REPORTER'S PRIVILEGE: MICHIGAN

The Reporters Committee for Freedom of the Press

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

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

Credits & Copyright

This project was initially made possible by a generous grant from the Phillip L. Graham Fund.

Published by The Reporters Committee for Freedom of the Press.

Executive Director: Lucy A. Dalglish
Editors: Gregg P. Leslie, Elizabeth Soja, Wendy Tannenbaum, Monica Dias, Dan Bischof

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

MICHIGAN

Prepared by:

Laurie Michelson
Dawn Phillips Hertz
Butzel Long
150 W. Jefferson, 9th Floor
Detroit, Michigan 48226
(734) 995-3110

I. Introduction: History & Background

Michigan recognizes a qualified privilege for journalists served with a subpoena against the disclosure of unpublished information. In the one appellate decision, *King* v *Photo Marketing Association International*, 120 Mich App 527; 327 NW2d 515, 517-518 (1982) the Court stated that a reporter could not be compelled to relate confidential information without a showing that the information was critical to the subpoenaing party's case and that there were no other sources for the information. In addition, Michigan statutes provide protection to reporters from subpoenas issued in Grand Jury proceedings MCL 767.5a and from subpoenas issued by Prosecutors under MCL § 767A.6 unless they are the object of the investigation. Under the Grand Jury statute the privilege applies except in cases involving life imprisonment in which case the privilege is limited in the same manner as subpoenas issued in civil cases, to wit, the information must be critical to the subpoenaing party's case, the reporter must be the only source of the information and the information must be relevant. The Michigan statute which allows prosecutors to apply for subpoenas from court's to act as a one person grand jury, contains a similar limitation.

One other case on photographs required the newspaper to produce photographs, published and unpublished of a fire scene. However, the holding in the case is limited by the fact that the newspaper had routinely provided photographs for the cost of reproduction until a month before the request for photos. Under the circumstances the newspaper was unable to file an affidavit with regard to the burden of providing photos since it had clearly done so for many years before.

Trial courts, however, have been liberal in their willingness to protect reporters from burdensome requests for information, whether testimony or notes.

II. Authority for and source of the right

As discussed in the Foreword, in Michigan the Reporter's privilege is created by case law although there are two statutes which limit subpoenas on reporters for grand jury proceedings and Prosecutor's Investigatory subpoenas.

A. Shield law statute

Michigan has two statutory provisions or shield laws which limit the use of subpoenas on journalists. One is for Grand Jury proceedings MCL 767.5a and the other is with respect to subpoenas issued by Prosecutors under MCL 767A.6.

The Grand Jury statute provides as follows:

> "a reporter or other person who is involved in the gathering or preparation of news for broadcast or publication shall not be required to disclose the identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant, in any inquiry authorized by this act, except an inquiry for a crime punishable by imprisonment for life when it has been established that the information which is sought is essential to the purpose of the proceeding and that other available sources of the information have been exhausted." MCL 767.5a.

Prosecutors may apply to a Circuit Court Judge for a subpoena in order to compel testimony of witnesses to investigations of criminal conduct. That statute likewise provides a privilege to reporters. It provides:

> "A reporter or other person who is involved in the gathering or preparation of news for broadcast or publication is not required to disclose the identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant, in any inquiry conducted under this chapter. A reporter or other person who is involved in the gathering or preparation of news for broadcast or publication is subject to an inquiry under this chapter only under the following circumstances:
>
> (a) to obtain information that has been disseminated to the public by media broadcast or print publication.

(b) If the reporter or other person is the subject of the inquiry." MCL 767A.6(6).

B. State constitutional provision

There is no state constitutional provision, other than a state free speech clause, governing a reporter's privilege. No state constitutional provision has been read to create a reporter's privilege.

C. Federal constitutional provision

In the case of *Marketos* v *American Employers Insurance Company*, 185 Mich App 179; 460 NW2d 272 (1990), the Court of Appeals rejected a reporter's privilege based upon the First Amendment. However, the case has limited application because of the facts. The request was for solely for unpublished photographs and the newspaper had until recently made such photographs available upon request for a modest fee. Furthermore, the newspaper did not present an affidavit of the burdens a subpoena places on photographers or the newspaper.

