

# REPORTER'S PRIVILEGE: MINNESOTA

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

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

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

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

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

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

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

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

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

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

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

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

### What is a subpoena?

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

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

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## I. Introduction: History & Background

Journalists in Minnesota have a strong qualified privilege for their confidential sources and unpublished information. A state statutory privilege has existed since 1973, and was amended in 1998 to make clear that it applies to unpublished information as well as to confidential sources. Federal courts in the state recognize a qualified privilege under the First Amendment.

## II. Authority for and source of the right

### A. Shield law statute

#### 1. History

Like many other states, Minnesota reacted to the U.S. Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), by enacting a shield statute. Early proponents of the legislation included John Finnegan (editor of the *St. Paul Pioneer Press*, chair of the Freedom of Information Committee of the Associated Press Managing Editors Association, and a founding member of the Minnesota Joint Media Committee), Don Gillmor (Silha Professor of Media Ethics and Law, University of Minnesota), and Peter Popovich (at the time an attorney in private practice representing the *St. Paul Pioneer Press* and other organizations, who later served as the first chief judge of the Minnesota Court of Appeals and as chief justice of the Minnesota Supreme Court). For more than twenty years, the statute was regarded as one of the strongest in the country in terms of protecting journalists, and was applied by the state's district courts to protect unpublished information in all forms, as well as to protect confidential sources. See N. Mate, *Piercing the Shield: Reporter Privilege in Minnesota Following State v. Turner*, 82 Minn. L. Rev. 1563, 1564, 1591–95 (1998).

In 1994, that began to change. The Minnesota Court of Appeals narrowly read the statutory language as protecting *only* confidential sources and unpublished information "which would tend to identify the person or means through which the information was obtained." *Heaslip v. Freeman*, 511 N.W.2d 21, 23 (Minn. Ct. App. 1994). Under this interpretation, the court held that the statute did not protect unpublished photographs of an automobile accident that one party was seeking from a newspaper (the newspaper was not a party to this civil lawsuit). The court acknowledged that its interpretation of the statute was "finely tuned." 511 N.W.2d at 23. Despite this setback under the statute, reporters continued to receive protection under other legal bases. See, e.g., *State v. Ross*, 22 Media L. Rep. 2509 (Ramsey Cty., Minn., Dist. Ct. 1994).

The court of appeals followed its narrow view of the shield law—and extended its result to a narrow view of the First Amendment privilege—in a criminal prosecution growing out of an assault during a college campus rally. *State v. Knutson*, 523 N.W.2d 909 (Minn. Ct. App. 1994) (holding that reporter who witnessed assault could be compelled to testify); *State v. Knutson*, 539 N.W.2d 254 (Minn. Ct. App. 1996) (refusing protection to unpublished photographs of the rally if no confidential source would be disclosed).

The Minnesota Supreme Court further eroded any reporter's privilege for unpublished information in *State v. Turner*, 550 N.W.2d 622 (Minn. 1996). The case arose after police charged Steven Allen Turner with felony possession of three bags of crack cocaine that they found when they searched him after he tried to evade them in his car. A newspaper photographer had been riding with the police as part of a study on crime in the community, and took pictures of the arrest. Turner wanted evidence from the photographer as "the only neutral disinterested eyewitness." The lower courts held that the photographer did not have to provide information after Turner subpoenaed him, but the supreme court reversed. The supreme court interpreted *Branzburg* as declaring "that no qualified constitutional privilege exists under the First Amendment that would protect reporters from compelled testimony in a criminal case." *Turner*, 550 N.W.2d at 628. It stated that the Minnesota shield law "was clearly intended to protect the confidential relationship which exists between a reporter and his or her sources of information," 550 N.W.2d at 631, and "rejected the argument that the Act applies to reporters who personally witness crimes, and to unpublished, nonconfidential information possessed by a newspaper," 550 N.W.2d at 630. Howev-

er, it held that district courts should review unpublished material in camera to be sure that it was relevant to the case before compelling its disclosure to parties in the case. 550 N.W.2d at 629.

Media organizations and their attorneys viewed *Turner* as poor policy and a misreading of the statute, and lobbied for corrective legislation, which became law on April 6, 1998. The amendments added the words "whether or not it" after the words "other reportorial data" and before "would tend to identify the person or means" in the section prohibiting disclosure of information. It also modified the situations in which courts could order disclosure of unpublished information, requiring a showing that "the specific information sought" was clearly relevant to a felony or gross misdemeanor, or clearly relevant to a misdemeanor if the information sought would not reveal a confidential source or means of information. The prior law had allowed disclosure only in situations where the information sought was "clearly relevant to a specific violation of the law other than a misdemeanor."

The Minnesota Newspaper Association, the Minnesota Broadcasters Association, and the Minnesota Society of Professional Journalists strongly supported the bill. Rick Kupchella, then president of Minnesota SPJ, and media attorneys Mark Anfinson, John Borger, and Lucy Dalglish testified in favor of the bill. During one committee hearing, State Senator Allen Spear commented that he had pushed for the original law in 1973 intending that it protect all unpublished information in addition to the identity of confidential sources. The legislation passed by wide margins in both the Senate and the House of Representatives. Although the governor objected to the new legislation and issued a public statement explaining his reasons for refusing to sign it, he allowed it to become law without his signature.

The U.S. District Court for the District of Minnesota apparently overlooked the 1998 amendments when it stated that the shield law "simply does not apply" to information that does not involve a confidential relationship. *Berglund v. City of Maplewood*, 173 F.Supp.2d 935, 950 (D. Minn. 2001), *aff'd sub nom. Zick v. City of Maplewood*, 50 Fed. App'x 805, 806 (8th Cir. 2002) (unpublished).

Since then, courts have interpreted the shield law's exceptions for both criminal proceedings and civil defamation actions.

In 2003, the Minnesota Supreme Court interpreted the defamation exception to the shield statute, holding that a nonparty reporter had to disclose which defendants named in a libel action were confidential sources for an article he wrote about a high school football coach. *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003). The court found that the coach had satisfied the exception's three requirements: (1) that disclosure of the source's identity would lead to relevant evidence on the issue of actual malice, (2) that there was probable cause to believe that the source had information clearly relevant to the issue of defamation, and (3) that the information could not be obtained by alternative means. 668 N.W.2d at 672–73. The court stressed that the test of relevance is whether evidence has "any tendency" to make a consequential fact more or less probable. 668 N.W.2d at 673. Therefore, where

the plaintiff has alleged that the defendant is the source of the allegedly defamatory statements, relevant evidence constitutes not only evidence on the source's knowledge, but also the source's identity. . . . [W]hen the identity of the speaker is hidden under the cloak of anonymity . . . it is self-evident that the identity of the speaker will lead to relevant evidence on the issue of actual malice.

668 N.W.2d at 673–74. The court further held that the probable cause requirement was satisfied because the district court's narrow order only required disclosure of those sources named as defendants, thereby ensuring that disclosure would lead to relevant information. 668 N.W.2d at 674.

A few years later, in 2006, a Blue Earth County judge held that a newspaper reporter had to disclose unpublished information obtained from a telephone interview with a suicidal man during a police standoff (the man ultimately killed himself). Order Re: MS 595.024 MN Free Flow of Information Act, *In re Death Investigation of Jeffrey Alan Skjervold*, No. CV 07 168, Blue Earth Cty., Minn., Dist. Ct., dated Feb. 13, 2007, *appeal pending*. Because the man held his wife hostage and shot at least two police officers, the court found that that he had committed felony violations and that there was "no doubt" that information obtained by the reporter "would be clearly relevant to such crimes." In so holding, it rejected the newspaper's argument that the exception only applies where a defendant faces actual prosecution. Because the man killed himself, the court held that the information could not be obtained through alternative means. Finally, the court held that there was a compelling and overriding interest

requiring disclosure, stating, "[t]he right claimed by the [newspaper] to seek the 'truth' must never be allowed to take precedent over the compelling and overriding interest of law enforcement authority to maintain human life."

## *2. Text of statute*

Following its most recent amendments in 1998, the Minnesota Free Flow of Information Act provides:

### *595.021 News media; protection of sources; citation.*

Sections 595.021 to 595.025 may be cited as the "Minnesota free flow of information act."

### *595.022 Public policy.*

In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of sections 595.021 to 595.025 is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

### *595.023 Disclosure prohibited.*

Except as provided in section 595.024, no person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof, to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained.

### *595.024 Exception and procedure.*

Subdivision 1. Disclosure; application. A person seeking disclosure may apply to the district court of the county where the person employed by or associated with a news media resides, has a principal place of business or where the proceeding in which the information sought is pending.

Subd. 2. Disclosure allowed; conditions. The application shall be granted only if the court determines after hearing the parties that the person making application, by clear and convincing evidence, has met all three of the following conditions:

- (1) that there is probable cause to believe that the specific information sought (i) is clearly relevant to a gross misdemeanor or felony, or (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained,
- (2) that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights, and
- (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.

Subd. 3. Determination; appeal. The district court shall consider the nature of the proceedings, the merits of the claims and defenses, the adequacies of alternative remedies, the relevancy of the information sought, and the possibility of establishing by other means that which the source is expected or may tend to prove. The court shall make its appropriate order after making findings of fact. The order may be appealed directly to the court of appeals according to the rules of appellate procedure. The order is stayed and nondisclosure shall remain in full force and effect during the pendency of the appeal. Where the court finds that the information sought has been published or broadcast, there shall be no automatic stay unless an appeal is filed within two days after the order is issued. Either party may request expedited consideration.

### 595.025 Defamation.

Subdivision 1. Disclosure prohibition; applicability. The prohibition of disclosure provided in section 595.023 shall not apply in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice.

Subd. 2. Disclosure conditions. Notwithstanding the provisions of subdivision 1, the identity of the source of information shall not be ordered disclosed unless the following conditions are met:

- (a) that there is probable cause to believe that the source has information clearly relevant to the issue of defamation;
- (b) that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights.

Subd. 3. Determination; appeal. The court shall make its order on the issue of disclosure after making findings of fact, which order may be appealed to the court of appeals according to the rules of appellate procedure. During the appeal the order is stayed and nondisclosure shall remain in full force and effect.

### B. State constitutional provision

The Minnesota Supreme Court has declined to apply the state constitution as a source for a reporter's privilege, for the same reasons it found no protection under the First Amendment, at least in criminal cases where the reporter is asked to testify to events personally witnessed or to produce unpublished photographs. *State v. Turner*, 550 N.W.2d 622, 628 (Minn. 1999). The *Turner* court stated, "This court has once before refused to interpret [the state constitution's] language to provide greater protection to reporters than the First Amendment, and we do so again today."

However, Minnesota state courts continue to recognize *some* degree of constitutional protection for journalist's sources and materials, and the state constitutional protection is co-extensive with the federal level of protection. *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608, 610 (Minn. Ct. App. 1997), *overruled to the extent inconsistent with Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003); *see also Weinberger*, 668 N.W.2d at 672, n.5 ("We do not address that issue because neither party has properly put that issue before the court, and it was not considered by the district court."); *Turner* 550 N.W.2d at 629 (requiring in camera review of journalist's unpublished photos before disclosure compelled).

### C. Federal constitutional provision

Recognition of a reporter's privilege based upon the First Amendment varies between state and federal courts in Minnesota.

The Minnesota Supreme Court held in *State v. Turner*, 550 N.W.2d 622, 628 (Minn. 1996) that "no qualified constitutional privilege exists under the First Amendment that would protect reporters from compelled testimony in a criminal case." However, Minnesota state courts continue to recognize *some* degree of federal constitutional protection for journalist's sources and materials. *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608, 610 (Minn. Ct. App. 1997), *overruled to the extent inconsistent with Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003); *see also Weinberger*, 668 N.W.2d at 672, n.5 ("We do not address that issue because neither party has properly put that issue before the court, and it was not considered by the district court."); *Turner* 550 N.W.2d at 629 (requiring in camera review of journalist's unpublished photos before disclosure compelled).

Further, the Supreme Court appeared to back pedal from *Turner's* strong language in 2006, within the context of a lawyer disciplinary proceeding. *In re Charges of Unprofessional Conduct*, 720 N.W.2d 807 (Minn. 2006). The court there ultimately held that resolution of the case did not require it to decide whether a First Amendment journalist's privilege existed. 720 N.W.2d at 817. However, in reaching this conclusion, it left the door open to future recognition of the privilege. *See generally* 720 N.W.2d at 816–17.

The federal court has recognized a significant First Amendment privilege. *See J.J.C. v. Fridell*, 165 F.R.D. 513, 516 (D. Minn. 1995) ("[M]ost federal courts have assumed the [reporter's] privilege protects a reporter's underlying work product as well as an informant's identity."). The federal court has not directly addressed this basis for

privilege since *Turner*. In *Fridell*, Magistrate Judge Montgomery (now U.S. District Judge Montgomery) applied the balancing approach followed in most federal courts, under which "the reporter's privilege is defeated only where the information sought is: (1) critical to the maintenance or the heart of the claim; (2) highly material and relevant; and (3) unobtainable from other sources." *Fridell*, 165 F.R.D. at 516. This privilege is similar to the Minnesota statutory privilege (as of the 1998 amendments), but not identical. For example, some information in civil cases might be compelled under the federal privilege that would not be compelled under the state statute.

#### **D. Other sources**

##### *1. Inherent judicial power*

Although rejecting protection for unpublished but nonconfidential information under the First Amendment and under the state statute, the Minnesota Supreme Court has directed the lower courts to review the requested information for themselves before requiring journalists to turn the information over to the parties in a case. *State v. Turner*, 550 N.W.2d 622, 629 (Minn. 1996). The court in *Turner* stated,

We believe that concerns of overburdening the news media justify the implementation of an in camera procedure for reviewing unpublished information, including photographs, before forcing a news organization to disclose information in its possession to a litigant. If a litigant asserts that unpublished information or photographs possessed by a newspaper may be relevant to his or her case, in camera review by the district court is an appropriate means of balancing the defendant's need for evidence to support his or her claims against the public's interest in a free and independent press.

The only information the court should release would be information relevant to the requesting party's theory of the case, as defined by that party's attorneys.

##### *2. Rules of procedure—avoiding undue burden*

Rule 22.02 of the Minnesota Rules of Criminal Procedure provides that the district court on motion may quash or modify a subpoena for production of documentary evidence or objects, "if compliance would be unreasonable or oppressive." Rule 26.03 of the Minnesota Rules of Civil Procedure allows the district court to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

In *State v. Ross*, 22 Media L. Rep. 2509 (Ramsey Cty., Minn., Dist. Ct. 1994), the district court relied in part upon Criminal Rule 22.02 to quash a criminal defendant's subpoena to newspaper reporters in connection with a sentencing proceeding after she pleaded guilty to the death of her four-year-old son. The court stated,

A subpoena in a criminal case must not create an "unreasonable or oppressive burden." Minn. R. Crim. Proc. 22.02. Subpoenas directed at the news media present special problems, in addition to the time and attention which is diverted from gathering and presenting news as a result of having to respond to the subpoenas. . . . [I]t is important for reporters to maintain objectivity and to be perceived by their sources and by their readers as neutral in public controversies, including criminal proceedings. If reporters are compelled to testify as witnesses on behalf of any party in a criminal trial or civil suit, they risk being perceived as advocates and their position of neutrality may be impaired. This may lead to a loss of credibility with readers and to increased difficulty in obtaining information. Compelling reporters to testify about material obtained in confidence or from entirely confidential sources also endangers their ability to obtain information from future confidential sources.

22 Media L. Rep. at 2510-11. The court, further relying upon the shield statute and upon the constitutional privilege, found that the defendant had not met any of the conditions for compelling disclosure of information from the reporters relating to stories they had written about her son's death.

The argument of undue or improper burden can succeed even if the information sought has been published. In an unpublished order in *United States v. Ford*, Crim. No. 4-92-112 (D. Minn. 1992), the court quashed a criminal defendant's subpoena against two newspapers that sought copies of "all articles" that had appeared in the newspapers over a three-week period relating to the shooting of a police officer and "relating to racial tensions stemming from the shooting." The court held that the defendant's attorney could find the articles through her own research, and that it was improper to shift that burden to the newspapers. It stated,

Appearances by the newspapers are not necessary to authenticate the articles, to the extent they have evidentiary value. Fed. R. Ev. 902(6). Insofar as defense counsel seeks to have the newspapers make the search and selection concerning the articles, the subpoenas shift the burden of trial preparation from defense counsel onto the newspapers; no matter what the extent of the newspapers' resources may be relative to the criminal defendant, this sort of burden-shifting is an unfair imposition upon innocent third-parties.

See J. Borger, *Resisting Subpoenas for Published or Broadcast Information*, 12 *Comm'n's Lawyer*, Spring 1994, at 10 (ABA).

### III. Scope of protection

#### A. Generally

The privilege in Minnesota extends substantial protection to unpublished information as well as to information relating to confidential sources.

#### B. Absolute or qualified privilege

The constitutional privilege in Minnesota is a qualified one in all types of cases. On its face, the statutory privilege is qualified in all criminal proceedings and in civil defamation actions and absolute in other civil actions.

#### C. Type of case

##### 1. Civil

On the face of the statute, the only civil actions in which a court could compel disclosure of confidential or unpublished information are defamation actions. Minn. Stat. §§ 595.024 (permitting compelled disclosure only where the specific information sought is clearly relevant to a felony, gross misdemeanor, or misdemeanor); 595.025 (permitting compelled disclosure in defamation actions). The defamation exception has been applied to compel disclosure in an action for deceptive trade practices and interference with prospective business advantage from a "media defendant in what is essentially ... a defamation case" where the requested information was relevant to whether the defendant knew that a broadcast was deceptive and yet chose to air it. *Aequitron Medical, Inc. v. CBS Inc.*, 24 Media L. Rep. 1025, 1027 (S.D.N.Y. 1995).

In *Johnson v. CBS Inc.*, the federal court compelled a television defendant to disclose notes, outtakes, and documents reviewed in the course of investigating and producing a televised report in a case alleging tortious interference with prospective contractual relations. No. CIV-3-95-624, 1996 WL 907735 (D. Minn. Sept. 14, 1996) (unpublished). (The Court later held that defamation standards would apply to plaintiff's claims, although plaintiff had not asserted a claim for defamation. *Johnson v. CBS Inc.*, 10 F. Supp.2d 1071, 1073 (D. Minn. 1998).) This decision came after the Minnesota Supreme Court had held that the Minnesota statute did not protect unpublished but nonconfidential information, and before the 1998 legislation that restored protection for such information. The court noted that it might have reached a different conclusion if the plaintiff had been seeking confidential source information protected under the statute. 1996 WL 907735 at \*2, n.2. Therefore, the 1998 legislation might produce a different result if the question arises in a later case.

The fact that the reporter or the news organization is not a party to the particular defamation action does not in itself prevent compulsory disclosure of confidential or unpublished information, but it may weigh against such disclosure. See, e.g., *Weinberger v. Maplewood Review*, 648 N.W.2d 249, 258 (Minn. Ct. App. 2002) ("Compelling disclosure of confidential sources of statements in an article about a public official, for the purpose of making the reporter a witness against sources, has significant potential to interfere with a reporter's ability to gather news. Given the nature of this case, the fact that [the reporter] is not, by asserting the privilege, shielding himself from liability and the potential burden to the newsgathering process of using reporters to impeach or testify against their sources, we conclude that this factor weighs against disclosure."), *rev'd*, 668 N.W.2d 667 (Minn. 2003); *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608, 611 (Minn. Ct. App. 1997) ("When the reporter is a party to the litigation, the balance may tip more in favor of disclosure than when the reporter is not a party."), *overruled to the extent inconsistent with Weinberger*, 668 N.W.2d 667.

## 2. Criminal

The constitutional and statutory privileges protect confidential and unpublished information even in criminal cases, but can be overcome if the requesting party makes the necessary showings, as discussed in other sections of this outline.

## 3. Grand jury

A grand jury could compel disclosure of confidential or unpublished information under the statute if the conditions for compelling disclosure could be met.

### D. Information and/or identity of source

All forms of the privilege in Minnesota protect the identity of a confidential source or information that would tend to identify a confidential source.

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

All forms of the privilege in Minnesota protect, to some degree, nonconfidential (if nonpublished) as well as confidential information.

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

Minnesota's statutory privilege does not extend to published or broadcast material. In some cases, the published or broadcast status of particular information could be disputed. If so, a court determination that publication or broadcast has occurred could affect rights on appeal. The statute provides, "Where the court finds that the information sought has been published or broadcast, there shall be no automatic stay unless an appeal is filed within two days after the order is issued." Minn. Stat. § 595.024 subd. 3.

No federal court decision in Minnesota addresses this aspect of a constitutional privilege.

### G. Reporter's personal observations

No federal court decision in Minnesota addresses this aspect of a constitutional privilege.

The statutory privilege does not explicitly distinguish on this basis. Pre-1998 decisions interpreting the earlier version of the statute contain language declining to protect personal observations, or finding that the necessary conditions for disclosure were met in situations involving a reporter's personal observations. *See, e.g., State v. Knutson*, 523 N.W.2d 909, 912–13 (Minn. Ct. App. 1994) ("[T]he Reporters Shield Law does not apply where, as here, no source is at risk and the reporter would testify regarding events personally witnessed. . . . Rosen [the reporter] has no constitutional privilege not to testify regarding his personal observation of an assault. . . . Neither the Minnesota Reporters Shield Law nor the Constitution provide Rosen a privilege not to testify regarding events he personally witnessed while covering a story.").

### H. Media as a party

In *Grunseth v. Marriott Corp.*, the court noted that the reporter was not a party in the case where plaintiff was seeking to compel disclosure of sources. 868 F. Supp. 333, 335 (D.D.C. 1994) (applying Minnesota law in part). In ordering disclosure by defendant in *Johnson v. CBS, Inc.*, the court observed that "[t]his is not a case where a non-party is being summoned to testify." No. CIV-3-95-624, 1996 WL 907735, \*5 (D. Minn. Sept. 14, 1996) (unpublished).

In *Bauer v. Gannett Co., Inc. (KARE 11)*, the court of appeals articulated five factors to be applied in "any consideration of cases arising under the [Minnesota Free Flow of Information] Act." 557 N.W.2d 608, 611 (Minn. Ct. App. 1997), *overruled to the extent inconsistent with Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 672 n.5 (Minn. 2003) One of those factors was whether the media was a party to the litigation:

First, the determination of whether the privilege applies is influenced by the nature of the litigation and whether the reporter or news organization from whom disclosure is sought is a party to the litigation. When the reporter is a party to the litigation, the balance may tip more in favor of disclosure than when the reporter is not a party. This is particularly true in a suit alleging the defamation of a public official or public figure because plaintiffs in those

cases must prove that the defamatory publication was made with "actual malice." The disclosure of a confidential source may be essential to the proof of actual malice if a plaintiff must demonstrate that the reporter's source was unreliable. . . . We stress, however, that this consideration is not dispositive, but rather one of multiple factors to be weighed in the district court's decision.

557 N.W.2d at 611. In a later defamation case in which the reporter and newspaper were not parties, the court of appeals applied the same factor, holding that

making the reporter a witness against sources[] has significant potential to interfere with a reporter's ability to gather news. Given the nature of this case, the fact that [the reporter] is not, by asserting the privilege, shielding himself from liability[,] and the potential burden to the newsgathering process of using reporters to impeach or testify against their sources, we conclude that this factor weighs against disclosure.

*Weinberger v. Maplewood Review*, 648 N.W.2d 249, 258 (Minn. Ct. App. 2002), *rev'd*, 668 N.W.2d 667. Whether courts will continue to consider this factor after the supreme court's decision in *Weinberger* is unclear. *See, e.g., Weinberger*, 668 N.W.2d at 675, n.9 (overruling *Bauer* to the extent it was inconsistent with the court's holding, without discussing the nonparty status of the reporter and newspaper).

### I. Defamation actions

Minn. Stat. § 595.025 subd. 1 expressly provides that the "prohibition of disclosure provided in section 595.023 shall not apply in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice." Subdivision 2 provides that "the identity of the source of information shall not be ordered disclosed unless the following conditions are met: (a) that there is probable cause to believe that the source has information clearly relevant to the issue of defamation; (b) that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights."

The supreme court interpreted this exception in 2003, holding that a nonparty reporter had to disclose which defendants named in a libel action were confidential sources for an article he wrote about a high school football coach. *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003). The court found that the coach had satisfied the three requirements of Minn. Stat. § 595.025. 668 N.W.2d at 672–73. The court stressed that the test of relevance is whether evidence has "any tendency" to make a consequential fact more or less probable. 668 N.W.2d at 673. Therefore, where

the plaintiff has alleged that the defendant is the source of the allegedly defamatory statements, relevant evidence constitutes not only evidence on the source's knowledge, but also the source's identity. . . . [W]hen the identity of the speaker is hidden under the cloak of anonymity . . . it is self-evident that the identity of the speaker will lead to relevant evidence on the issue of actual malice.

668 N.W.2d at 673–74. The court further held that the probable cause requirement was satisfied because the district court's narrow order only required disclosure of those sources named as defendants, thereby ensuring that disclosure would lead to relevant information. 668 N.W.2d at 674.

