

REPORTER'S PRIVILEGE: MISSOURI

The Reporters Committee for Freedom of the Press

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

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

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Executive Director: Lucy A. Dalglish

Editors: Gregg P. Leslie, Elizabeth Soja, Wendy Tannenbaum, Monica Dias, Dan Bischof

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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) for greater flexibility in how it can be used. Printouts of individual state and circuit chapters are made available for readers' convenience.

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

MISSOURI

Prepared by:

Jean Maneke, Esq.
 The Maneke Law Group, L.C.
 620 One Main Plaza
 4435 Main St.
 Kansas City, MO 64111
 (816) 753-9000

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I. Introduction: History & Background

Missouri has not adopted a shield statute for reporters, but a proposed law is working its way through the Missouri legislature in the spring, 2007, session, so it is possible it will pass and by August, 2007, Missouri will join the states that have a qualified privilege. This will be a significant improvement in this area of the law for this state, inasmuch as the law prior to this time has been murky and not necessarily consistent throughout the state.

While in the last three years, there has not been any development in case law in regard to the reporters' privilege, there has indeed been litigation on the subject, but none has gone to the level of a court of record. One high profile case involved a subpoena of a reporter who had interviewed a suspected murderer. The State listed the reporter as a prospective witness and the defense then wanted to subpoena the reporter to find out what he knew about the case, despite that the story he wrote was of his interview with the defense attorneys' own client. Fortunately, in that case, the suspect pleaded guilty to a lesser-offense before the deposition could occur.

Another high profile case involved the photographs of a University football practice session shot by a newspaper photographer, who happened to get the collapse and subsequent death of a player in the course of documenting the session. The father of the victim sought to subpoena the unpublished photographs of the photographer, and he was joined by the University who decided that accessing these unpublished photographs might be a good idea. After a lower-court unfavorable decision, and realizing the likelihood that an appellate court would not create new law in this area, the newspaper chose to release the unpublished photos on its website before releasing all of the photographs to the father's attorney.

II. Authority for and source of the right

A. Shield law statute

Missouri has no shield law statute for reporters, but, again, it is possible one will be passed as it is pending in the Missouri legislature during the spring, 2007, session, and could become law in August, 2007, if passed and signed by the governor. The bill under consideration was drafted by attorneys working with the Missouri Press Association, including attorneys for the St. Louis Post-Dispatch. It originally was drafted for the 2006 legislative session, where it was introduced but failed to make it out of the Senate committee where it had its initial hearing. It was revived in 2007 due to strong support from newspapers within in the state and in its second attempt, it was launched in the Missouri House of Representatives, where it gained quick approval, before being sent to the Senate for a second attempt. Although it did pass through Senate committee in 2007, it allegedly has two high-profile state senators threatening to halt its progress on the floor. Those legislators, who have not tied their objection to any named interest group in the state, have stated they believe reporters should not be entitled to any special privilege not available to the general public.

B. State constitutional provision

Article I, Section 8, of the Missouri Constitution, in similar fashion to the First Amendment to the United States Constitution, provides "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts."

This provision provides a basis for beginning the argument in Missouri that a reporter's privilege should attach to the identity of sources used in the preparation of stories. However, no Missouri case has discussed in detail the application of this constitutional provision to the issue, but simply noted its existence.

C. Federal constitutional provision

Similarly, case law in the state has noted that the First Amendment to the United States Constitution provides a basis for beginning the argument that a reporter's privilege should attach to the identity of sources used in the preparation of stories. But no state court has directly held this based upon Federal constitutional provisions. Indeed, there are only two cases in the state of Missouri in which this issue has been addressed: *CBS, Inc., v. Campbell*, 645 S.W.2d 30 (Mo. Ct. App. 1982); and *State of Mo. ex rel Classic III, Inc., v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997), and both have relied heavily on federal case precedent in making what determinations have been made regarding this issue for reporters in the State of Missouri. In fact, the *Ely* case cited above contains probably the most thorough discussion of this issue in the State of Missouri to date.

D. Other sources

There are no court rules, state bar guidelines or administrative procedures addressing this issue.

III. Scope of protection

A. Generally

Missouri case law does provide a basis to begin the argument that a privilege does attach to the reporter in regard to disclosure of sources under certain circumstances.

B. Absolute or qualified privilege

The case law in Missouri would seem to support that this privilege is qualified, based upon the four-pronged test set out in *Classics III*, as outlined below.

