

REPORTER'S PRIVILEGE: MISSISSIPPI

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
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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

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I. Introduction: History & Background

At the time of submission of this summary, there are no reported decisions from Mississippi's appellate courts regarding the reporters' privilege, qualified or otherwise. The authors were limited to selected orders from state trial courts which discuss the reporters' privilege, although with limited legal analysis. The majority of these orders recognize a qualified privilege for reporters and apply a three-part test forwarded by the Fifth Circuit Court of Appeals in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). Only two reported cases from the federal courts in Mississippi apply the reporters' privilege. *Brinston v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996); *McKee v. Starkville*, 11 Med. L. Rptr. 2312, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985). The analysis below relies upon these limited trial court orders and cases from Mississippi's federal district courts.

Readers should recognize that these trial court orders and federal decisions carry no precedential value for state courts and should not be relied on as such. Instead, they provide the tenor which one may expect from state courts in Mississippi when applying for protection under the reporters' privilege. As these selected trial court orders rely upon the three-part analysis forwarded by the Fifth Circuit Court of Appeals and federal district courts in Mississippi, it would be reasonable to look to Fifth Circuit precedent in formulating an argument in favor of enforcing the reporters' privilege.

The following are various trial court orders gathered by the authors and referred to throughout this summary: *Linda Brune v. City of Jackson*, No. 3:99cv77 (S.D. Miss. 2001); *Alfred Stubblefield v. City of Jackson*, No. 3:93cv279 (S.D. Miss. 1995); *Charles R. Pope v. Village Apartments*, Hinds County Circuit Court, No.92-72-436CV (Jan. 23,1995); *State v. Byron de la Beckwith*, Hinds County Circuit Court, No. 90-3-495CR H (July 28, 1993); *Mary Doe v. Maurin-Ogden Mgmt. Corp.*, Hinds County Circuit Court, No. 90-64-502 (Feb. 8, 1991); *State v. Hand*, Tallahatchie County Circuit Court, No. CR89-49-C (T-2) (July 31, 1990); *In re Grand Jury Subpoena*, Hinds County Circuit Court, No. 38,664 (Oct. 4, 1989); *City of Jackson v. Crawford*, Municipal Court of Jackson, Mississippi, No. 88-0219 (May 20, 1988); *State v. Young*, Hinds County Circuit Court Crim. No. 825 (Mar. 16, 1988); *McKee v. Starkville*, 11 Med. L. Rptr. 2312, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985); *Hersdorffer v. Mississippi Publishers Corp.*, Hinds County Circuit Court, No. 29,251 (Apr. 7, 1983); *Hawkins v. Williams*, Hinds County Circuit Court, No. 29,054 (Mar. 16, 1983).

II. Authority for and source of the right

A. Shield law statute

There is no reporters' shield law within the Mississippi statutory scheme. *Brinston v. Dunn*, 919 F. Supp. 240, 242 (S.D. Miss. 1996).

B. State constitutional provision

Section 13 of Article 3 of the Mississippi Constitution provides in relevant part: "The freedom of speech and of the press shall be held sacred" One trial court order cited to this section of the state constitution as a source of a journalist's qualified right against compelled disclosure. *Hawkins v. Williams*, Hinds County Circuit Court, No. 29,054 (March 16, 1983). In a libel action against a newspaper and its reporter, *not a reporters' privilege case*, the Mississippi Supreme Court commented that the State's constitutional safeguard "appears to be more protective of the individual's right to freedom of speech than does the First Amendment since our constitution makes it worthy of religious veneration." *Gulf Publishing Co., Inc. v. Lee*, 434 So. 2d 687, 696 (Miss. 1983).

C. Federal constitutional provision

The First Amendment to the United States Constitution is the most often-cited source on which the reporters' privilege is based. *Brinston v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996); *McKee v. Starkville*, 11 Med. L. Rptr. 2312, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985). In a libel suit brought against a newspaper and its editorial columnist, the Mississippi Supreme Court concluded that "[f]reedom of the press is a fundamental requisite for

the vitality of any democratic society. . . . In the Constitution of the United States, freedom of the press is among the rights proclaimed in the First Amendment, made binding on the states via the Fourteenth Amendment." *Ferguson v. Watkins*, 448 So. 2d 271, 277 (Miss. 1984).

D. Other sources

Currently, Mississippi does not provide further privileges for reporters via court rules, state bar guidelines, or administrative procedures. One should note that Miss R. Evid. 501 provides:

Except as otherwise provided by the United States Constitution, the State Constitution, by these rules, or by other rules applicable in the courts of this state to which these rules apply, no person has a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

III. Scope of protection

A. Generally

Mississippi trial courts recognize a qualified privilege for news gatherers against disclosing information when the news gatherer is not a party to the suit. In considering whether the privilege applies, the courts have applied the three-part inquiry forwarded by the Fifth Circuit in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) and reiterated by two federal district courts in Mississippi: (1) is the information relevant, (2) can the information be obtained by alternate means, and (3) is there a compelling interest in the information? *Brinston v. Dunn*, 919 F. Supp. 240, 242 (S.D. Miss. 1996) and *McKee v. Starkville*, 11 Med. L. Rptr. 2312, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985). The following orders of the trial courts have applied the three-part test in determining that the party seeking discovery had not met its burden of proof in showing that the qualified privilege had been overcome: *Charles R. Pope v. Village Apartments*, Hinds County Circuit Court, No.92-72-436CV (Jan. 23,1995); *Mary Doe v. Maurin-Ogden Mgmt. Corp.*, Hinds County Circuit Court, No. 90-64-502 (Feb. 8, 1991); *State v. Hand*, Tallahatchie County Circuit Court, No. CR89-49-C (T-2) (July 31, 1990); *In re Grand Jury Subpoena*, Hinds County Circuit Court, No. 38,664 (Oct. 4, 1989); *City of Jackson v. Crawford*, Municipal Court of Jackson, