REPORTER'S PRIVILEGE: MAINE

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

MAINE

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I. Introduction: History & Background

On April 18, 2008, Maine Governor John Baldacci signed into law "An Act to Shield Journalists' Confidential Sources." The statute is effective July 18, 2008 and is codified at 16 M.R.S.A. 61. Prior to that time, the reporter's privilege has reached the Maine Supreme Judicial Court twice. In the most recent opinion to address the issue, *In re Denis Letellier*, 578 A.2d 722, 17 Med.L.Rptr. 2169 (Me. 1990), the Court essentially adopted the balancing test propounded by the First Circuit in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 6 Med.L.Rptr. 2057 (1st. Cir. 1980). The Court held, "The First Amendment . . . requires that we balance the competing societal and constitutional interest on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct." Consequently, non-confidential sources and outtakes enjoy what amounts to a qualified privilege.

In the Supreme Judicial Court's only prior decision on the subject, *State v. Hohler*, 364 A.2d 364, 15 Media L.Rep. 1611 (1988), the Court refused to recognize any "qualified privilege for a reporter to refuse to testify concerning non-confidential, published information obtained from an identified source."

II. Authority for and source of the right

A. Shield law statute

Maine's version of the shield law, codified at 16 M.R.S.A. 61, provides a qualified privilege against compelled disclosure of confidential sources of information, information that identifies confidential sources, and confidential information obtained from a source. The statute does not include any protection for non-confidential information.

B. State constitutional provision

In *Letellier, supra*, the Maine Supreme Court held that ". . . we can find no basis in language or history to differentiate a claim of privilege under the Maine Constitution from a claim of privilege advanced under the First Amendment." Accordingly, the Court rested its decision on the provisions of the First Amendment of the United States Constitution as opposed to Article I, § 4 of the Maine Constitution, which provides that "no laws shall be passed regulating or restraining the freedom of the press."

C. Federal constitutional provision

In *Letellier, supra*, the Maine Supreme Court embraced the First Circuit's analysis in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st. Cir. 1980), and held that "The First Amendment thus requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct."

D. Other sources

There are no other sources in Maine relating to a reporter's privilege and in *Letellier, supra*, the Maine Supreme Court specifically noted the absence of court rules or rules of evidence providing a basis for the privilege.

III. Scope of protection

A. Generally

The shield law creates a qualified privilege against compelling a journalist to disclose the identity of a confidential source, any information used to identify a confidential source, or any information obtained from the confidential source by the journalist while acting in a journalistic capacity.

With regard to non-confidential sources, in *Letellier, supra*, the Maine Supreme Court ordered the disclosure of non-confidential outtakes sought by a grand jury in a criminal prosecution. Applying the First Circuit's "balanc-

ing test," the Maine Supreme Court had no difficulty ordering the disclosure of unbroadcast portions of a videotape, specifically noting the absence of a confidential source and the fact that the information was sought by a grand jury.

B. Absolute or qualified privilege

With regard to confidential sources and information, the shield law statute (16 M.R.S.A. 61(1)) provides that a judicial, legislative, administrative or other body with the power to issue a subpoena may not compel a journalist to testify about, produce or otherwise disclose or adjudge the journalist in contempt for refusal to testify about, produce or disclose:

A. The identity of a confidential source of any information;

B. Any information that could be used to identify a confidential source; or

C. Any information obtained or received in confidence by the journalist acting in the journalistic capacity of gathering, receiving, transcribing or processing news or information for potential dissemination to the public.

A court may compel disclosure of the identity of a confidential source or information if the court finds, after the journalist has been provided notice and the opportunity to be heard, that the party seeking the identity of the source or the information has established by a preponderance of the evidence, in all matters, whether criminal or civil, that: (A) The identity of the source or the information is material and relevant; (B) The identity of the source or the information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material to the claim or defense; (C) The identity of the source or the information is not obtainable from any alternative source or cannot be obtained by alternative means or remedies less destructive of First Amendment rights; and (D) There is an overriding public interest in the disclosure. In addition, based on information obtained from a source other than the journalist, in a criminal investigation or prosecution, there are reasonable grounds to believe that a crime has occurred; and in a civil action or proceeding, there must be a prima facie cause of action. 61 M.R.S.A. 16(2).