If the shield law now under consideration in the Missouri legislature in 2007 should pass, the law would provide a qualified privilege for reporters in the state. The bill under consideration allows a reporter to seek a judge's oversight into the effort to obtain disclosure, mandating the court to consider the nature of the proceedings, the merits of the claim or defense, the adequacy of any remedy otherwise available, the possibility of establishing by other means that which it is alleged the source or information will tend to prove, the public interest in protecting the confidentiality of any source as balanced against the public interest in requiring disclosure, and the relevancy of the source or information.

The court would be required to find that the information sought does not involve matters or details necessary in any proceeding that are required to be kept secret under federal or state law and that all other available sources of information have been exhausted; and that disclosure of the information is essential to the protection of the public interest involved in the proceedings.

C. Type of case

1. Civil

The Court in *CBS*, at 33, suggests that it believes disclosure in a civil trial could result in potential harm to a reporter in the performance of his or her duties. And in *Classics III*, at 655, Missouri adopted the four-part balancing test set out in many federal cases, focusing on the following four elements: 1) whether the movant has exhausted alternative sources of the information; 2) the importance of protecting confidentiality in the circumstances of the case; 3) whether the information sought is crucial to plaintiff's case; and 4) whether plaintiff has made a prima facie case of defamation. These facts are then balanced in determining whether to apply the privilege to the particular information or identity sought. But the court further noted that the four-part test will only apply if the journalist invokes a reporter's shield privilege based upon a promise of confidentiality to his or her source. At 654, the court in *Classics III* based its decision, in part, on the holding of the 8th Circuit Court of Appeals in *Cervantes v. Time*, 454 F.2d 986 (8th Cir., 1972), *cert denied*, 409 U.S. 1125, 93 S.Ct. 939, 35 L.Ed.2d 257 (1973).

2. Criminal

The Court in *CBS*, *id.*, at 33, suggests that it believes disclosure in a criminal trial could result in potential harm to a reporter in the performance of his or her duties.

3. Grand jury

The Court in *CBS*, at 33, indicates that it believes the secrecy of grand jury proceedings in the State of Missouri would render disclosure in that setting less harmful than if disclosure were in conjunction with an ordinary civil or criminal trial. This case (following the *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), analysis) held that there was no qualified privilege in such proceedings when there was no claim that the information was confidential or that the grand jury investigation was a sham undertaken to obtain the subpoenaed information. *CBS*, at 33.

D. Information and/or identity of source

The court in *Classics III*, at 655, noted that the claim of privilege generally is strongest when the information sought is the names of persons who have given information in confidence to the reporter.

E. Confidential and/or non-confidential information

The court in *Classics III*, at 654, held that a reporter's shield privilege applies in civil cases to protect the reporter from being forced to reveal the identity of and confidential communications made by confidential sources where confidentiality was promised, even if the material was not used in the story. The court further engages in a detailed analysis at 658 as to whether it is critical that the source's material be used in the story for the privilege to attach and concludes that this is not a valid test, inasmuch as a reporter may give a promise of confidentiality to a source **after** the story has been published without knowing at that time if a second article will follow.

F. Published and/or non-published material

As stated above in the *Classics III* case, the privilege applies to non-published material as well as published material.

G. Reporter's personal observations

There is no statutory or case law addressing this issue. The bill under consideration in the Missouri legislature in 2007 recognizes that a reporter has an obligation to testify in court as to eyewitness or direct evidence just as any other citizen has such a responsibility.

H. Media as a party

There is no statutory or case law addressing this issue.

I. Defamation actions

There is language in *Classics III*, at 655, suggesting that the claim of a right to discovery is strongest when the case involves an alleged libel by the reporter. But, the court noted that this factor was not, in itself, dispositive.

IV. Who is covered

Because Missouri has no "shield law" statute, the only discussion of quashing subpoenas in the context of non-reporters in cases in the state have been in terms of general discovery issues, which are not relevant to this discussion, and to issues related to confidential communications in the context of an attorney-client relationship or a doctor-client relations, none of which are covered by this author in this outline.

