apply to newsmen outside of Maryland. *In re State of California for the County of Los Angeles, Grand Jury Investigation*, 471 A.2d 1141 (Md. Ct. Spec. App. 1984) (appellant could not rely on Maryland's Shield Law to argue that the matters about which he would testify were protected because Maryland's Press Shield law has no extraterritorial application.)

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

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

Md. Cts. & Jud. Proc. Code Ann. § 9-112(b) — "Persons affected — The provisions of this section apply to any person who is, or has been, employed by the news media in any news gathering or news disseminating capacity."

There is no statutory or case law definition of "reporter."

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

Md. Cts. & Jud. Proc. Code Ann. § 9-112(b) — "Persons affected — The provisions of this section apply to any person who is, or has been, employed by the news media in any news gathering or news disseminating capacity."

There is no statutory or case law definition of "editor."

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

There is no statutory or case law definition of "news," however Md. Cts. & Jud. Proc. Code Ann. § 9-112(a) defines "news media" as (1) [n]ewspapers; (2) [m]agazines; (3) [j]ournals; (4) [p]ress associations; (5) [n]ews agencies; (6) [w]ire services; (7) [r]adio; (8) [t]elevision; and (9) [a]ny printed, photographic, mechanical, or electronic means of disseminating news and information to the public."

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

Md. Cts. & Jud. Proc. Code Ann. § 9-112(b) — "Persons affected — The provisions of this section apply to any person who is, or has been, employed by the news media in any news gathering or news disseminating capacity."

There is no statutory or case law definition of "reporter."

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

Md. Cts. & Jud. Proc. Code Ann. § 9-112(a) defines "news media" as (1) [n]ewspapers; (2) [m]agazines; (3) [j]ournals; (4) [p]ress associations; (5) [n]ews agencies; (6) [w]ire services; (7) [r]adio; (8) [t]elevision; and (9) [a]ny printed, photographic, mechanical, or electronic means of disseminating news and information to the public."

There is no case law applying this definition.

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

*Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855, 35 Med. L. Rep. 1115 (Md. App. 2006), *appeal dismissed*, 918 A.2d 468 (Md. 2007). Shield law applies to financial newsletter.

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

The privilege belongs to the newsman, not the informant. *Lightman v. State*, 294 A.2d 149, 156 (Md. Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Md. 1972), *cert. denied*, 411 U.S. 951 (1973) ("The Maryland statute, however, does not protect against the disclosure of communications; it privileges only the source of the information and the privilege is not that of the informant but of the newsman.")

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

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

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

##### *a. Circuit Court — Discovery*

Deposition - Md. R. Civ. Pro. 2-412(a) — "A party desiring to take a deposition shall serve a notice of deposition upon oral examination at least ten days before the date of the deposition or a notice of deposition upon written questions in accordance with Rule 2-417." Same time re: subpoena for non-party deponent.

Deposition plus production of documents or other tangible things — Md. R. Civ. Pro. 2-412(c) — "If a subpoena requiring the production of documents or other tangible things at the taking of the deposition is to be served on a party or nonparty deponent, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice and the subpoena shall be served at least 30 days before the date of the deposition." Same time for requests for documents from parties. Md. R. Civ. Pro. 2-412 and 2-422.

Deposition — Written questions — Md. R. Civ. Pro. 2-417(a) — "A party desiring to take a deposition upon written questions shall serve the questions together with the notice of deposition. Within 30 days after service of the notice and written questions, a party may serve cross questions. Within 15 days after service of cross questions, a party may serve redirect questions. Within 15 days after service of redirect questions, a party may serve recross questions."

Deposition — By telephone — Md. R. Civ. Pro. 2-412(a) — "A party desiring to take a deposition shall serve a notice of deposition upon oral examination at least ten days before the date of the deposition."