Michigan Courts have declined on several occasions to recognize a constitutional basis for objecting to subpoenas on reporters. However, the net effect of most court decisions on subpoenas follows the Branzburg formula: the subpoena must seek highly relevant information and there must not be another source. However, more deference is given to confidential sources and source material.

D. Other sources

Michigan has a Court Rule similar to the federal rule allowing objections to burdensome subpoenas. MCR 2.301.

III. Scope of protection

A. Generally

Journalists have a qualified privilege for unpublished materials in Michigan. One appellate case required that the material be confidential as well as unpublished. It is not a strong privilege since it is created by case law except for the privilege created in grand jury proceedings and from prosecutor's investigatory subpoenas where the privilege is statutory and is nearly absolute.

B. Absolute or qualified privilege

As interpreted in Michigan law there is a qualified privilege for unpublished information. One case has required in addition that the material be confidential. However, the privilege given to journalists to resist grand jury and prosecutor's investigatory subpoenas is nearly absolute.

C. Type of case

1. Civil

In civil cases the Court usually evaluates the relative burden on the parties to produce information. Generally the Court will not subject a reporter to a fishing expedition i.e. broad discovery early in the litigation, but will require the reporter to produce information if the party issuing the subpoena has done substantially all of its discovery and the reporter appears to be the only witness.

This deference is based upon basic discovery etiquette rather than any special status of the media. In the case of *Marketos* v *American Employers Insurance Company*, 185 Mich App 179; 460 NW2d 272 (1990), the Michigan Courts required the newspaper to produce photographs, published and unpublished, of a suspicious fire to an insurance company. However, the case holding is limited because the newspaper had just ended its policy of selling photographs for $5.00. The Court obviously was influenced by this recent change in policy. The Court of Appeals quoted the following colloquy of the trial court and counsel:

> The Court: *The News* has usually been pretty good about: you pay your dollar and they let you have copies. It used to be a friendly newspaper that tried to help out the rest of the community.
>
> Counsel: Well, I think *The News* still thinks of itself as a friendly newspaper, Your Honor.
>
> The Court: But they're refusing to let them have copies of a few photographs even if they pay them for it.

Despite the negative holding of the Court of Appeals in Marketos, Michigan courts have continued to provide protection to reporters and photographers. The Michigan legislature also has recognized a reporters' privilege to be free from subpoenas in the Grand Jury setting which is arguably an arena where the government's interest in reporter knowledge is high and in proceedings by prosecutors to obtain investigatory subpoenas before charges are issued.

2. Criminal

In the criminal setting Court's are very sensitive to the Defendant's rights under the Sixth Amendment to a fair trial. On the other hand most judges require a high degree of materiality before burdening the press.

In addition, the Michigan Courts have held that in *People v. Pastor (In re March 1999 Riots)* (2000) 463 Mich 378, 617 NW2d 310, that the Michigan Court Rule on subpoenas, MCR 2.506, is not applicable in criminal cases. Criminal discovery is governed by a different Court rule, 6.201 that does not provide for subpoenas on reporters and prohibits discovery of information protected by privilege. The Court rebuffed attempts of the County Prosecutor to obtain unpublished photographs taken by photographers from the Lansing State Journal during the riots following a college championship basketball game. The Prosecutor first tried to subpoena the unpublished photographs under the general court rule in its prosecution of Mr. Pastor. The Supreme Court held that the general rule on subpoenas was only applicable to civil cases and criminal trials and was not applicable to discovery in criminal cases.

The prosecutor then sought an investigatory subpoena under MCL 767A.1. But that statute has a specific exclusion for the media as discussed above. The Prosecutor nonetheless sought to avoid the privilege. The Supreme Court held that where the media representatives had obtained the photographs in the gathering of news, had not distributed this particular material to the public and the reporters were not the subject of the inquiry, the statute prohibited the prosecutor from obtaining an investigatory subpoena. The language of the statute clearly created an absolute privilege against subpoenas on reporters so long as the material was unpublished and the reporter was not the subject of the inquiry.