With regard to non-confidential sources and information, the Maine Supreme Court expressly eschewed embracing a "privilege" in *Letellier* and, instead, adopted Justice Powell's concurrence in *Bransburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed. 626 (1972), calling for the Court to strike "a proper balance" on a case-by-case basis "between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." This is at best comparable with a qualified privilege.

C. Type of case

1. Civil

The shield law statute applies to civil actions and proceedings.

In a footnote to its *Letellier* case, the Maine Supreme Court noted that many cases recognizing a privilege "arose in civil actions where the balancing of interests is arguably different than in criminal actions," *Letellier* at 725, n. 7, suggesting that the Court might be more inclined to quash a subpoena in a civil case than in an action involving a grand jury inquiry into criminal activity.

2. Criminal

The shield law statute applies to criminal investigations or prosecutions.

The Maine Supreme Court did not differentiate, in *Letellier*, between subpoenas sought by prosecutors or defense counsel.

3. Grand jury

Although "grand juries" are not expressly mentioned in the shield law statute, it does apply Brady to any "judicial, legislative, administrative or other body with the power to issue a subpoena." 16 M.R.S.A. 61(1).

In *Letellier*, *supra,* the Court upheld the forced disclosure of non-confidential outtakes to a grand jury. The outtakes were sought by a subpoena issued by the District Attorney. The Court noted that the information was sought

for presentation to a grand jury, which the Court termed "a unique body guaranteed by both the United States and Maine Constitutions to play an historically vital role in our criminal justice system." *Id.* at 728-29.

D. Information and/or identity of source

The shield law statute applies to both confidential information and the identity of a confidential source. 16 M.R.S.A. 61(1).

In *Letellier,* the Maine Supreme Court went out of its way to note that the information sought was neither confidential nor did it involve a confidential source, suggesting that future deference might be given to cases involving confidential information or sources.

E. Confidential and/or non-confidential information

The shield law statute applies only to confidential sources and information. 16 M.R.S.A. 61(1).

Letellier involved the forced disclosure of non-confidential outtakes. Throughout the decision, the Court noted that the information sought was not confidential and did not involve a confidential source, thus suggesting that greater deference be paid when a confidential source or confidential information is involved. In *Hohler*, by contrast, the Court refused to recognize any "qualified privilege for a reporter to refuse to testify concerning *non-confidential*, published information obtained from an identified source." (emphasis added).

F. Published and/or non-published material

The privilege afforded by the shield law statute is waived "if the journalist voluntarily discloses or consents to disclosure of the protected information." 61 M.R.S.A. 16(4).

Letellier involved the forced disclosure of non-broadcast "outtakes" in the possession of a television station. In *Hohler*, by contrast, the Court the Court refused to recognize any "qualified privilege for a reporter to refuse to testify concerning non-confidential, *published* information obtained from an identified source." (emphasis added).

G. Reporter's personal observations

The shield law applies to "[a]ny information obtained or received in confidence by the journalist acting in the journalistic capacity of gathering, receiving, transcribing or processing news or information for potential dissemination to the public." 16 M.R.S.A. 61(1)(C). The statute, therefore, distinguishes between information obtains or received in a journalistic capacity and information obtained or received in a personal capacity.

With regard to non-confidential personal observations, Maine's courts have not addressed this issue.

H. Media as a party

Maine's courts have not addressed this issue.

I. Defamation actions

Maine's courts have not addressed this issue, including whether there is a "libel exception" (and thus no privilege). Specifically, there are no cases where a court has allowed entry of judgment against a media defendant, or instructed the jury that they should presume that there was no source, or declared a presumption of actual malice based on the media's assertion of a privilege and unwillingness to produce sources or protected information.

IV. Who is covered

The shield law applies to a "journalist." That term is not defined.

In *Letellier, supra,* the Maine Supreme Court noted the need to strike a balance to avoid "potential injury or impairment of protected newsgathering and editorial processes." The particular case did not present an issue or discussion concerning who protected "news gatherers" and "editors" were. The defendants in *Letellier* were a TV reporter and the television station.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Maine's courts have not addressed this issue.

b. Editor

Maine's courts have not addressed this issue.

c. News

Maine's courts have not addressed this issue.

d. Photo journalist

Maine's courts have not addressed this issue.

e. News organization / medium

Maine's courts have not addressed this issue.

2. Others, including non-traditional news gatherers

Maine's courts have not addressed this issue.