Missouri's proposed shield law provides that a "covered person" is: Any person or entity whose revenue comes principally from the business of gathering, creation, or distribution of news or from charitable contributions that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means, and that meets one of the following three criteria: (a) Publishes, in either print or electronic form, a newspaper, book, magazine, pamphlet, or any other periodical; or (b) Operates a radio or television broadcast station, a network of such stations, a cable system, a satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or (c) Operates a news agency or wire service, or a news or feature syndicate. A "covered person" shall also include: a parent, subsidiary, affiliate, employee, or contractor of a covered

person if such parent, subsidiary, affiliate, employee, or contractor derives revenue from the business of gathering, creation, or distribution of news or from charitable contributions.

a. Reporter

There is no statutory or case law addressing this issue.

b. Editor

There is no statutory or case law addressing this issue.

c. News

There is no statutory or case law addressing this issue.

d. Photo journalist

There is no statutory or case law addressing this issue.

e. News organization / medium

There is no statutory or case law addressing this issue.

2. Others, including non-traditional news gatherers

There is no statutory or case law addressing this issue.

B. Whose privilege is it?

There is no statutory or case law addressing this issue. Missouri's proposed statute provides the privilege belongs to the "covered person." The bill states that "No covered person shall be required to disclose in any federal or state proceeding, including but not limited to any criminal, civil, or administrative proceeding, the source of any published or unpublished, broadcast or nonbroadcast information obtained in the gathering, receiving, or processing of information for any covered person. No covered person shall be required to disclose in any federal or state proceeding, including but not limited to any criminal, civil, or administrative proceeding, any unpublished or nonbroadcast information obtained or prepared in gathering, receiving, or processing of information for any covered person."

V. Procedures for issuing and contesting subpoenas

Under Missouri's proposed shield law, if any person or entity claims the privilege provided by the law, the person or entity seeking the information may move the circuit court of the county in which the proceeding is located for an order divesting such privilege and ordering the disclosure of the information sought. The motion shall allege the name of the person or entity claiming the privilege, the entity with which such person or entity was connected at the time of obtaining the information, the specific information sought and how it is relevant to the proceedings, and the necessity of disclosure of the information.

A. What subpoena server must do

1. Service of subpoena, time

Missouri law sets out the requirements for service of subpoenas in Section 536.077, R.S.Mo. That statute does not set out a minimum amount of time before the deposition, and the only discussion of an "untimely" notice was in the context of a subpoena issued in the course of a hearing. The statute does set out certain other requirements that must be met at certain times and in certain circumstances.

2. Deposit of security

There is no statutory or case law addressing this issue.

3. Filing of affidavit

There is no statutory or case law addressing this issue.

4. Judicial approval

Missouri rules of civil procedure do not require judicial approval in any circumstance before a subpoena is issued.

5. Service of police or other administrative subpoenas

There is no statutory or case law addressing this issue.

B. How to Quash

1. Contact other party first

While Missouri Court Rules do not require the attorney for the reporter to contact the other party before filing a motion to quash, general practice has suggested to this attorney that it is always a good idea to make contact and attempt to determine what is being sought. Often there are ways to work around the issue that generated the subpoena that will satisfy the party serving the discovery request while protecting the reporter from having to engage in a court battle to quash the subpoena, such as the providing of an affidavit (ie: a business records affidavit).

2. Filing an objection or a notice of intent

The formal procedure in Missouri is for the reporter to attend the deposition and to refuse to testify, raising the First Amendment and Missouri constitutional privilege. The party serving the subpoena then must file a motion to compel with the courts and a hearing is heard on the merits, at which time briefs may be filed by the parties on the issues. Alternatively, and sometimes a way to move the procedure more quickly, is for the reporter's attorney to file a motion to quash, which can allow the issues to be addressed by the court more quickly.

3. File a motion to quash

a. Which court?

The proper forum in Missouri for the motions is the court in which the underlying case is being heard.

b. Motion to compel

Technically, the proper response to the subpoena is for the reporter to assert the privilege and the motion to compel to be filed. However, this author has seen both methods used in the state without objection by the courts.

c. Timing

The motion to quash may be filed at any time after the subpoena is served. A motion to compel must be filed after the privilege is asserted in the deposition, but is timely at any time until pending motions are terminated in the underlying case.

d. Language

No special requirements.

4. In camera review

a. Necessity

While Missouri cases have not spoken specifically on this issue, they have cited with approval the various federal cases that suggest this is important.

b. Consequences of consent

The filing of a motion to compel or a motion to quash stays the underlying subpoena until it can be ruled upon by the court, including any future appeals of that underlying court ruling.

c. Consequences of refusing

If a reporter refuses any order of a court in Missouri, whether for in-camera review or for any other matter, he or she may be held in contempt of court and the penalties could include a fine or imprisonment or any combination of the two.