That said, when a subpoena is received for materials or testimony to be presented at a criminal trial, as opposed to investigation or discovery, the analysis returns to the Branzburg principles.

3. Grand jury

In Michigan grand jury subpoenas against reporters are subject to a statute, (see above) which provides fairly strong protection against grand jury subpoenas. MCL 767.5a. The prohibition against reporter subpoenas applies to the identity of and the unpublished information given by informants. There is no requirement that the informant have a confidential relationship with the reporter.

However, the statute does provide a subpoena will issue to a reporter if the grand jury is investigating a crime punishable by imprisonment for life but only when it has been established that the information which is sought is essential to the purpose of the proceeding and that other available sources of the information have been exhausted.

Thus protection for reporters from subpoenas issued by Grand Juries is strong in Michigan.

Prosecutor's subpoenas

Michigan statutes also provide for a special prosecutor's subpoena to be used in connection with law enforcement investigations. In response to complaints by law enforcement that witnesses in many investigations especially in drug related investigations, were uncooperative, the legislature enacted a law allowing prosecutors to apply for special subpoenas from judges to require witnesses to appear before the prosecutor before any charges were filed to answer questions propounded by the prosecutor. Witnesses were refusing to talk voluntarily with police in many drug related investigations.

The prosecutor's subpoena is in essence a one person grand jury. Reporters are immune from such subpoenas unless they are the target of the investigation or the information has been published.

In a highly publicized case, the Lansing State Journal refused to give the Ingham County Prosecutor its unpublished photographers of rioters on the Campus of Michigan State University. The Supreme Court upheld the Journal's statutory right to be exempt from the Prosecutor's subpoena.

D. Information and/or identity of source

As noted above, the statutory privileges prohibiting grand juries and prosecutor subpoenas protect the identity of and information supplied by the source without respect to confidentiality. However, in civil and criminal matters in the court confidentiality of the information and the informant's identity is important. Court's are less likely to prohibit subpoenas for non-confidential information.

E. Confidential and/or non-confidential information

As noted above, the statutory privileges prohibiting grand juries and prosecutor subpoenas protect the identity of and information supplied by the source without respect to confidentiality. However, in civil and criminal matters in the court confidentiality of the information and the informant's identity is important. Court's are less likely to prohibit subpoenas for non-confidential information.

F. Published and/or non-published material

The two statutory privileges against subpoenas on reporters only apply to non-published information. Thus, subpoenas for published information are difficult to quash.

However, Michigan has a rule of evidence which makes news paper articles self authenticating. That means that it is not necessary for the reporter to appear to establish that the article in fact appeared in the newspaper. Michigan Rule of Evidence 902(6) provides:

> "Extrinsic evidence of authenticity [that is to say, an editor or reporter or photographer testifying, "Yes, we published that story or photograph"] as a condition precedent to admissibility is not required with respect to . . . printed materials purporting to be newspapers or periodicals."

This reduces the opportunity for parties to question the reporter on related matters.

In civil and criminal trials, however, it is difficult to resist a subpoena based on the reporter's privilege if the information has been published. Generally we attempt to limit the scope of the examination of the reporter about the published material.

G. Reporter's personal observations

There are no Michigan cases distinguishing this situation from reporter's stories based on third party observations. However, caution should be exercised. If the reporter saw the fire as a reporter, there may be a basis for asserting the privilege. However, if the reporter lived next door to the fire and saw because he couldn't help but see the fire next door, assertion of the privilege would be difficult.

H. Media as a party

There are no reported cases distinguishing application of the privilege in case in which the media is a party and the media is not a party.

I. Defamation actions

There are no reported cases in which the issue has arisen. Trial courts are open to the argument that the privilege should be the same regardless of the media's status as a defendant.

In a federal case, the trial court granted summary disposition and refused to allow the Plaintiff to obtain discovery of the libel defendant Southern Poverty Law Center as to its confidential informant.