Discovery of documents — Md. R. Civ. Pro. 2-422 — "(a) Scope. Any party may serve at any time one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents . . . ;" "(c) Response. The party to whom a request is directed shall serve a written response within 30 days after service of the request or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is refused, in which event the reasons for refusal shall be stated. If the refusal relates to a part of an item or category, the part shall be specified."

##### *b. Circuit Court — Trial*

Subpoena for Nonparty — Md. R. Civ. Pro. 2-510(a) — "A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition."

Subpoenas — Md. R. Civ. Pro. 2-510(d) — "Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing."

When court may require production of evidence — Md. R. Civ. Pro. 2-514 — "When it appears to the court at a hearing or trial that the attendance or testimony of any person or the production of any document or tangible thing not produced by any party is necessary for the purpose of justice, the court (a) may order any party to produce the document or tangible thing for inspection by the court or jury, or (b) may issue a subpoena for the production of the person, document, or tangible thing; and in either event the court may continue the hearing or trial to allow compliance with the order or subpoena, upon such conditions as to time, notice, cost, and security as the court deems proper."

### *c. District Court*

Depositions are not permitted in district court, unless a written stipulation is filed in the action. *See* Md. R. Civ. Pro. 3-401.

Discovery — Md. R. Civ. Pro. 3-401 — "Except as otherwise provided in this Title, a party may obtain discovery by written interrogatories and, if a written stipulation is filed in the action, by deposition upon oral examination or written questions. The taking and use of a deposition permitted under this Rule shall be in accordance with Chapter 400 of Title 2.

Subpoena for Nonparty — *See* Md. R. Civ. Pro. 3-510(a) (substantively identical to Md. R. Civ. Pro. 2-510(a)).

Subpoenas — Md. R. Civ. Pro. 3-510(d) — "Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing."

When court may require production of evidence — Md. R. Civ. Pro. 3-514 - "When it appears to the court at a hearing or trial that the attendance or testimony of any person or the production of any document or tangible thing not produced by any party is necessary for the purpose of justice, the court (a) may order any party to produce the document or tangible thing for inspection by the court or jury, or (b) may issue a subpoena for the production of the person, document, or tangible thing; and in either event the court may continue the hearing or trial to allow compliance with the order or subpoena, upon such conditions as to time, notice, cost, and security as the court deems proper."

## **2. Deposit of security**

There is no rule or case law requiring a deposit of security.

## **3. Filing of affidavit**

Md. R. Civ. Pro. 2-311(d). "A motion or a response to a motion that is based on facts not contained in the record or papers on file in the proceeding shall be supported by affidavit and accompanied by any papers on which it is based." Pursuant to Md. R. Civ. Pro. 1-304 and 2-311(d), it appears that the affidavit may be based on information and belief. There is no case law addressing this issue.

## **4. Judicial approval**

There is no requirement for judicial approval before a subpoena can be served.

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

There are no special rules regarding the use and service of police or other administrative subpoenas.

## **B. How to Quash**

## 1. Contact other party first

There is no requirement to contact the other party first.

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

There is no requirement that a notice of intent to quash be filed prior to the motion to quash.

Objection to subpoena for court proceeding — Md. R. Civ. Pro. 2-510(e) — "On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order . . . including one or more of the following: (1) that the subpoena be quashed or modified; (2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena; (3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or (4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them."

Objection to subpoena for court proceeding — Md. R. Civ. Pro. 3-510(e) (substantively identical to Md. R. Civ. Pro. 2-510(e)).

Objection to subpoena for deposition — Md. R. Civ. Pro. 2-510(f), Md. R. Civ. Pro. 3-510(f) — "A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production."