5. Briefing schedule

Any motion filed in a case in Missouri should be set for hearing. This is done by calling the judge's clerk and asking when the judge would be available to hear the motion. The attorney setting the hearing then is responsible for preparing the notice and mailing copies to all interested parties.

6. Amicus briefs

Generally, courts in Missouri do not look with favor upon amicus briefs at the lower-court (circuit court) level. However, it is frequently the practice that amicus briefs are accepted by the courts of appeal and certainly they are often accepted by the state Supreme Court. The Missouri Press Association is a frequent provider of amicus briefs at those levels and is always interested in hearing about cases that involve these issues. The association is located at 802 Locust, Columbia, Mo., and can be reached at 573-449-4167. The author of this section is counsel for the association and also may be contacted about such matters.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

In Missouri, in a civil case context, the court in *Classics III* seems to indicate that if a reporter raises the privilege, the subpoenaing party must meet a standard of proof as set out below.

B. Elements

Missouri uses the four-part test cited in *Classics III*, above, in weighing the privilege. The elements include: 1) whether the movant has exhausted alternative sources of the information; 2) the importance of protecting confidentiality in the circumstances of the case; 3) whether the information sought is crucial to plaintiff's case; and 4) whether plaintiff has made a prima facie case of defamation. These facts are then balanced in determining whether to apply the privilege to the particular information or identity sought.

1. Relevance of material to case at bar

The court in *Classics III* points out, at 657, that the test of relevancy must go further than the standard for discovery set out in the Missouri Supreme Court Rules, which states that the evidence discovered must be relevant or reasonably likely to lead to the discovery of admissible evidence. That same case cites as persuasive the tests set out in *Cervantes v. Time*, 464 F.2d 986 (8th Cir., 1972), cert. denied, 409 U.S. 1125, 93 S.Ct. 939, 35 L.Ed.2d 257 (1973), wherein the court held that the identity of sources should be revealed only if the movant shows concrete evidence that the source will lead to persuasive evidence on a key issue.

And, further, in its analysis of the four-part test, the court in *Classics III*, at 659, required that a test be made of the strength of the movant's case for libel prior to requiring disclosure.

2. Material unavailable from other sources

The court in *Classics III* cites numerous federal circuit cases in its analysis of whether the movant can obtain the information from other sources. It notes that there has been no showing of what alternative sources were inquired of regarding the information sought. Ultimately, the court concluded in *Classics III* that similar evidence could be obtained from non-source individuals and found that the movants had not been their burden of proof on this element.

a. How exhaustive must search be?

There is no statutory or case law addressing this issue.

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

While this issues has not been specifically addressed in case law, a reference in *Classics III* at 656 notes that the court found important in its analysis of the elements that the subpoenaing party could likely obtain the same or similar evidence from other potential witnesses.

c. Source is an eyewitness to a crime

There is no statutory or case law addressing this issue.

3. Balancing of interests

This issue is discussed above in VI. B.

4. Subpoena not overbroad or unduly burdensome

Nothing in Missouri case law or court rules speaks specifically to this issue, other than the fact that it is general practice in Missouri courts for the judge to make a decision upon the narrowest grounds possible, and therefore it would be expected that the court would rule so as to provide guidance on the breadth that the inquiry could take under the subpoena.

5. Threat to human life

There is no statutory or case law addressing this issue.

6. Material is not cumulative

There is no statutory or case law addressing this issue.

7. Civil/criminal rules of procedure

There is no statutory or case law addressing this issue. In general, all subpoenas are treated alike, with the exception of the notation above in the *CBS* case, at 33, that there was no evidence that the grand jury actions constituted impermissible harassment.

8. Other elements

The court also is required, pursuant to the test in *Classics III*, to weigh the importance of protecting confidentiality to the source. This case suggests there must be an evaluation if the claimed need for confidentiality is real or whether the reporter regularly offers confidentiality to sources on a regular basis to prevent discovery in all cases. *Classics III*, at 656.

C. Waiver or limits to testimony

There is no statutory or case law addressing this issue. However, in the case involving the photographer at the university football practice cited earlier in this outline, one issue considered by the lower court was that the photographer had discussed in some detail her impressions of that event for industry publications, and argued that by talking to third parties about the actions of that day and the photos she shot, she had waived any privilege in regard to those matters. Counsel for the photographer argued that she had been permitted to choose what details to make public (ie: "to publish") but that enforcement of the subpoena would have taken that right to choose out of her hands.