IV. Who is covered

Michigan Courts have not made distinctions on the basis of the news gatherer's status. The major appellate decision involved an international trade association of photo dealers and photofinishers which gathered data concern-

ing the operations and activities of its members and published trade news periodicals. Although not a traditional news media, the court found sufficient facts to justify the possible application of a news writer's privilege and remanded the matter to the trial court to determine the applicability of a news writer's privilege to the respondent. *King* v *Photo Marketing Association International*, 120 Mich App 527; 327 NW2d 515, 517-518 (1982)

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The statutes granting a privilege do not contain any definitions of reporter, editor, news, photo journalist or media. Nor do cases draw any distinctions among news gatherers.

b. Editor

The statutes granting a privilege do not contain any definitions of reporter, editor, news, photo journalist or media. Nor do cases draw any distinctions among news gatherers.

c. News

Neither case law nor the statutes define "news".

d. Photo journalist

The statutes granting a privilege do not contain any definitions of reporter, editor, news, photo journalist or media. Nor does case law distinguish amongst members of the media.

e. News organization / medium

The statutes granting a privilege do not contain any definitions of reporter, editor, news, photo journalist or media.

2. Others, including non-traditional news gatherers

There are no cases on non-traditional news gatherers, although Court's have made gratuitous statements that in the particular instance before the Court "there is no question" that the petitioner was gathering the news.

B. Whose privilege is it?

There are no appellate decisions addressing this issue

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Under Michigan Rules of Court 2.506 service of all subpoenas must be made at least two days before the time for appearance unless the Court specifies otherwise. Service must be made personally except parties to the case can be served by service on their attorney.

Service may be made by mail although the recipient is not required to attend pursuant to a subpoena served by mail. In order to compel attendance personal service of the subpoena must be obtained. However, many lawyers mail or fax subpoenas with or without service fees. Such subpoenas are not sufficient to compel attendance.

2. Deposit of security

In civil cases, service of the subpoena on a non-party must be accompanied by one days witness fee and mileage to the site of the taking of testimony or document production.

In criminal cases, no fees are required.

3. Filing of affidavit

No affidavit of cause is required.

4. Judicial approval

Subpoenas must be signed by a magistrate/judge or by an attorney in the case. In most circumstances subpoenas are simply prepared and signed by an attorney and then served

5. Service of police or other administrative subpoenas

Subpoenas may be served by any competent person over the age of 18 or by mail. Fees must be delivered with the subpoena in civil cases, not in criminal cases. The fees must be one dayâ€™s attendance plus mileage.

B. How to Quash

1. Contact other party first

Although there is no requirement that you contact the other party, it is advisable to contact the party issuing the subpoena to try to limit the subpoena and to learn the purpose of the subpoena. It will aid you in defending against the subpoena. For example, if they just want a copy of the article for authentication purposes, you can provide that information and avoid the subpoena. Michigan Rules of Evidence 902(6) makes newspapers self authenticating. You can also suggest other avenues for investigation that do not involve the reporter.

The most annoying subpoenas are those seeking "all articles published about the controversy that is the subject of the lawsuit." Most smaller newspapers have no method of accomplishing that other than sitting with the old issues and going through them one by one. Therefore a call to the issuer of the subpoena offering a seat in the morgue or suggesting that they go to the public library which usually has copies of back issues of the local newspapers is in order.

Again, talking with the issuer may avoid a costly legal battle.

2. Filing an objection or a notice of intent

Under Michigan Court Rule 2.506(H) a person served with a subpoena may appear in person or by writing explain why the person should not be compelled to comply with the subpoena. Alternatively a motion to quash can be filed. It is recommended that if the subpoena is for a court hearing, that a letter of explanation or motion to quash precede the hearing.

3. File a motion to quash

a. Which court?