Protective Orders — Md. R. Civ. Pro. 2-403 — "On motion of a party or of a person from whom discovery is sought, and for good cause shown, the court may enter any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had, (2) that the discovery not be had until other designated discovery has been completed, a pretrial conference has taken place, or some other event or proceeding has occurred, (3) that the discovery may be had only on specified terms and conditions, including an allocation of the expenses or a designation of the time or place, (4) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery, (5) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters, (6) that discovery be conducted with no one present except persons designated by the court, (7) that a deposition, after being sealed, be opened only by order of the court, (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way, (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

In general, a person claiming a reporter's privilege to refuse to answer certain questions must attend the deposition and object/refuse to answer on a question-by-question basis. *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855, 35 Med. L. Rep. 1115 (Md. App. 2006), *appeal dismissed*, 918 A.2d 468 (Md. 2007).

## 3. File a motion to quash

### a. Which court?

The motion to quash should be filed in the court issuing the subpoena.

### b. Motion to compel

There is no requirement that one wait until the adverse party files a motion to compel before filing a motion to quash.

### **c. Timing**

Objection to subpoena for court proceedings – Md. R. Civ. Pro. 2-510(e) – "On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order . . ., including one or more of the following: (1) that the subpoena be quashed or modified; (2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena; (3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or (4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them."

Objection to subpoena for court proceedings – Md. R. Civ. Pro. 3-510(e) (substantively identical to Md. R. Civ. Pro. 2-510(e), above).

Objection to subpoena for depositions – Md. R. Civ. Pro. 2-510(f), Md. R. Civ. Pro. 3-510(f) – "A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production."

### **d. Language**

The rules do not specify a requirement for the use of stock language or preferred text in a motion. However, the general provisions of the Maryland Rules provide guidance as to the proper form of court papers, which apply to all motions (i.e. caption and titling, designation of parties and attorneys, size of papers, legibility and durability, existing documents, verification and corporate seal unnecessary). *See* Md. R. Civ. Pro. 1-301(a) — (f).

Statement of grounds and authorities — Md. R. Civ. Pro. 2-311 (c) — "A written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground."

Statement of grounds; exhibits — Md. R. Civ. Pro. 3-311(b) — "A written motion and a response to a motion shall state with particularity the grounds. A party shall attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference as permitted by Rule 3-303 (d) or set forth as permitted by Rule 3-421 (g)."

### **e. Additional material**

Md. R. Civ. Pro. 3-311(b) — "A party shall attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference as permitted by Rule 3-303 (d) or set forth as permitted by Rule 3-421 (g)."

*See also*, Md. R. Civ. Pro. 2-311.

## **4. In camera review**

### **a. Necessity**

There is no statute or case law requiring the 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**

An adverse ruling resulting from in camera review of documents does not entitle the person submitting the documents to an automatic stay pending appeal. *In re Grand Jury Subpoena (Under Seal)*, 774 F.2d 624, 627 (4th Cir.

1985) (appellant's motion for stay pending appeal was denied after in camera review of subpoenaed documents where court concluded the documents were not covered by the attorney-client privilege).

### c. Consequences of refusing

There is no case law documenting the consequences of a refusal to consent to an in camera review.

## 5. Briefing schedule

Filing of Briefs — There are no rules dictating the regular briefing schedule for a motion to quash. Typically, the rules regarding briefing schedules vary by county.

## 6. Amicus briefs

There is no rule or case law either permitting or prohibiting the filing of amicus briefs at the district or circuit court levels.

Amicus briefs are explicitly permitted at the appellate level — Md. R. App. Rev., Ct. App. & Ct. Special App. 8-511(a) — "Generally. A person may participate as an amicus curiae only with permission of the court."

## VI. Substantive law on contesting subpoenas

### A. Burden, standard of proof

The Maryland Shield Law explicitly requires a showing of "clear and convincing evidence" by the party seeking disclosure of protected news or information. Md. Cts. & Jud. Proc. Code Ann. § 9-112(d)(1) (2001).

### B. Elements

The party seeking protected news or information must show by clear and convincing evidence that:

*The news or information is relevant to a significant legal issue before any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas;*

How exhaustive must the search be? Maryland case law has not addressed this issue.