Although the supreme court did not explicitly discuss the reporter's nonparty status in *Weinberger*, other courts have suggested that a reporter's status as a nonparty weighs against compelling disclosure of confidential or unpublished information. *See, e.g., Weinberger v. Maplewood Review*, 648 N.W.2d 249, 258 (Minn. Ct. App. 2002), *rev'd*, 668 N.W.2d 667; *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608, 611 (Minn. Ct. App. 1997), *overruled to the extent inconsistent with Weinberger*, 668 N.W.2d 667. Whether courts will continue to consider this factor after *Weinberger* is unclear. *See, e.g., Weinberger*, 668 N.W.2d at 675, n.9 (overruling *Bauer* to the extent it was inconsistent with the court's holding, without discussing the nonparty status of the reporter and newspaper).

## IV. Who is covered

### A. Statutory and case law definitions

While the Minnesota Free Flow of Information Act refers to the "news media," it extends protection to any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public."

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

All traditional newsgatherers are covered by the privilege.

#### **a. Reporter**

Courts have applied the privilege to protect reporters in *Grunseth v. Marriott Corp.*, 868 F. Supp. 333 (D.D.C. 1994) (applying Minnesota statute as well as other bases for privilege) and *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608 (Minn. Ct. App. 1997); *overruled to the extent inconsistent with Weinberger v. Maplewood Review*, 668 N.W.2d 667 (Minn. 2003).

Cases involving reporters, but denying protection for other reasons, include *Johnson v. CBS, Inc.*, No. CIV-3-95-624, 1996 WL 907735 (D. Minn. Sept. 14, 1996) (unpublished); *Weinberger*, 668 N.W.2d 667; and *State v. Knutson*, 523 N.W.2d 909, 912–13 (Minn. Ct. App. 1994).

#### **b. Editor**

No specific Minnesota cases dealing with editors.

#### **c. News**

No specific Minnesota cases dealing with news personnel not covered in other sections.

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

Courts have applied the privilege to protect photojournalists. *See Findings of Fact, Conclusions of Law and Order, State v. Berglund*, No. K5-00-600125, Ramsey Cty., Minn., Dist. Ct., dated April 12, 2000 (compelling city to return original videotape that police had seized from cable access show personnel).

Cases involving photojournalists, but denying protection for other reasons, include *State v. Turner*, 550 N.W.2d 622 (Minn. 1996), and *State v. Knutson*, 539 N.W.2d 254 (Minn. Ct. App. 1995).

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

Courts have applied the privilege to news organizations in *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608 (Minn. Ct. App. 1997) (television station), *overruled to the extent inconsistent with Weinberger v. Maplewood Review*, 668 N.W.2d 667 (Minn. 2003); *McNeilus v. Corporate Report, Inc.*, 21 Media L. Rep. 2171, 2174–75 (Dodge Cty., Minn., Dist. Ct. 1993) (magazine publisher); *Aerial Burials, Inc. v. Minneapolis Star and Tribune Co.*, 8 Media L. Rep. 1653 (Hennepin Cty., Minn., Dist. Ct. 1982) (newspaper).

Cases involving news organizations, but denying protection for other reasons, include *Heaslip v. Freeman*, 511 N.W.2d 21 (Minn. Ct. App. 1994) (photographs).

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

Courts have applied the privilege to nontraditional news gatherers. *See Findings of Fact, Conclusions of Law and Order, State v. Berglund*, No. K5-00-600125, Ramsey Cty., Minn., Dist. Ct., dated April 12, 2000 (compelling city to return original videotape that police had seized from cable access show personnel).

Cases involving reporters, but denying protection for other reasons, include *Berglund v. City of Maplewood*, 173 F.Supp.2d 935, 950 (D. Minn. 2001) (cable access show personnel), *aff'd sub nom. Zick v. City of Maplewood*, 50 Fed. App'x 805, 806 (8th Cir. 2002) (unpublished).

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

The privilege belongs to the "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public," in the words of the statute. One district court has held that the "statutory privilege is that of the media, not of the

sources." Order and Memorandum at 9, *Jamieson v. Doe*, No. MC 88-18860, Hennepin Cty., Minn., Dist. Ct., dated February 1, 1989.

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

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

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

Minnesota imposes no special procedures or deadlines for service of a subpoena on journalists. Rule 45 of the Minnesota Rules of Civil Procedure does not set a minimum period between service and the time of testimony. Case law establishes that notice must be "reasonable" under the circumstances, but this is a flexible standard. *See* 1A David F. Herr & Robert S. Haydock, *Minnesota Practice* § 45.7, at 408–09; *see also Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (Minn. 1956); *Phillippe v. Comm'r of Pub. Safety*, 374 N.W.2d 293, 297 (Minn. Ct. App. 1985).

#### **2. Deposit of security**

Minnesota law does not require the subpoenaing party to deposit any security to procure the testimony or materials of a reporter. Rule 45.02(a) requires that service be accompanied by tender of one day's witness fee plus mileage, and Rule 45.01 directs the subpoenaing party to advise the witness of the right to have certain expenses reimbursed under Rule 45.03(d).

#### **3. Filing of affidavit**

Minnesota law does not require the subpoenaing party to serve or file an affidavit to procure testimony or materials from a reporter. If the testimony or materials involve confidential or unpublished material protected by the statute, the subpoenaing party cannot compel disclosure without obtaining a court order in advance.

#### **4. Judicial approval**

A person seeking disclosure of information protected under the shield statute may apply to the district court for an order compelling disclosure. Minn. Stat. § 595.024 subd. 1. Disclosure is required only if the court grants the order upon a determination that the statutory conditions have been met.

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

The requirements of the Shield Law apply to all forms of subpoenas, including police and administrative subpoenas. Minn. Stat. § 595.023.

### **B. How to Quash**

#### **1. Contact other party first**

In practice, a telephone call or letter to the attorney who has requested information from a reporter often will be enough to persuade the attorney to drop the request, at least when the reporter or news organization is not a party to the litigation in which the information is sought.

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

Minnesota Rule of Civil Procedure 45 was amended in 2006 and now mirrors, virtually in its entirety, the federal counterpart. Rule 45.04(b) states, "When information subject to a subpoena is withheld on a claim that it is privileged . . . the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Minn. R. Civ. P. 45.04(b).

In a civil action, Rule 45.03(b)(2) permits a written objection to a subpoena for documents, placing the burden on the attorney serving the subpoena to obtain a court order before the materials can be obtained ("[A] person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney

designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued."). The objection alone, however, does not relieve the person subpoenaed of the obligation either to appear at the deposition or to move to quash the deposition.

In a criminal action, Rule 22.02 of the Minnesota Rules of Criminal Procedure provides that the district court on motion may quash or modify a subpoena for production of documentary evidence or objects, "if compliance would be unreasonable or oppressive." Rule 26.03 of the Minnesota Rules of Civil Procedure allows the district court to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

### **3. File a motion to quash**

#### **a. Which court?**

Motions under the Shield Law may be heard by the district court "of the county where the person employed by or associated with a news media resides, has a principal place of business or where the proceeding in which the information is sought is pending." Minn. Stat. § 595.024 subd. 1.

Motions to quash that go beyond the Shield Law are motions for a protective order and can be heard by the district court in which the action is pending or the district court in the district where the deposition is to be taken. Minn. R. Civ. Proc. 26.03.

Rule 22.02 of the Minnesota Rules of Criminal Procedure provides that the district court on motion may quash or modify a subpoena for production of documentary evidence or objects, "if compliance would be unreasonable or oppressive." Rule 26.03 of the Minnesota Rules of Civil Procedure allows the district court to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

#### **b. Motion to compel**

If a party objects to a subpoena (see section V.B.2 above), the party seeking discovery may move to compel production of the documents at any time before or during the taking of the deposition.

#### **c. Timing**

Motions should be brought before the time scheduled for the deposition. If the time is too short to permit normal briefing and scheduling, the court can expedite the briefing schedule. Minn. R. Gen. Prac. 115.07. The court also can grant an ex parte motion to postpone the deposition until such time as the motion to quash can be heard. 1A David F. Herr & Robert S. Haydock, *Minnesota Practice* § 45.7, at 408.

#### **d. Language**

Typical language for an objection: "Pursuant to Rule 45.04(b) of the Minnesota Rules of Civil Procedure, [objecting witness] hereby objects to the production, inspection, or copying of any and all of the materials designated in Exhibit A to the subpoena duces tecum dated \_\_\_\_, and signed by [attorney for subpoenaing party]. [Objecting witness] objects to the subpoena on the grounds, *inter alia*, that [grounds]."

Typical language for Notice of Motion and Motion to Quash: "To [attorney for the party serving the subpoena]: PLEASE TAKE NOTICE that [reporter or news organization] by the undersigned, will move this Court for an Order pursuant to Rules 26, 37, and 45 of the Minnesota Rules of Civil Procedure, providing: 1. That the subpoenas duces tecum served on [moving party] by [subpoenaing party] be quashed; and 2. That the notices of deposition of [moving party or witness] be quashed."