A motion to quash subpoena is filed in the Court from which the subpoena was issued.

b. Motion to compel

Given the option to send in a written statement explaining why you should not have to appear, it is highly advisable to respond to the subpoena rather than waiting for a motion to compel, especially if the subpoena seeks your appearance at a court hearing. There is no requirement that you file a motion to quash first, but judges seem to respond better if you send a letter of explanation or file the motion to quash rather than waiting until the motion to compel is filed.

c. Timing

The only requirement is that the motion to quash should be noticed for hearing before the date in the subpoena. Usually you can work with opposing counsel and the court on the time for hearing. However, that said, some attorneys are fond of issuing subpoenas on the eve of trial putting you and the court in the predicament of trying to handle a jury pool waiting for selection and finding time to hear your motion to quash. You have no choice at that point but to work with the Court and appear as directed.

Failure to respond to a subpoena including appearance at any court hearing makes it difficult to get the Court to hear your arguments and makes the granting of a motion to compel highly probable.

d. Language

There is no special language; however, it is a good idea to have a reporter's affidavit or an editor's affidavit as to how the subpoena will interfere with news gathering activities.

e. Additional material

The motion should be as short and to the point as possible since courts are busy and they view objections to subpoenas as a nuisance. Obviously the attachment of an affidavit from the reporter is appropriate. However, brevity is the way to a judge's heart.

4. In camera review

a. Necessity

There is no statutory or other requirement for in camera review. In camera review raises other problems. But to some extent the problems depend upon the circumstances. If the subpoena is seeking confidential information, even the Court should not be allowed to see the material. Even the attorney representing the news organization may not want to see the material to avoid complications if the material is confidential.

b. Consequences of consent

There are no reported Michigan cases discussing the issue of waiver of the privilege based upon in camera review.

c. Consequences of refusing

There are no reported Michigan cases discussing the issue of waiver of the privilege based upon in camera review.

5. Briefing schedule

Motions including the brief are to be served 9 days before hearing; responsive briefs are due 5 days before a hearing unless there is personal service of the motion. However, that is often modified by the Court.

6. Amicus briefs

Michigan courts are generous in their grant of the right to allow supporting organization to file briefs amicus curiae. Reporters should contact

Michigan Press Association
827 N. Washington
Lansing, Mi 48906
(517) 372-2424
michiganpress.org

Michigan Association of Broadcasters
819 N. Washington
Lansing, MI 48906
(517) 484-7444
www.michmab.com

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

In the usual case, if one can get the Court to recognize the privilege, then the burden is on the issuer to establish that the information is relevant, essential to the case and not obtainable from any other source. However, the reporter may have to demonstrate confidentiality to the extent that it was a factor.

If the subpoena is issued under the Grand Jury statute or the Prosecutor's statute, if the privilege applies, the subpoena is quashed. However, if the grand jury proceeding is investigating a crime which provides for life imprisonment, then the issuer of the subpoena must meet the Branzburg test: the information which is sought must be essential to the purpose of the proceeding and other available sources of the information have been exhausted.

Under the Prosecutor's subpoena statute MCL 767A.6, the privilege applies to news gatherers unless they are the target of the investigation or the material sought has been published. The Prosecutor has the burden of showing one or the other if she wants to enforce the subpoena against a news gatherer.

B. Elements

1. Relevance of material to case at bar

Materiality is required under the Court Rules. Court's will always expect the issuer of the subpoena to demonstrate the relevance of the material sought.

2. Material unavailable from other sources

Generally Court's will listen to this argument. There have not been that many reported appellate decisions in this area of the law. So it is difficult to answer these questions with precision.

a. How exhaustive must search be?

There have been no appellate cases discussing this precise issue. Strategically we try to get the trial court to tell issuers to take their other depositions first and grant the motion to quash the subpoena without prejudice should upon the conclusion of discovery the issuer believe that they need the evidence from the media.

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

There have been no appellate cases discussing this precise issue.

c. Source is an eyewitness to a crime

There have been no appellate cases discussing this precise issue.

3. Balancing of interests

There have been no appellate cases discussing this precise issue.

4. Subpoena not overbroad or unduly burdensome

Under Michigan Court Rule 2.302 Courts may issue protective orders upon motion and may issue any order that "justice requires to protect from annoyance, embarrassment, oppression, or undue burden or expense…"

5. Threat to human life

There have been no appellate cases discussing this precise issue.

6. Material is not cumulative

Although there have been no appellate cases discussing this precise issue, it is obviously an issue which the media should raise.