*The news or information could not, with due diligence, be obtained by any alternate means;*

Proof the subpoenaing party must make: The subpoenaing party must demonstrate by clear and convincing evidence that it has exhausted all other avenues for the information it seeks from the news media member. *See* Md. Cts. & Jud. Proc. Code Ann. § 9-112 (d)(1)(ii).

In *WBAL-TV Division v. State*, the court concluded that the lower court had correctly found that the information sought was not otherwise available from non-media sources where WBAL was the sole possessor of the protected information and where the only individuals present when the protected information was re-counted could not be expected to remember the information word for word. The court further reasoned . . . "the State was seeking verbatim statements . [T]he statements . . . constituted voluntary admissions of a criminal defendant [that] could not be duplicated through subsequent questioning." *WBAL-TV Division v. State*, 477 A.2d 776, 10 Media L. Rep. 2121 (Md. 1984). In *Prince George's County v. Hartley*, 822 A.2d 537, 31 Med. L. Rep. 1679 (Md. App. 2003), the Court indicated the due diligence prong was satisfied by a government investigator's affidavit, without cross-examination, indicating the investigator had interviewed other potential sources of information, none of whom claimed to have relevant knowledge.

*There is an overriding public interest in disclosure.* Md. Cts. & Jud. Proc. Code Ann. § 9-112 (d)(1)(i) — (iii).

When source is an eyewitness or participant to a crime: "Where a newsman, by dint of his own investigative efforts, personally observes conduct constituting the commission of criminal activities by persons at a particular location, the newsman, and not the persons observed, is the 'source' of the news or information . . . [and] appellant can lawfully be directed to disclose [the news or information observed as] these questions do not go to the 'source' of the appellant's publication and they must be answered." *Lightman v. State*, 294 A.2d 149

(Md. Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Md. 1972), *cert. denied*, 411 U.S. 951 (1973). *Prince George's County v. Hartley*, *supra* (same).

Balancing of interests: In addition, in Maryland the reporter's privilege should be evaluated by achieving a balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal or tortious conduct. *Tofani v. State*, 465 A.2d 413, 9 Media L. Rep. 2193 (Md. 1983) (overturned by statute on other grounds).

Overbroad or Unduly Burdensome: "It is well established that an enforcing court may limit through modification or partial enforcement subpoenas it finds to be unduly burdensome." *Equitable Trust Co. v. State Comm'n on Human Relations*, 411 A.2d 86 (Md. 1979) quoting *FTC v. Texaco, Inc.* 517 F.2d 137 (D.C. Cir. 1975).

Threat to Human Life / Cumulative Material: Maryland law has not addressed these issues.

### C. Waiver or limits to testimony

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

Yes, but under Md. Cts. & Jud. Proc. Code Ann. 9-112(e) disclosure of sources does not waive the privilege.

#### 2. Elements of waiver

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

Maryland's statute provides absolute protection against compelled disclosure of confidential sources, even if the source's identity has been published.

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

Maryland's statute provides absolute protection against compelled disclosure of non-confidential sources, even if the source's identity has been published.

In *Lightman v. State*, the Maryland Court of Special Appeals reasoned that the Maryland statute did "not purport to protect a newsman from disclosing only such sources of news or information published by him that was received in the course of a confidential newsman-informant relationship" and found the privilege "broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not." *Lightman v. State*, 294 A.2d 149 (Md. Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Md. 1972), *cert. denied*, 411 U.S. 951 (1973).

##### c. Partial disclosure of information

The reporter's privilege is not deemed waived by partial disclosure of information. Specifically, the Maryland Shield Law establishes that: If any person employed by the news media disseminates . . . any portion of the news or information procured while pursuing professional activities, the protection from compelled disclosure under this section is not waived by the individual. Md. Cts. & Jud. Proc. Code Ann. § 9-112 (e).

##### d. Other elements

None.