1. Is the privilege waivable at all?

There is no statutory or case law addressing this issue.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no statutory or case law addressing this issue.

b. Disclosure of non-confidential source's name

There is no statutory or case law addressing this issue.

c. Partial disclosure of information

There is no statutory or case law addressing this issue.

d. Other elements

There is no statutory or case law addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law addressing this issue.

VII. What constitutes compliance?

A. Newspaper articles

The general practice in the state is for a "custodian of records" to testify if needed in court to authenticate any business record. This may be done by affidavit rather than by appearance of a person pursuant to R.S.Mo. Section 490.692. If a subpoena is served that relates to such matters, the counsel for the media often can simply facilitate the production of such an affidavit to prevent the need for a witness to testify in court. Often it is important to distinguish a "custodian of records" for the material as someone separate from the reporter/photographer in order to limit the information available through a deposition, if one is required (ie: the custodian of records is likely to know far less about the article than the reporter who wrote it, but that reporter is not the "custodian of records" for purposes of authenticating the publication of the article in the paper).

B. Broadcast materials

A similar affidavit could seemingly serve to authenticate a true and accurate copy of a video as aired, if such were the only purpose of a subpoena.

C. Testimony vs. affidavits

See answers to the above items.

D. Non-compliance remedies

As stated above, if a reporter fails to honor a valid, upheld subpoena, a court may issue sanctions for contempt of court. Fortunately for reporters in the state, no examples of contempt citations have been entered, so far as it is known by this author.

1. Civil contempt

a. Fines

There is no statutory or case law addressing this issue, and no known instances on the state level.

b. Jail

There is no statutory or case law addressing this issue, and no known instances on the state level.

2. Criminal contempt

There is no statutory or case law addressing this issue, and no known instances on the state level.

3. Other remedies

There is no statutory or case law addressing this issue, and no known instances on the state level.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Appeals of a denial of a motion to quash (or an upholding of the movant's motion to compel) must be made by a writ of prohibition to the appropriate appellate court. There is no time frame within the Supreme Court Rules for the filing of the writ, but the general practice in the state is that a writ is filed very shortly after the lower-court ruling in order to preserve the stay pending the appellate process.

2. Expedited appeals

The rules for the time of the writ process is set out in Missouri Supreme Court Rule 84.22, et seq. The entire process moves fairly quickly, and a ruling is issued by the Court in an expedited matter.

B. Procedure

1. To whom is the appeal made?

The initial appeal from the circuit court order in Missouri goes to the Court of Appeals for the district in the state in which the circuit court sits. The party unsatisfied by the ruling by the Court of Appeals may then seek review through the filing of a Writ before the Missouri Supreme Court.

2. Stays pending appeal

While there is no specific provision in the rules regarding a stay pending appeal, the general practice of counsel in the state is that such matters are stayed informally while the appeal proceeds. And the appellate court may itself issue a stay pending resolution of the matter by application of the appealing party or by its own motion.

3. Nature of appeal

See information set out above regarding filing writs of appeal.

4. Standard of review

Missouri appellate courts will not issue a writ in such matters unless the damage to the party against whom discovery is sought is both severe and irreparable if the privileged material is produced and this damage cannot be repaired on appeal.

5. Addressing mootness questions

There is no statutory or case law addressing this issue, and no known instances on the state level. However, as a general statement, Missouri judges tend to choose to avoid continuing a matter when it is moot, in order to expedite their dockets.

6. Relief

The general procedure is to seek relief through a writ, because once the testimony is given pursuant to a subpoena, any attempt to remedy the matter at appeal will be too late and the damage will have been done. In addition, often the subpoena is of a reporter who is not a party to the underlying action and therefore the reporter has no standing to file any appeal.

IX. Other issues

A. Newsroom searches

Since enactment of the federal Privacy Protection Act (42 U.S.C. 2000aa), there have been no instances where law enforcement has attempted to search any newsroom in the state. No similar provisions exist under state law in Missouri.

B. Separation orders

There is no statutory or case law addressing this issue. However, Missouri has an unwritten "rule" that allows attorneys to clear the courtroom of any person who is a prospective witness prior to the start of a trial, which is general invoked by all attorneys practicing in the state as a matter of course. It would be highly unlikely for a reporter to be summoned to testify while covering a case unless the factual circumstances were highly unusual.

C. Third-party subpoenas

There is no statutory or case law addressing this issue other than that set out above.

D. The source's rights and interests

There is no statutory or case law addressing this issue, and no known instances on the state level.