7. Civil/criminal rules of procedure

Issuance of a subpoena requires that the attorney sign the subpoena. MCR 2.506. Execution of a document by an attorney subjects the attorney to sanctions upon proof that the document was frivolous or interposed for improper purposes. MCR 2.114.

8. Other elements

There are no other elements that are apparent.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There have been no appellate cases discussing this precise issue.

2. Elements of waiver

a. Disclosure of confidential source's name

There have been no appellate cases discussing this precise issue.

b. Disclosure of non-confidential source's name

There have been no appellate cases discussing this precise issue.

c. Partial disclosure of information

There have been no appellate cases discussing this precise issue.

3. Agreement to partially testify act as waiver?

There have been no appellate cases discussing this precise issue.

VII. What constitutes compliance?

A. Newspaper articles

Michigan Rule of Evidence 902(6) provides that newspaper articles are self-authenticating. Therefore, it is not necessary for a newspaper person to appear in order to authenticate newspaper reports.

B. Broadcast materials

Not addressed.

C. Testimony vs. affidavits

Michigan Rule of Evidence 902(6) provides that newspaper articles are self-authenticating. Affidavits may not be used in lieu of testimony when the subpoena is upheld.

D. Non-compliance remedies

There have been no appellate cases discussing this precise issue. However, Michigan does recognize civil and criminal contempt. Criminal contempt is limited to contumacious behavior in the presence of the Court and requires honoring all rights of the criminal defendant.

1. Civil contempt

a. Fines

There have been no appellate cases discussing this precise issue. There is no cap on fines for contumacious behavior.

b. Jail

There have been no appellate cases discussing this precise issue in the reporter setting. There are no limits on jail time although a finding of criminal contempt would be required in order to impose jail time. Criminal contempt requires abiding by all constitutional safeguards for criminal defendants.

2. Criminal contempt

There have been no appellate cases discussing this precise issue in the reporter subpoena setting.

3. Other remedies

There have been no appellate cases discussing this precise issue. However, it is clear that Courts in Michigan have been willing to impose sanctions on parties who refuse discovery. Thus, these are still issues of first impression in Michigan.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Interlocutory appeals are allowed under Michigan Court Rules. If a court refused to quash a subpoena, the recipient of the subpoena may file an interlocutory appeal. The Appellate Courts have been fairly receptive to interlocutory appeals by media organizations.

There is no difference between appealing a discovery subpoena versus a trial subpoena except for the timing issue. Courts of Appeal do not like to interfere with trial court dockets. Therefore be prepared for swift justice. One can also file a motion for emergency appeal to get expedited treatment.

An interlocutory appeal is obtained by motion for leave to appeal. Frequently, on these kinds of issues, and especially if the matter is time sensitive, the Court will issue an order granting the appeal which contains the substantive decision on the merits. That is to say, the Court will rule on the appealable issue rather than merely accepting leave to appeal which would trigger additional briefs due in three to six months followed by a hearing a year later.

This means that you have to put your best arguments in your brief in support of your interlocutory appeal. Your brief in support of your motion for leave to appeal may be your only opportunity to address the Court on the merits. It therefore needs to be complete and persuasive.

2. Expedited appeals

The rules provide for an expedited appeal though the filing of a motion for immediate consideration. If one is appealing an adverse ruling on a subpoena, expedited hearing on appeal should be sought because there is no automatic stay upon the filing of the appeal. You can ask the trial judge for a stay (and in fact you must ask the trial judge before you may ask the Court of Appeals for a stay) but a judge who has refused your motion to quash a subpoena is probably not going to be sympathetic to your request for a stay.

Therefore, a motion for immediate consideration is in order for most interlocutory appeals on the denial of a motion to quash a subpoena. Each aspect of the appeal requires its own motion for immediate consideration.

B. Procedure

1. To whom is the appeal made?

Appeals from District Courts go to Circuit Court. Appeals from Circuit Courts go to the Court of Appeals. Appeals from the Court of Appeals go by leave only to the Michigan Supreme Court.