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

Maryland cases do not address whether a reporter's agreement to partially testify results in waiver of the privilege. If disclosure in the media does not constitute waiver, then partial testimony should not constitute waiver, especially as to source identity. Also, because Maryland has historically shown a strong commitment to freedom of the press, such partial testimony is not likely to result in waiver of the privilege. *See Telnikoff v. Matusevitch*, 702 A.2d 230, 25 Media L. Rep. 2473 (Md. 1997).

## VII. What constitutes compliance?

### A. Newspaper articles

Maryland Rule of Evidence 5-902 establishes that newspapers are self-authenticating. The rule provides "[e]xcept as otherwise provided by statute, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [p]rinted materials purporting to be newspapers or periodicals." Md. R. Evid. 5-902 (2002).

### **B. Broadcast materials**

Maryland case law does not address which, if any, representative of a broadcaster must appear when turning over tapes of material that was aired.

### **C. Testimony vs. affidavits**

Reporter's affidavit does not take place of testimony. *Prince George's County v. Hartley*, 822 A.2d 537, 31 Md. L. Rep. 1679 (Md. App. 2003).

### **D. Non-compliance remedies**

#### **1. Civil contempt**

Maryland courts have issued contempt orders in relation to reporters' failing to comply with subpoenas. *See WBAL-TV Division*, 477 A.2d 776 and *Lightman*, 294 A.2d 149. However, Maryland cases have not addressed the fines and/or jail time assessed as a result of contempt orders. Maryland Rules allow "[t]he court against which a direct civil or criminal contempt has been committed [to impose] sanctions on the person who committed it . . ." Md. R. Other Special Proceedings 15-203 (2002).

##### **a. Fines**

Maryland cases do not provide examples of fines levied against reporters who refused to comply with court orders. In addition, Maryland cases do not address whether fines are capped for civil contempt

##### **b. Jail**

Maryland cases do not provide examples of reporters who were jailed rather than disclose the names of confidential sources or information. In addition, Maryland cases do not address whether jail sentences are limited.

#### **2. Criminal contempt**

Maryland Rules allow "[t]he court against which a direct civil or criminal contempt has been committed [to impose] sanctions on the person who committed it . . ." Md. R. Other Special Proceedings 15-203 (2002).

## **VIII. Appealing**

### **A. Timing**

Appeals from Final Judgments

#### *Court of Special Appeals*

Under Rule 8-202 (a), "Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Md. R. Evid. 8-202(a) (2002).

Under 8-202 (f), "'Entry' as used in this Rule occurs on the day when the clerk of the lower court first makes a record in writing of the judgment, notice, or order on the file jacket, on a docket within the file, or in a docket book, according to the practice of that court, and records the actual date of the entry. Md. R. App. Rev., Ct. App. & Ct. Special App. 8-202(f) (2002). *See also WBAL-TV Division*, 477 A.2d 776 (Md. 1984).

#### *Court of Appeals*

Rule 8-302 provides the parameters for petitioning for writ of certiorari.

From appeal to Court of Special Appeals. "If a notice of appeal to the Court of Special Appeals has been filed pursuant to Rule 8-201, a petition for a writ of certiorari may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than 15 days after the Court of Appeals issues its mandate."

By other party. "If a timely petition for a writ of certiorari is filed by a party, any other party may file a petition for a writ of certiorari within 15 days after the date on which the first timely petition was filed or within any applicable time otherwise prescribed by this Rule, whichever is later. Md. R. App. Rev., Ct. App. & Ct. Special App. 8-302(a), (c) (2002).

*Right of Appeal* — §12-301 provides:

"[A] party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law." Md. Code. Ann., Cts. & Jud. Proc. § 12-301 (2001).

### 1. Interlocutory appeals

*Appeal of Injunction:* A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:

An order:

- (i) Granting or dissolving an injunction, but if the appeal is from an order granting an injunction, only if the appellant has first filed his answer in the cause.
- (ii) Refusing to dissolve an injunction, but only if the appellant has first filed his answer in the cause.
- (iii) Refusing to grant an injunction; and the right of appeal is not prejudiced by the filing of an answer to the bill of complaint or petition for an injunction on behalf of any opposing party, nor by the taking of depositions in reference to the allegations of the bill of complaint to be read on the hearing of the application for an injunction.