B. Whose privilege is it?

The shield law requires that the journalist be given notice and an opportunity to be heard, the same is not true for the source.

In *Letellier*, *supra*, there was no discussion about ownership of the privilege as between source, reporter, etc. There was a footnote, however, noting that the trial judge had held the source was without standing to oppose the subpoena on the reporter. *Id.* at 724, n.2. The trial judge's order was not challenged on appeal.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no special rules regarding service of subpoenas on the press. The subpoena server must comply with either Rule 45 of the Maine Rules of Civil Procedure or Rule 17 of the Maine Rules of Criminal Procedure.

2. Deposit of security

There is no requirement for a deposit of security.

3. Filing of affidavit

There is no requirement for the filing of an affidavit to serve a subpoena on the media.

4. Judicial approval

There is no requirement to secure prior judicial approval to serve a subpoena on the media. However, if the subpoena is for the disclosure of a confidential source or confidential information, a court may compel such disclosure only after the "journalist has been provided notice and the opportunity to be heard." 16 M.R.S.A. 61(2).

5. Service of police or other administrative subpoenas

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

B. How to Quash

1. Contact other party first

There is no requirement to contact opposing counsel as a precondition to seeking to quash a subpoena.

However, it is frequently helpful to do so. It is sometimes the case that a subpoena is served long after a reporter has lost or destroyed his or her notes or no longer has any relevant recollection of an incident that may have occurred long ago (Maine has a 6 year statute of limitations). If the reporter has nothing pertinent to share this will usually lead to withdrawal of the subpoena. Further, because subpoenas on reporters are a relatively infrequent occurrence in Maine, many attorneys are unaware of the newly adopted shield law or the *Letellier* balancing test applicable to subpoenas on reporters. Once educated about the shield law and *Letellier*, some attorneys will withdraw or narrow the scope of a subpoena. Further, if the prospect of fight over the subpoena looms — an expensive sideshow (particularly if the evidence sought may only be marginally relevant or available from other sources) — some attorneys will agree to limit or withdraw a subpoena entirely.

2. Filing an objection or a notice of intent

There is no requirement that a notice of intent to quash be filed before a motion to quash is served.

3. File a motion to quash

The shield law should limit the need to file a motion to quash when confidential sources or information are involved. The burden is on the party seeking the identity of the source or the information to meet the multi-factor test set forth in the law before obtaining the identity of the source or the information. 16 M.R.S.A. 61(2).

In any civil case a motion to quash may be filed pursuant to Maine Rule of Civil Procedure 45. In criminal cases, Maine Rule of Criminal Procedure 17 provides "no procedure for quashing a subpoena *ad testificandum* on the grounds that the testimony would be inadmissible." *State v. Willoughby*, 507 A.2d 1060 (Me.1986). The opinion, instead, endorses the practice of requiring "the witness to appear and claim any privilege or immunity he may have or raise an objection to particular questions put to him." To the authors' knowledge, the *Willoughby* case has not been applied in any case involving a subpoena on a reporter, but the case suggests that trial courts may refuse to hear objections to a subpoena to testify in criminal case until the time of trial. Of course, a reporter would be wise to file a memorandum of law and to contact the clerk's office (and the relevant attorneys) to notify them of his or her intent to object and to seek a hearing prior to trial. The Superior Court did hear a motion to quash a subpoena for a broadcaster's videotape (not testimony) in *Letellier*.

a. Which court?

A motion to quash should be brought in the same court (and the same county) where the subpoena issued.

b. Motion to compel

The media party should file the motion to quash rather than await a motion to compel to avoid any argument that there has been a "waiver" based on the passage of time or the expectations of the party issuing the subpoena.

c. Timing

Maine's civil rule recognizes quashing or modifying subpoenas "on *timely*" motion. Frequently, judges are less inclined to modify or quash a subpoena to the extent undue time has passed and the motion interferes with the actual timing of trial or other court proceeding.

d. Language

If a confidential source or information is involved a motion to quash should cite the shield law. If non-confidential sources or information are at stake, a motion to quash should cite the Maine Supreme Court's *Letellier* decision and its call to strike a balance of competing societal and constitutional interests in order to avoid potential injury or impairment of the protected newsgathering and editorial processes.

e. Additional material

With regard to non-confidential sources and information, because *Letellier* calls for a "case-by-case" analysis of potential injury or impairment of the protected newsgathering and editorial processes, it may be helpful to attach an affidavit of the editor or reporter articulating the specific harm they will suffer. Also, it may be helpful to attach a copy of "Agents of Discovery: A Report of the Incidence of Subpoenas Served on the News Media," a bi-

ennial survey prepared by The Reporters Committee for Freedom of the Press of the incidence of news media subpoenas.