#### **e. Additional material**

Motions should be accompanied by a memorandum of law and must be accompanied by a proposed order. Minn. R. Gen. Prac. 115.04. Affidavits and exhibits may be submitted. Minn. R. Gen. Prac. 115.04.

### **4. In camera review**

"The court has the duty, where applicable, to review in camera any evidence to determine its actual relevance before ordering it to be disclosed." *Bauer v. Gannett Co., Inc. (Kare 11)*, 557 N.W.2d 608, 613 (Minn. Ct. App. 1997), *overruled to the extent inconsistent with Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003); *see also State v. Turner*, 550 N.W.2d 622, 629 (Minn. 1996) (requiring in camera review of journalist's unpublished photos before disclosure compelled).

### **5. Briefing schedule**

Privilege motions are considered nondispositive motions under Minnesota rules. The normal briefing schedule requires the moving party to serve and file motion papers at least fourteen days prior to the hearing, requires the responding party to serve and file opposition papers at least seven days before the hearing, and allows the moving party to serve and file reply papers at least three days before the hearing. Minn. R. Gen. Prac. 115.04. The court can waive or modify these time limits "if irreparable harm will result absent immediate action by the court, or if the interests of justice otherwise require." Minn. R. Gen. Prac. 115.07.

### **6. Amicus briefs**

Amicus participation is unusual in Minnesota district courts. State court rules do not directly address such participation.

At the appellate level, amicus participation is routinely approved, following application for leave to participate under Minn. R. Civ. App. P. 129 (requests for leave generally must be filed within fifteen days after the filing of the notice of appeal).

Amici in cases involving the reporters' privilege have included individual news organizations, the Society of Professional Journalists ([www.mnspj.org](http://www.mnspj.org)), the Minnesota Newspaper Association ([www.mnnewspapernet.org](http://www.mnnewspapernet.org)), and the Minnesota Broadcasters Association ([www.minnesotabroadcasters.com](http://www.minnesotabroadcasters.com)).

## **VI. Substantive law on contesting subpoenas**

### **A. Burden, standard of proof**

The person seeking to compel disclosure of information protected by the shield statute must establish each element for one of the exceptions by "clear and convincing evidence." Minn. Stat. § 595.024 subd.2; *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608, 610 (Minn. Ct. App. 1997), *overruled to the extent inconsistent with Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003)

### **B. Elements**

#### **1. Relevance of material to case at bar**

The statute requires that the information sought be "clearly relevant." Minn. Stat. §§ 595.024 subd.2(1), 595.025 subd. 2(a).

In 2006, a Minnesota district judge held that a newspaper reporter had to disclose unpublished information obtained from a telephone interview with a suicidal man during a police standoff (the man ultimately killed himself). Order Re: MS 595.024 MN Free Flow of Information Act, *In re Death Investigation of Jeffrey Alan Skjervold*, No. CV 07 168, Blue Earth Cty., Minn., Dist. Ct., dated Feb. 13, 2007, *appeal pending*. Because the man held his wife hostage and shot at least two police officers, the court found that that he had committed felony violations and that there was "no doubt" that information obtained by the reporter "would be clearly relevant to such crimes." In so holding, the court rejected the newspaper's argument that the exception only applies where a defendant faces actual prosecution.

Likewise, the supreme court stressed in *Weinberger v. Maplewood Review* that the test for relevance is a liberal one: whether evidence has "any tendency" to make a consequential fact more or less probable. 668 N.W.2d 667, 673 (Minn. 2003). In that case the court held that a high school football coach could obtain from a nonparty reporter the identities of his confidential sources who were also named defendants in the coach's defamation action. 668 N.W.2d at 675. The court considered both (1) whether disclosure of the source's identity would lead to rele-

vant evidence on the issue of actual malice and (2) whether there was probable cause to believe that the source had information clearly relevant to the issue of defamation. 668 N.W.2d at 672–73. Concluding that both tests were met, the court stated,

the plaintiff has alleged that the defendant is the source of the allegedly defamatory statements, relevant evidence constitutes not only evidence on the source's knowledge, but also the source's identity. . . . [W]hen the identity of the speaker is hidden under the cloak of anonymity . . . it is self-evident that the identity of the speaker will lead to relevant evidence on the issue of actual malice.

668 N.W.2d at 673–74. The court further held that the probable cause requirement was satisfied because the district court's narrow order only required disclosure of those sources named as defendants, thereby ensuring that disclosure would lead to relevant information. 668 N.W.2d at 674.

To the extent it was not overruled by *Weinberger*, another instructive case is *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608 (Minn. Ct. App. 1997), *overruled to extent inconsistent with Weinberger*, 668 N.W.2d 667. In *Bauer* the court of appeals held that the "clearly relevant" standard would be satisfied by evidence that "went to the heart of the claim," and went on to state that "[t]he constitutional standard, as well as the plain meaning of the statutory text, however, require the district court to perform an exacting analysis of each individual request for disclosure of a confidential source or information leading to his or her identity to determine if that particular source or that particular information is clearly relevant to the claim." 557 N.W.2d at 611.

In *State v. Knutson*, the appellate court ordered in camera review of photographs because "there is a likelihood that a photograph will provide *conclusive* information as to whether Simmer was wearing brass knuckles at the time of Knutson's assault. . . . Photographs may provide more accurate information than conflicting eyewitness accounts as to whether Simmer was wearing brass knuckles." 539 N.W.2d 254, 258 (Minn. Ct. App. 1995) (emphasis added).

Conclusory statements that the information sought might be important are not sufficient to compel disclosure. *Steele v. Tell*, No. C2-94-981, 1994 Minn App Lexis 1079, \*9 (Minn. Ct. App. Nov. 1, 1994) (unpublished).

## 2. Material unavailable from other sources

The statute requires that the person seeking to compel disclosure show that "that the information cannot be obtained by alternative means or remedies less destructive of first amendment rights." Minn. Stat. §§ 595.024 subd.2(2), 595.025 subd. 2(b).

In 2006 a Minnesota district court held that this standard was satisfied where the county sought information regarding a conversation between a newspaper reporter and a man who subsequently killed himself. Order Re: MS 595.024 MN Free Flow of Information Act, *In re Death Investigation of Jeffrey Alan Skjervold*, No. CV 07 168, Blue Earth Cty., Minn., Dist. Ct., dated Feb. 13, 2007, *appeal pending*. The court found no evidence that anyone had recorded the conversation, stating, "that leads to just one rather obvious conclusion: If we want the information, it has to come from the Free Press reporter."

The supreme court reached a similar decision in *Weinberger v. Maplewood Review*, 668 N.W.2d 667 (Minn. 2003). In *Weinberger* the plaintiff sought to ascertain whether any of the defendants named in his defamation action were the confidential sources a newspaper reporter used in writing an article about the plaintiff's termination as the local high school's football coach. 668 N.W.2d at 669–70. The court found that the plaintiff had deposed each of the defendants to no avail: not one "owned up to any of the statements in question or provided information as to the source." 668 N.W.2d at 675. In fact, the parties did not dispute that this factor weighed in favor of disclosure. 668 N.W.2d at 675.

In *Bauer v. Gannett Co., Inc. (KARE 11)*, the court of appeals explained this requirement

Most courts have required that the movant show an exhaustion of all reasonable alternative means of obtaining the information. . . . We decline to endorse any formulaic approach relying, for example, on numbers of potential sources interviewed or deposed to determine whether the "any alternative means" condition has been satisfied. But we note that this requirement places a burden on the movant to demonstrate that substantial ef-

forts have been made to obtain the information through other means—what constitutes substantial efforts will necessarily vary from case to case.

557 N.W.2d 608, 612 (Minn. Ct. App. 1997), *overruled to extent inconsistent with Weinberger*, 668 N.W.2d 667.

In *State v. Knutson*, the appellate court ordered in camera review of photographs, even though eyewitnesses might testify to the same general information, because the "photographers . . . used an objective means of recording that information. It is that objective record, not the photographers' eyewitness impressions, that the subpoena seeks." 539 N.W.2d 254, 258 (Minn. Ct. App. 1995) (emphasis added). In a prior decision arising from the same criminal prosecution, the court of appeals held that "alternative means" were not present when the other eyewitness testimony was conflicting. *State v. Knutson*, 523 N.W.2d 909, 912–13 (Minn. Ct. App. 1994).

In *J.J.C. v. Fridell*, the court held that plaintiff's assertions that interviews and depositions had failed to reveal the information she was seeking "does not demonstrate an exhaustion of all reasonable alternative means to obtaining the information." 165 F.R.D. 513, 516 (D. Minn. 1995).