Md. Code. Ann., Cts. & Jud. Proc. § 12-303 (2001).

The Court of Special Appeals of Maryland has ruled that denial of the media's motion to intervene is an appealable order. This ruling coincides with the court's finding that "[s]imply because a trial may have reached a certain stage does not mean that First Amendment rights are greater or less than at any other stage." *Hearst Corp. v. State*, 484 A.2d 292, 295 (Md. 1984).

The Court of Special Appeals recognizes the right of a non-party to an immediate appeal of order compelling the non-party to testify. *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855, 35 Med. L. Rep. 1115, (Md. App. 2006), *appeal dismissed*, 918 A.2d 468 (Md. 2007).

*Contempt:* § 12-402 provides:

"Any person may appeal from any order or judgment passed to preserve the power or vindicate the dignity of the court and adjudging him in contempt of court. This includes an interlocutory order, remedial in nature, adjudging any person in contempt, whether or not a party to the action."

Md. Code Ann., Cts. & Jud. Proc. § 12-402 (2001).

### 2. Expedited appeals

Maryland Court of Special Appeals

Maryland procedure for expedited appeals includes:

By election of parties.

- (1) Election. Within 20 days after the first notice of appeal is filed or within the time specified in an order entered pursuant to Rule 8-206 (d), the parties may file with the Clerk of the Court of Special Appeals a joint election to proceed pursuant to this Rule.

(2) Statement of case and facts. Within 15 days after the filing of the joint election, the parties shall file with the Clerk four copies of an agreed statement of the case, including the essential facts, as prescribed by Rule 8-413 (b). By stipulation of counsel filed with the clerk, the time for filing the agreed statement of the case may be extended for no more than an additional 30 days.

(3) Withdrawal. The election is withdrawn if (1) within 15 days after its filing the parties file a joint stipulation to that effect or (2) the parties fail to file the agreed statement of the case within the time prescribed by subsection (a) (2) of this Rule. The case shall then proceed as if the first notice of appeal had been filed on the date of the withdrawal[.]

...

(9) Decision. Except in extraordinary circumstances or when a panel of the Court recommends that the opinion be reported, the decision shall be rendered within 20 days after oral argument, or if all parties submitted on brief, within 30 days after the last submission.

Md. R. App. Rev., Ct. App. & Ct. Special App. 8-207 (a)(1) — (a)(3), (a)(9) (2002).

Rule 8-206(d) provides: On completion of any conference conducted under this Rule, the judge shall enter an order reciting the actions taken and any agreements reached by the parties. Md. R. App. Rev., Ct. App. & Ct. Special App. 8-206(d) (2002).

Rule 8-413(b) provides in pertinent part that: "If the parties agree that the questions presented by an appeal can be determined without an examination of all the pleadings and evidence, they may sign and, upon approval by the lower court, file a statement showing how the questions arose and were decided, and setting forth only those facts or allegations that are essential to a decision of the questions. The parties are strongly encouraged to agree to such statement." Md. R. App. Rev., Ct. App. & Ct. Special App. 8-413(b) (2002).

Rule 2-602(a) provides that: "Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action . . . or that adjudicates less than an entire claim or that adjudicates the rights and liabilities of fewer than all the parties to the action, (1) is not a final judgment, (2) does not terminate the action as to any of the claims or any of the parties; and (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties." Md. R. Civ. Pro. 2-602(a) (2002).

## **B. Procedure**

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

There is a right to appeal to the Maryland Court of Special Appeals and a privilege to seek, by certiorari, a hearing before the Maryland Court of Appeals.