Additional evidence along the same lines may be helpful to rebut an attempt to show by a "preponderance of the evidence" that confidential sources or information should be disclosed under the shield law.

4. In camera review

There is neither a statute nor a court decision requiring in camera review prior to deciding a motion to quash, but the court does have authority to do so and will frequently do so when considering privilege in other contexts (e.g., attorney-client privilege).

a. Necessity

Maine's courts have not addressed this issue.

b. Consequences of consent

A journalist waives the protection provided by the shield law if the journalist voluntarily discloses or consents to disclosure of the protected information. 16 M.R.S.A. 61(4).

Maine's courts have not addressed this issue.

c. Consequences of refusing

Maine's courts have not addressed this issue.

5. Briefing schedule

A brief should be submitted, in Maine courts, along with the motion to quash. The court will probably hear the motion as soon as both sides have briefed the issue.

6. Amicus briefs

There probably will not be sufficient time to secure a cadre of *amicus curiae* in the trial court proceeding to quash a subpoena. However, in the *Letellier* case the Maine Supreme Court did allow a half dozen broadcasters and publishers to appear by amicus brief.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

For confidential sources and information the burden of proof is "preponderance of the evidence." 16 M.R.S.A. 61(2).

Maine's courts have not addressed this issue in the context of non-confidential sources or information.

B. Elements

With regard to confidential sources and information, the party seeking the source or information must, in all matters, whether criminal or civil, establish that:

(1) The identity of the source or the information is material and relevant;

(2) The identity of the source or the information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material to the claim or defense;

(3) The identity of the source or the information is not obtainable from any alternative source or cannot be obtained by alternative means or remedies less destructive of First Amendment rights; and

(4) There is an overriding public interest in the disclosure.

In addition, based on information obtained from a source other than the journalist, the party seeking the source or information must establish:

(1) In a criminal investigation or prosecution, that there are reasonable grounds to believe that a crime has occurred; or

(2) In a civil action or proceeding, that there is a prima facie cause of action.

With regard to non-confidential sources and information in *Letellier, supra,* the Maine Supreme Court specifically eschewed recognition of a "privilege" and any attendant three-pronged test. Rather, the Court called for a balancing test, on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct.

The *Letellier* Court considered the following facts:

First, the Court found that the subpoena would "not interfere in any significant way with . . . news operations." *Id*. at 728. At most, the Court found, testimony might be required to authenticate the videotape.

Second, the information was sought for presentation to a grand jury, which the Court termed "a unique body guaranteed by both the United States and Maine Constitutions to play an historically vital role in our criminal justice system. *Id*. at 728-29.

Third, the Court found that the information sought was a "unique bit of evidence frozen at a particular place and time containing information unobtainable from any other source;" that "[t]he videotape presents an invaluable and irreplaceable opportunity" for the grand jury to observe the defendant's demeanor and to hear an unedited version of his story in his own words with any subtle nuance that it may reveal." *Id* at 729 (internal quotations omitted).

Fourth, the Court noted that the grand jury investigation involved alleged corruption of the law enforcement process by a police commissioner, a matter of "grave public concern striking at the heart of public confidence and trust in government. *Id*. at 729. These circumstances rendered the public interest in disclosure "particularly pressing." *Id*.

Given its careful weighing of the particular facts before it, the Court cautioned that "[t]he importance of the constitutional protections of a free press . . . lead us to state . . . that our decision is limited to the particular fact circumstances of this case." *Id*. at 730.

1. Relevance of material to case at bar

For confidential sources and information, the identity of the source or the information must be "critical" or "necessary." 16 M.R.S.A. 61(2)(A)(2).

For non-confidential sources and information the relevance of the materials sought will clearly be a factor in weighing any possible injury to the free flow of information against the subpoenaing party's pursuit of the information.