The plaintiff's own memory can be a suitable alternative source. *Aerial Burials, Inc. v. Minneapolis Star and Tribune Co.*, 8 Media L. Rep. 1653 (Hennepin Cty., Minn., Dist. Ct. 1982). It clearly is not enough for a plaintiff to say that he has not been able to obtain the information from the journalists at depositions or in interrogatories. *McNeilus v. Corporate Report, Inc.*, 21 Media L. Rep. 2171, 2174–75 (Dodge Cty., Minn., Dist. Ct. 1993).

#### **a. How exhaustive must search be?**

In *Grunseth v. Marriott Corp.*, relying in part upon Minnesota law, the court quashed a subpoena to compel a reporter to disclose a source because the plaintiff had not "demonstrated, other than in conclusory language, that he has exhausted all other reasonable sources for obtaining the information." 868 F. Supp. 333, 335 (D.D.C. 1994).

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

This will vary depending upon the circumstances of each case. See discussion above.

#### **c. Source is an eyewitness to a crime**

There are no specific Minnesota cases or statutory provisions on this point. This point likely would be considered as part of the other elements.

### **3. Balancing of interests**

Except in defamation cases, the person seeking to compel disclosure must show "that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice." Minn. Stat. § 595.024 subd.2(3).

In 2007 a Minnesota district court held in rather conclusory fashion that this standard was met. Order Re: MS 595.024 MN Free Flow of Information Act, *In re Death Investigation of Jeffrey Alan Skjervold*, No. CV 07 168, Blue Earth Cty., Minn., Dist. Ct., dated Feb. 13, 2007, *appeal pending*. In *Skjervold*, the court held that a newspaper reporter had to disclose unpublished information obtained from a telephone interview with a suicidal man during a police standoff (the man ultimately killed himself). Law enforcement sought the information for an "on-going investigation" into the man's suicide. However, the investigation was not focused on any particular person. Further, the court appeared to misplace its focus on past events: rather than considering whether law enforcement's need to fully investigate the suicide trumped the newspaper's need to maintain its independence, the court considered whether the newspaper's need to talk to the suicidal man trumped law enforcement's need to prevent his death. The court stated, "The right claimed by the [newspaper] to seek the 'truth' must never be allowed to take precedent over the compelling and overriding interest of law enforcement authority to maintain human life."

The court of appeals' explanation of this requirement in *Bauer v. Gannett Co., Inc. (KARE 11)*, may also be helpful, although it is probably improper to consider the compelling interest factor in a defamation case. *Bauer*, 557 N.W.2d 608, 612 (Minn. Ct. App. 1997), *overruled to the extent inconsistent with Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003); *see also Weinberger*, 668 N.W.2d at 673 (naming only three conditions for application of the defamation exception). In *Bauer* the court made clear that a "compelling interest" can weigh

against disclosure as well as *in favor of* disclosure. 557 N.W.2d at 612. The court stated, "the court must consider whether there is a compelling interest in the information or source. . . . Thus, the court should consider not only the relevance but also the necessity of any information a confidential source might have. There may be no need to disclose the identity of relevant confidential sources: evidence of malice may be available from nonconfidential sources, or the defendant may have sufficient evidence of truth and prudence in publishing to prevail on a motion for summary judgment. . . . A compelling interest might also keep the court from disclosing the identity of a confidential source despite demonstrated relevance and necessity." 557 N.W.2d at 612 (internal citations omitted).

In *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 335-36 (D.D.C. 1994) (relying in part upon Minnesota statute), the court stated that "Plaintiff has demonstrated no overwhelming or compelling societal interest in overcoming the presumption favoring First Amendment protections for a reporter's sources. This is not a case involving election fraud, or governmental corruption, or any other issue that affects the fundamental validity of the electoral process."

#### **4. Subpoena not overbroad or unduly burdensome**

Minnesota courts have long rejected overly broad requests for information from journalists, beginning with *Thompson v. State*, 170 N.W.2d 101 (Minn. 1969).

#### **5. Threat to human life**

Minnesota case law and statutes do not expressly require the court to weigh whether the matter subpoenaed involves a threat to human life. Consideration of such a factor likely would be appropriate under other factors of the test.

#### **6. Material is not cumulative**

In *State v. Knutson*, the court of appeals considered the eyewitness testimony of a reporter, as a more or less non-biased source, to be noncumulative despite the availability of other eyewitnesses who presented conflicting testimony. 523 N.W.2d 909, 912-13 (Minn. Ct. App. 1994).

#### **7. Civil/criminal rules of procedure**

Minnesota Rule of Civil Procedure 45 was amended in 2006 and now mirrors, virtually in its entirety, the federal counterpart. Rule 45.04(b) states, "When information subject to a subpoena is withheld on a claim that it is privileged . . . the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Minn. R. Civ. P. 45.04(b).

In a civil action, Rule 45.03(b)(2) permits a written objection to a subpoena for documents, placing the burden on the attorney serving the subpoena to obtain a court order before the materials can be obtained ("[A] person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued."). The objection alone, however, does not relieve the person subpoenaed of the obligation either to appear at the deposition or to move to quash the deposition.

In a criminal action, Rule 22.02 of the Minnesota Rules of Criminal Procedure provides that the district court on motion may quash or modify a subpoena for production of documentary evidence or objects, "if compliance would be unreasonable or oppressive." Rule 26.03 of the Minnesota Rules of Civil Procedure allows the district court to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

#### **8. Other elements**

### **C. Waiver or limits to testimony**

## 1. Is the privilege waivable at all?

The Minnesota statute does not address the issue of waiver.

In *J.J.C. v. Fridell*, the court held that "[v]oluntary disclosure of information covered by a privilege could constitute, but does not mandate, a waiver of the privilege." 165 F.R.D. 513, 517 (D. Minn. 1995)

## 2. Elements of waiver

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

A published statement that someone is not the source of information does not constitute a waiver of the privilege. *J.J.C. v. Fridell*, 165 F.R.D. 513, 517 (D. Minn. 1995) ("Mentioning who is not an informant is not the same as indicating who is the informant."). Only actual disclosure of the identity of the informant to a third party might constitute (but would not mandate) waiver. 165 F.R.D. at 517

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

Under the logic discussed in the previous section, disclosure of the name of a nonconfidential source would not constitute a waiver of any privilege for any information other than what has been disclosed.

### c. Partial disclosure of information

Under the logic discussed in the previous sections, partial disclosure of information would not constitute a waiver of any privilege for any information other than what has been disclosed.

### d. Other elements

No Minnesota case law or statutory provisions apply here.

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

Under the logic discussed in the previous sections, partial disclosure of information would not constitute a waiver of any privilege for any information other than what has been disclosed.

## VII. What constitutes compliance?

### A. Newspaper articles

Newspaper articles are self-authenticating under Minn. R. Civ. Proc. 902(6).

In an unpublished order in *United States v. Ford*, Crim. No. 4-92-112 (D. Minn. 1992), the court quashed a criminal defendant's subpoena against two newspapers that sought copies of "all articles" that had appeared in the newspapers over a three-week period relating to the shooting of a police officer and "relating to racial tensions stemming from the shooting." The court held that the defendant's attorney could find the articles through her own research, and that it was improper to shift that burden to the newspapers. It stated,

Appearances by the newspapers are not necessary to authenticate the articles, to the extent they have evidentiary value. Fed. R. Ev. 902(6). Insofar as defense counsel seeks to have the newspapers make the search and selection concerning the articles, the subpoenas shift the burden of trial preparation from defense counsel onto the newspapers; no matter what the extent of the newspapers' resources may be relative to the criminal defendant, this sort of burden-shifting is an unfair imposition upon innocent third-parties.

See J. Borger, *Resisting Subpoenas for Published or Broadcast Information*, 12 Comm'n's Lawyer, Spring 1994, at 10 (ABA).

### B. Broadcast materials

Broadcast materials are not self-authenticating under any specific subdivision of Minn. R. Ev. 902.

### C. Testimony vs. affidavits

The parties could stipulate to the authenticity of published or broadcast materials as produced by the news organization, or they could agree to accept an affidavit in place of testimony, particularly to confirm that the material is a true and accurate copy of what was published or broadcast. They also could stipulate to calling the reporter as a witness only if the identified source disputes the accuracy of published material, and to limiting the testimony of the reporter to confirming what has been published. *See, e.g., Stipulation and Order Limiting Testimony of Reporter Paul McEnroe, State v. Buie*, No. XX-94-335, Ramsey Cty., Minn., Dist. Ct., dated June 6, 1994.