Most subpoenas are issued from the Circuit Court requiring appeals to be taken to the Court of Appeals. However, if the subpoena is in the District Court (Under $25,000) then the initial appeal must go to the Circuit Court for the County in which the District Court is located.

All appeals of subpoenas are interlocutory which means that the first step is to seek leave to appeal.

Lastly there is a procedure to by pass intermediate courts and go directly to the Supreme Court. This is a judgment call as to when to use this procedure. It is time consuming and there is no guarantee that the Supreme Court will take such an appeal. However, it is an available avenue if the case is clearly headed to the Supreme Court.

2. Stays pending appeal

There is no automatic stay upon appeal. In order to obtain a stay pending appeal, request must first be made of the trial court. If the trial court denies the request for stay, then a request for stay may be made to the Court of Appeals. A motion for immediate consideration is needed if you want the quickest relief. A bond may be required for the stay i.e. a bond that you promises to prosecute the appeal with due diligence.

3. Nature of appeal

An appeal from an order denying a motion to quash is interlocutory. That is to say, the appeal is made by way of a motion for leave or permission to appeal. There is no appeal of right. The motion for leave to appeal must be made within 21 days of the entry of the order.

There are no oral arguments on the motion for leave to appeal so all argument must be placed in the brief in support of the motion for leave to appeal. Submit your most persuasive arguments in your brief because it may be your only opportunity.

As discussed above, the Courts of Michigan often will rule on the substantive issue i.e. whether or not to quash the subpoena, in its order granting or denying the appeal. Thus, you may never get oral argument on the reasons why the subpoena should be quashed or modified. It is essential that the brief in support of the motion for leave to appeal be complete including exhibits.

There is no transcript requirement on a motion for leave to appeal. However, you may want to order a transcript to reduce the time it takes for the Court to rule if the Court determines that it would like to see the transcript.

Again if you need to be heard on an expedited basis there are procedures including personal service on the issuer of the subpoena which can get your application for stay and your motion for leave to appeal before a panel of the Court of Appeals immediately.

Michigan Courts have recognized the need for speedy action in certain appellate situations. In the subpoena setting, the Court has acted promptly. However, don't cry wolf! That is to say, be sure that immediate consideration is necessary. It usually is, but be sure you need special attention before you demand it.

4. Standard of review

Generally the standard for review is abuse of discretion by the trial court. There is no de novo review of a decision on quashing a subpoena. Since the Michigan courts have not recognized a constitutional privilege for reporters, the decision to quash is nothing more than an interlocutory decision of the trial court subject to reversal only if it constitutes an abuse of discretion.

5. Addressing mootness questions

Generally Michigan courts will review a case even if technically moot, if it is capable of repetition but evading review.

6. Relief

The reporter should seek reversal of the trial court. However, the Court of Appeals will fashion the relief it finds appropriate under the circumstances. Often on the first appeal, the Court of Appeals will ask the trial court to reconsider in light of the factors identified by the Court of Appeals. If the trial court still doesn't "get it right", the Court of Appeals is more likely to issue a definitive ruling quashing or upholding the subpoena. However, the Court of Appeals does show deference to trial courts and usually tries to get the trial court to make the ultimate decision.

IX. Other issues

A. Newsroom searches

Although there have been no appellate cases discussing this precise issue, we have often used the Federal Privacy Protection Act (42 USC 2000aa) as a bar to newsroom searches.

We also argue that the Prosecutor's subpoena statute exemption applies to search warrants of newsrooms.

B. Separation orders

When a court attempts to restrict a reporter's access to the court room as a potential witness, we argue that this is part of the reason that the reporter should not be called. If the Court insists that a reporter is going to have to testify, we generally send another reporter to cover the court proceeding unless the testifying reporter's testimony is very basic and innocuous. If we can't assign another reporter, then we try to get the reporter on and off the stand as quickly as possible so she or he can return to reporting on the trial. Unfortunately this doesn't always work.

C. Third-party subpoenas

There have been no appellate cases discussing this precise issue.

D. The source's rights and interests

There have been no appellate cases discussing this precise issue.