2. Material unavailable from other sources

For confidential sources and information,the identity of the source or the information must be unobtainable from any alternative source or unobtainable by alternative means or remedies less destructive of First Amendment rights. 16 M.R.S.A. 61(2)(A)(3).

For non-confidential sources and information, the Court will inquire whether the information is available from other sources in assessing whether the potential injury or impairment of the protected newsgathering and editorial processes outweighs the other party's need to acquire that information from the press. However, no court has expressly addressed how exhaustive such a search must be, what search the subpoenaing party needs to make, or how important it is that the source is an eye witness to criminal activity.

a. How exhaustive must search be?

Maine's courts have not addressed this issue.

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

Maine's courts have not addressed this issue.

c. Source is an eyewitness to a crime

Maine's courts have not addressed this issue.

3. Balancing of interests

For confidential sources and information, each factor set out in the shield law must be met. 16 M.R.S.A. 61(2).

For non-confidential sources or information, as noted above, the Maine Supreme Court has eschewed the label "privilege" and any concomitant three-pronged test and has, instead, called for a balancing of the competing societal and constitutional issues on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence.

4. Subpoena not overbroad or unduly burdensome

Any subpoena, whether directed to a member of the media or not, can be quashed or modified in scope to the extent that it is overbroad, burdensome or oppressive.

5. Threat to human life

No Maine court has addressed whether a subpoena on the press involves a threat to life, but undoubtedly the Court would give that matter considerable weight.

6. Material is not cumulative

Although no Maine court has specifically addressed the issue, the Court would, undoubtedly, consider whether material sought was cumulative or, instead, unique and therefore necessary. If confidendial sources and information is merely cumulative, such sources and information would presumably be protected from disclosure because such information would no longer be critical or necessary "to the maintenance of a party's claim, defense or proof of an issue material to the claim or defense." 16 M.R.S.A. 61(2)(A)(2).

7. Civil/criminal rules of procedure

Both Rule 45 of the Maine Rules of Civil Procedure and Rule 17 of the Maine Rules of Criminal Procedure permit protection from subpoenas that are overly broad, burdensome or oppressive.

8. Other elements

Maine's courts have not addressed what other elements may be applicable.

C. Waiver or limits to testimony

A journalist waives the protection provided for confidential sources and information under the sheild law "if the journalist voluntarily discloses or consents to disclosure of the protected information." 16 M.R.S.A. 61(4). Though there are no Maine cases discussing waiver of a journalistic privilege or protection, for non-confidential sources or information clearly the disclosure would weigh heavily in ordering disclosure by subpoena. The same would apply to a partial disclosure to a lesser degree.

1. Is the privilege waivable at all?

Not addressed.

2. Elements of waiver

The privilege is waivable under the shield law. 16 M.R.S.A. 61(4). The courts have not addressed the issue in the context of non-confidential sources and information.

a. Disclosure of confidential source's name

Under the shield law if the name is disclosed the privilege is waived. 16 M.R.S.A. 61(4).

b. Disclosure of non-confidential source's name

The Maine courts have not addressed the issue.

c. Partial disclosure of information

The Maine courts have not addressed the issue of partial disclosure.

3. Agreement to partially testify act as waiver?

The Maine course have not addressed the issue of whether an agreement ot partially testify may act as a waiver.

VII. What constitutes compliance?

A. Newspaper articles

Newspaper articles are not self-authenticating under Maine law or court rules, but can be authenticated by a librarian or archivist having appropriate qualifications.

B. Broadcast materials

There are no Maine cases discussing this issue, but under Maine's rules of authenticating evidence, the broadcast materials could probably be authenticated by the camera person, the reporter, a technician or an editor.

C. Testimony vs. affidavits

Evidence cannot be authenticated by affidavit, even if it is merely to establish that an article was true and accurate as published. However, a trial judge would bring great pressure on the litigants to stipulate to the authenticity rather than force a member of the media to testify.

D. Non-compliance remedies

There are no Maine court decisions addressing non-compliance remedies. Presumably, a reporter who refused or failed to testify or produce information pursuant to a subpoena would be held in civil or criminal contempt under Rule 66 of the Maine Rules of Civil Procedure or Rule 42 of the Maine Rules of Criminal Procedure. Both Rules permit fines or incarceration.

There are no Maine cases discussing other potential remedies against the media.

1. Civil contempt

In *Hohler*, the Court affirmed a contempt conviction.

a. Fines

No Maine cases address the subject of fines in the context of subpoenas on the media.

b. Jail

No Maine cases address the subject of imprisonment in the context of subpoenas on the media.

2. Criminal contempt

Maine's courts have not addressed this issue.

3. Other remedies

Maine's courts have not addressed this issue.

VIII. Appealing

A. Timing

1. Interlocutory appeals

There is an exception to the "final judgment" rule, thereby allowing interlocutory appeals, when a party's constitutional rights may be substantially impaired or destroyed. That would certainly be the case when, and if, a reporter were held in contempt and subjected to imprisonment. A court would probably grant an interlocutory ap-

peal of an order compelling a reporter to produce subpoenaed information — particularly if such information were confidential or involved a confidential source.

2. Expedited appeals

In *Letellier*, the Maine Supreme Court granted an expedited hearing in a case involving a subpoena on the press.

B. Procedure

1. To whom is the appeal made?

All appeals from Maine trial court go to the State's single appellate court, the Supreme Judicial Court of Maine sitting as the Law Court.

2. Stays pending appeal

A trial judge sitting in Maine's Superior Court would undoubtedly consider a stay pending appeal in a case involving important constitutional issues involving the press, particularly if the Court's finding would subject a reporter to sanctions for contempt absent a stay.

3. Nature of appeal

Generally, an appeal arising from a subpoena or order to quash a subpoena is in the nature of a straight "appeal" of that decision to the Maine Supreme Judicial Court, rather than being in the nature of an extraordinary writ such as mandamus.

4. Standard of review

The Maine Supreme Court will consider issues of law "*de novo*." The Court has not considered the standard of review for mixed questions of law and fact in First Amendment cases, but would likely follow First Circuit precedent that mixed fact/law questions are also considered *de novo*. *See, e.g., Ridley v. Mass. Bay Transp. Auth*., 390 F.3d 65, 75 (1st Cir.2004) ("We engage in de novo review of ultimate conclusiosn of law and mixed questions of law and fact in First Amendment cases."). In ordinary cases, the trial court's findings of fact will not be overturned unless "clearly erroneous."

5. Addressing mootness questions

The Maine Supreme Court has specifically stated, in other cases, that it will not allow important issues that are "capable of repetition but evading review" to be defeated by mootness.

6. Relief

The relief afforded by the Maine Supreme Judicial Court will vary, from case to case, depending on the specific legal issue decided and on whether the Court has taken issue with any specific findings of fact. Generally, the Supreme Court will remand "for further proceedings consistent with this decision" — which amounts to a requirement that the trial court reconsider its earlier decision.

IX. Other issues

A. Newsroom searches

To this writer's knowledge, the provisions of the Privacy Protection Act (42 U.S.C. 2000aa) have not had to be invoked in this state and have not been the subject of a state court decision. Maine has no statutory counterpart to the federal act.

B. Separation orders

There are no Maine decisions or statutory provisions limiting the scope of separation orders issued against reporters who are both trying to cover a trial and are on a witness list.

C. Third-party subpoenas

Under the shield law, the protection from compelled disclosure of confidential sources and information "also applies with respect to any subpoena issued to, or other compulsory process against, a 3rd party that seeks records, information or other communications relating to business transactions between the 3rd party and the journalist" for the purpose of discovering the identity of the confidential source or obtaining confidential information. "Whenever a subpoena is issued to, or other compulsory process is issued against, a 3rd party that seeks records, information or other communications on business transactions with the journalist, the affected journalist must be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated and an opportunity to be heard. In the event that the subpoena issued to, or other compulsory process against, the 3rd party is in connection with a criminal investigation in which the journalist is the express target and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process must be given to the affected journalist as soon as it is determined that the notification will no longer pose a clear and substantial threat to the integrity of the investigation." 16 M.R.S.A. 61(3).

There are no Maine decisions addressing third-party subpoenas for non-confidential (or confidential) sources or information.

D. The source's rights and interests

There is no reported instance in Maine where a source has sought to intervene anonymously to halt disclosure of their identity or where they have been allowed to sue over disclosure after the fact. However, in *Fitch v. Doe*, 2005 ME 39, 869 A.2d 722 the trial court did allow counsel for an anonymous defendant to enter an an appearance for his anonymous client (although he did so without objection) and to argue against disclosure of his client's identity.