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

### **1. Civil contempt**

Under Minn. R. Civ. P. 37.02, a court is authorized to impose sanctions for failure to comply with discovery orders. Civil contempt is one type of sanction. *See* Rule 37.02(b)(4) ("In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination."); *see also* Minn. Stat. § 588.01, subd. 3 (8). In determining whether to impose a severe sanction, such as civil contempt, a court will examine "the extent of disobedience, the motivation for it, [w]hether it was intentional or negligent," and "whether the disobedience caused any prejudice to the party obtaining the order compelling discovery." 1A David F. Herr & Robert S. Haydock, *Minnesota Practice* § 37.9, at 228; *see also Minnesota State Bar Assoc. v. Divorce Assistance Assoc. Inc.*, 248 N.W.2d 733, 740 (Minn. 1976) ("[S]uch a sanction is appropriate only where the alleged contemnor has acted contumaciously, in bad faith, and out of disrespect for the judicial process.").

Civil contempt is "generally imposed to compel compliance with a court order." Herr & Haydock, *supra* § 37.9, at 229; *see also Burkstrand v. Burkstrand*, No., C2-01-1200, 2002 WL 378092, \*4 (Minn. Ct. App. Mar. 12, 2002) (unpublished). It is used frequently to compel a nonparty's compliance with a discovery order because other sanctions would have little impact on a nonparty. Herr & Haydock, *supra* § 37.9, at 229.

#### **a. Fines**

Courts sometimes impose continuing fines for each day of noncompliance with an order. A \$250 fine is the maximum permitted for contempt. Minn. Stat. § 588.10; *see also Wenger v. Wenger*, 274 N.W. 517, 521 (Minn. 1937). Although the courts have inherent authority to sentence for contempt, independent of any statutory authorization, they should generally defer, as a matter of comity, to the statutory limits on such sentences. *State v. Tatum*, 556 N.W.2d 541, 547 (Minn. 1996); *State v. Lingwall*, 637 N.W.2d 311, 314 (Minn. Ct. App. 2001).

Violation of a lawful court order is constructive (rather than direct) contempt. Minn. Stat. § 588.01 subd. 3 (2001). Under Minnesota law, "[e]very court and judicial officer may punish a contempt by fine or imprisonment, or both. ... When it is a constructive contempt, it must appear that the right or remedy of a party to an action or special proceeding was defeated or prejudiced by it before the contempt can be punished by imprisonment or by a fine exceeding \$50." Minn. Stat. § 588.02.

#### **b. Jail**

A court may impose a jail sentence on a person found in contempt of court. *Minnesota State Bar Assoc. v. Divorce Assistance Assoc., Inc.*, 248 N.W.2d 733, 740–41 (Minn. 1976); *Burkstrand v. Burkstrand*, No., C2-01-1200, 2002 WL 378092, \*4 (Minn. Ct. App. Mar. 12, 2002) (unpublished); *Nelson v. Nelson*, No. CX-96-280, 1996 WL 481533, \*2 (Minn. Ct. App. Aug. 27, 1996) (unpublished). A civil contempt order, however, cannot impose a fixed sentence; instead, it must allow for release through compliance. *See* Minn. Stat. § 588.12 ("When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, the person may be imprisoned until the person performs it, and in such case the act shall be specified in the warrant of commitment."). "[C]ivil contempt is said to give the contemnor the keys to the jail cell because compliance with the order allows him to purge himself and end the sanction." *Burkstrand*, 2002 WL 378092, at \*4; *see also Minnesota State Bar Assoc.*, 248 N.W.2d at 741.

### **2. Criminal contempt**

"Criminal contempt is imposed to punish an affront to the court's authority." 1A David F. Herr & Robert S. Haydock, *Minnesota Practice* § 37.9, at 229; *see also* Minn. Stat. § 588.20; *Ramos Colon v. U.S. Atty. for the Dis-*

*trict of Puerto Rico*, 576 F.2d 1, 5 (1st Cir. 1978); *Minnesota State Bar Assoc. v. Divorce Assistance Assoc., Inc.*, 248 N.W.2d 733, 741 (Minn. 1976). In the criminal contempt context, unconditional and fixed sentences are allowed. *Matter of Welfare of K.E.H.*, 542 N.W.2d 658, 661 (Minn. Ct. App. 1996).

### 3. Other remedies

In a defamation action against the news organization, the normal civil sanctions for contempt could apply, including prohibitions on evidence, orders that certain matters will be taken to be established, orders striking pleadings, and default judgment. Minn. R. Civ. Proc. 37.02(b). In *McNeilus v. Corporate Report, Inc.*, the court allowed the publisher to protect the identity of its confidential source, but held that the publisher could not introduce into evidence at trial any confidential information or documentation that had not been disclosed to plaintiff at least ten days prior to trial. 21 Media L. Rep. 2171, 2175 (Dodge Cty., Minn., Dist. Ct. 1993)

Damages are available under Minn. Stat. § 588.11 for persons injured by violation of a court order. An award under this statute requires a showing of actual injury and the extent of that injury. See *Campbell v. Motion Picture Mach. Operators*, 186 N.W. 787, 789 (Minn. 1922) (holding that a contempt award for the benefit of the injured party "must be based on proof of the damage actually sustained"); *Hanson v. Thom*, 636 N.W.2d 591, 593-94 (Minn. Ct. App. 2001) (holding that award under Minn. Stat. § 588.11 is limited to that necessary to make aggrieved party whole for damages actually suffered, not to penalize the party in contempt); *Time-Share Systems, Inc. v. Schmidt*, 397 N.W.2d 438, 441 (Minn. Ct. App. 1986) (stating that "'indemnity must be based on proof of damages actually suffered or it cannot be sustained'" (quoting *Westgor v. Grimm*, 381 N.W.2d 877, 880 (Minn. Ct. App. 1986))).

## VIII. Appealing

### A. Timing

For appeals in federal court, see separate survey for Eighth Circuit.

#### 1. Interlocutory appeals

Most orders compelling or refusing to compel disclosure of source and unpublished material will be in the context of discovery rather than final judgments. Many jurisdictions would regard review of such orders as interlocutory, unless appeal is taken from an order holding the reporter in contempt for failing to disclose. The Minnesota statute, however, treats all appeals from orders relating to the shield statute as normal appeals under the state rules of appellate procedure. Minn. Stat. § 595.024 subd. 3. This is true even of appeals from discovery orders in defamation actions. Minn. Stat. § 595.025 subd. 3.

#### 2. Expedited appeals

Either party may request expedited consideration in an appeal to the Minnesota state appellate courts. Minn. Stat. § 595.024 subd. 3; Minn. Stat. § 595.025 subd. 3.

### B. Procedure

For appeals in federal court, see separate survey for Eighth Circuit.

Procedure in Minnesota state courts is discussed below.

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

Appeals from Minnesota state district court decisions involving the Minnesota shield law are made to the Minnesota Court of Appeals. Minn. Stat. § 595.024 subd. 3; Minn. Stat. § 595.025 subd. 3. Further review is discretionary in the Minnesota Supreme Court.

#### 2. Stays pending appeal

Disclosure is automatically stayed during appellate review within the Minnesota state appellate courts; however, if the district court finds that the information sought has been published or broadcast, there is no automatic stay

unless an appeal is filed within two days after the order compelling disclosure is issued. Minn. Stat. § 595.024 subd.3.

### 3. Nature of appeal

Review in the Minnesota Court of Appeals is by standard appeal under the state rules of appellate procedure.

### 4. Standard of review

The standard of review is de novo. *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 672–73 (Minn. 2003).

However, in *Steele v. Tell*, No. C2-94-981, 1994 Minn. App. LEXIS 1079, \*8–9 (Minn. Ct. App. Nov. 1, 1994) (unpublished), the court of appeals affirmed a district court's *denial* of a motion to compel disclosure of confidential sources, stating that the district court had not abused its discretion.

### 5. Addressing mootness questions

In *State v. Brenner*, the Minnesota Supreme Court vacated a court of appeals decision regarding reporter's privilege "because there is no underlying criminal prosecution and the issue addressed and decided by the court of appeals is therefore moot." 497 N.W.2d 262, 263 (Minn.1993).

### 6. Relief

The typical results on appeal are a decision that the information need not be disclosed, that the information must be disclosed, or that the lower court must reconsider whether disclosure is necessary in light of the appellate court's discussion of the issues.