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

Rule 8-422 provides: Except as otherwise provided in the Code or Rule 2-632, an appellant may stay the enforcement of a civil judgment, other than for injunctive relief, from which an appeal is taken by filing a super-sedeas bond... Md. R. App. Rev., Ct. App. & Ct. Special App. 8-422(a) (2002).

Rule 2-632 in pertinent part provides that:

(a) On motion of a party the court may stay the operation or enforcement of an interlocutory order on whatever conditions the court considers proper for the security of the adverse party. The motion shall be accompanied by the moving party's written statement of intention to seek review of the order on appeal from the judgment entered in the action.

(b) Except as otherwise provided in this Rule, enforcement of a money judgment is automatically stayed until the expiration of ten days after its entry [.]

...

(e) Except as provided in this section . . . a stay pending appeal is governed by Rules 8-422 through 8-424. If the court determines that because of the nature of the action enforcement of the judgment should not be stayed by the filing of a supersedeas bond or other security, it may enter an order denying a stay or permitting a stay only on the terms stated in the order. Md. R. Civ. Pro. 2-632 (a) - (b), (e) (2002).

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

There is a right to appeal to the Maryland Court of Special Appeals and a privilege to seek, by certiorari, a hearing before the Maryland Court of Appeals. §12-301 of Maryland's Courts and Judicial Proceedings provides that ". . . a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even through imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment." Md. Code Ann., Cts. & Jud. Proc. §12-301 (1998 & Supp. 2001).

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

Maryland applies a normal standard of review by deferring to the fact finder for questions of fact and reviewing appeals for errors of law.

When the issue is whether a constitutional right has been infringed, Maryland courts make their own independent constitutional appraisal. *Crosby v. State*, 784 A.2d 1102, 1106 (Md. 2001). See also *Stokes v. State*, 765 A.2d 612, 615 (Md. 2001) (quoting *Jones v. State*, 682 A.2d 248, 253 (Md. 1996)).

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

Courts may address moot issues in circumstances requiring a decision in the public interest. The Maryland Court of Appeals has held: If the public interest will clearly be hurt if the question is not immediately decided, if the matter is likely to recur frequently and its recurrence will involve a relationship government and its citizens, or a duty of government, and upon any recurrence the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Maryland Court of Appeals may find justification for deciding issues raised by a question which has become moot. *Maryland v. Sheridan*, 236 A.2d 18 (Md. 1967), quoting *Lloyd v. Bd. of Supervisors of Elections*, 111 A.2d 379 (Md. 1954).

Although the issue before the court was moot, the Court of Special Appeals of Maryland ruled that a "constitutional right to intervene is not suspended or abrogated merely because of the chronological moment at which it is raised." *Hearst Corp. v. State*, 484 A.2d 292 (Md. 1984).

### **6. Relief**

Appellate courts can quash subpoenas. See *Tofani v. State*, 465 A.2d 413, 9 Media L. Rep. 2193 (Md. 1983).

## **IX. Other issues**

### **A. Newsroom searches**

Maryland case law does not discuss the impact and/or use of the Federal Privacy Protection Act (the search and seizure by government officers and employees in connection with investigation or prosecution of a criminal offense) within the State. There are no similar provisions under Maryland law.

### **B. Separation orders**

Maryland case law does not discuss a reporter's protection limiting the scope of separation orders issued against reporters who are both trying to cover the trial and are on a witness list.

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

Maryland case law does not discuss a media interest in fighting subpoenas issued to third parties in an attempt to discover a reporter's source. Specifically, the Maryland Shield Law applies to "any person who is, or has been,

employed by the news media in any news gathering or news disseminating capacity." Md. Cts. & Jud. Proc. Code Ann. § 9-112 (b).

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

The Supreme Court has held that newspaper publishers have no special immunity from the application of general laws. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). In this case, not only was the source able to sue the defendant newspaper publisher for disclosure, but the newspaper publisher was held liable for breach of contract based on promissory estoppel. *Id.*