Appeals involving actual contempt orders are rare. In *Thompson v. State*, the Minnesota Supreme Court reversed an order holding a reporter in contempt (and ordering him jailed for ninety days) for refusing to answer the following question in a murder trial: "And who were the sources of your information for the news articles that you wrote in connection with the murder of Carol Thompson?" 170 N.W.2d 101, 102 (Minn. 1969). Although the supreme court noted the then-existing "paucity of authority" for the reporter's assertion of privilege, it disapproved of the "scattergun" question and stated,

No authority has been cited which would establish a basis for a finding of contempt of court for failure to answer a question with respect to sources as vague and imprecise as the one contained in the record. We are asked to assume that [the reporter] did in fact cause to be published certain relevant information which was prejudicial and that the petitioner [reporter] is entitled to know the source of such information so that he might use it in proving that his conviction resulted from a denial of his rights.

170 N.W.2d at 103.

## IX. Other issues

### A. Newsroom searches

The authors are not aware of any "newsroom searches"—with or without a warrant—by Minnesota law enforcement authorities in the mode of *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (search of newsroom for photographic evidence to use against third parties). Sporadic problems have occurred with police or other law enforcement officials who, without a warrant, have simply seized photographs or materials from journalists. Some situations have been resolved quietly and quickly when the officers (or their superiors) have acknowledged that they acted improperly and have apologized to the journalists involved. Two cases have resulted in extensive litigation, as discussed below.

#### 1. The Federal First Amendment Privacy Protection Act (42 U.S.C. § 2000aa)

##### a. *Minneapolis Star and Tribune Co. v. United States*, No. 3-87 CIV 36 (D. Minn.)

On December 22, 1986, WCCO-TV cameraman Gary Feblowitz and Star Tribune photographer Thomas Sweeney recorded a narcotics arrest at a convenience store in north Minneapolis; they shot from the store's

public parking lot and the adjacent public sidewalk. FBI agents demanded that they turn over their film and videotape, threatened them with incarceration, and forcibly removed and confiscated their equipment, film, and videotape. They later explained that they were concerned that the identity of undercover agents at the scene of the arrest could be revealed through publication of the film and videotape, citing a report that one of the suspects arrested that night had allegedly hired someone to kill one of the undercover officers who was present at the scene of the arrest. In a series of unpublished rulings on motions to dismiss or for summary judgment, U.S. District Judge Donald Alsop:

- Held that the Privacy Protection Act applied to the facts of the case, despite the defendants' claim that they had not seized the materials as part of "the investigation . . . of a criminal offense." The court held that Congress had not intended to limit the scope of the act to searches and seizures of journalists' materials to be used as evidence in criminal proceedings against third parties. (August 13, 1987)
- Held that the statute's reference to "otherwise applicable law" (§§ 2000aa(a) and (b)) included the protections of the first and fourth amendments; therefore, the government had to show that the FBI agents who seized the material had complied with the first and fourth amendment protections afforded the journalists before the government could invoke the "life in danger" exception in the statute. (June 9, 1988)
- Held that "warrantless seizures are allowable under the life-in-danger exception under the same circumstances that such seizures are allowable under the Fourth Amendment in general." (August 1, 1988)
- Held that the seizure of materials from the journalists was a prior restraint in violation of the First Amendment and that "therefore, defendant cannot invoke the exceptions to the liability provision of the PPA." (August 1, 1988).

b. *Berglund v. City of Maplewood*, 173 F.Supp.2d 935, 950 (D. Minn. 2001), *aff'd sub nom. Zick v. City of Maplewood*, 50 Fed. App'x 805, 806 (8th Cir. 2002) (unpublished).

On December 28, 1999, Robert Zick and Kevin Berglund attended a "recognition event" at the Maplewood Community Center for the mayor and two city council members whose terms were ending. They wanted to record the farewell speeches for their public-access cable television program. A dispute arose regarding whether they would have to pay a \$15 admission fee that was intended to cover the costs of food (that they told the person in charge they would not eat) and a farewell gift (that they considered inappropriate to pay because they were covering the event, not supporting the city officials). A city official agreed to waive the fee if Zick and Berglund agreed to certain "rules" on where and how they would videotape the event. As the official and Zick were discussing the location for videotaping, off-duty Maplewood police officers told Zick and Berglund they had to "pay or leave." One officer placed his hand on Berglund's arm to direct him outside. A physical encounter occurred that involved Berglund and four off-duty police officers, including the chief of police. Berglund, who had been videotaping all of the discussions and events, passed the camera to Zick, who continued videotaping. Berglund was arrested and charged with trespass and assault and taken away to jail. (He was later acquitted of all charges in a criminal jury trial.) Police then forcibly seized the videotape from Zick. They returned a copy of the videotape two days later, too late for Zick and Berglund to show on their next weekly cable show. In the criminal case against Berglund, the state court judge held that the police had violated the state shield law and as a sanction for that improper conduct ordered the city to return the original videotape to Berglund. Findings of Fact, Conclusions of Law and Order, *State v. Berglund*, No.

K5-00-600125, Ramsey Cty., Minn., Dist. Ct., dated April 12, 2000. Zick and Berglund brought separate actions in federal court alleging violations of the Federal First Amendment Privacy Protection Act and the Federal Civil Rights Act. The district court granted summary judgment in favor of the defendants and against both Zick and Berglund on October 25, 2001. *Berglund v. City of Maplewood*, 173 F.Supp.2d 935 (D. Minn. 2001), *aff'd sub nom. Zick v. City of Maplewood*, 50 Fed. App'x 805, 806 (8th Cir. 2002) (unpublished). The court found that two exceptions to the statute applied under the circumstances of the case. First, because Berglund was arrested in connection with activities that he recorded on the videotape, the seizure satisfied the "criminal suspect" exception (allowing a government officer to search for and seize "work product" or "documentary materials" if "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate"), even though the police seized the

videotape from Zick (who was not arrested on any charge) rather than from Berglund. 173 F.Supp.2d at 949. Second, it held that the seizure satisfied the "destruction of evidence" exception, finding that "an objectively reasonable officer would have reason to believe that Zick, who was Berglund's companion, would erase or tamper with the videotape that provided evidence of Berglund's conduct." 173 F.Supp.2d at 949.

## 2. Federal Civil Rights Act (42 U.S.C. § 1983)

In *Berglund v. City of Maplewood*, the district court held that a warrantless seizure of materials protected by the First Amendment would violate the Fourth Amendment, and therefore support a claim for violation of the Civil Rights Act, unless "exigent circumstances" required immediate seizure to preserve evidence of a crime. 173 F.Supp.2d 935, 943 (D. Minn. 2001), *aff'd sub nom. Zick v. City of Maplewood*, 50 Fed. App'x 805, 806 (8th Cir. 2002) (unpublished). The court found that exigent circumstances were present in this case because "Zick was Berglund's companion and was in the position to destroy the video recording. Moreover, [police] believed that the tape could be destroyed, erased or tampered with if they did not take it from Zick." 173 F.Supp.2d at 944.

## 3. Minnesota Shield Law

The Minnesota Free Flow of Information Act does not provide for a damages remedy. *Berglund v. City of Maplewood*, 173 F.Supp.2d 935, 950 (D. Minn. 2001), *aff'd sub nom. Zick v. City of Maplewood*, 50 Fed. App'x 805, 806 (8th Cir. 2002) (unpublished).

### B. Separation orders

There are no reported cases or statutes in Minnesota limiting the scope of separation orders issued against reporters who are both trying to cover a trial and are on a witness list. Separation orders involving reporters who are on a witness list are very rare. Assuming that a separation order has been entered and a reporter appears on a witness list but the reporter has not actually been subpoenaed (and therefore a motion to quash the subpoena would be premature), a prudent first step in challenging the order would be to move to strike the reporter from the witness list or to determine the scope and admissibility of the reporter's potential testimony.

### C. Third-party subpoenas

There are no known instances of third-party subpoenas in Minnesota involving attempts to discover a reporter's sources.

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

Journalists who voluntarily break promises of confidentiality may be answerable in damages to their sources. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387 (Minn. 1992). Disclosure of a confidential source pursuant to court order should not trigger damages liability to the source. *See United Techs. Commc'ns. Co. v. Washington County Bd.*, 624 F. Supp. 185, 190 (D. Minn. 1985) (applying Minnesota law and stating, "[i]t is a general principle of the law of contracts that one is not liable in an action for breach where that breach was the result of a court order"); *Automatic Alarm Corp. v. Ellis*, 99 N.W.2d 54 (Minn. 1959) (holding that unforeseen exercise of governmental authority rendering performance of contractual obligation impossible will excuse promisor's obligation in connection therewith); *Village of Minneota v. Fairbanks, Morse & Co.*, 31 N.W.2d 920, 925 (Minn. 1948) (holding that judicial order or other act of government making performance impossible discharges contractual duty); *National Farmers Union Prop. & Cas. Co. v. Fuel Recovery Co.*, 432 N.W.2d 788, 791 (Minn. Ct. App. 1988) (same).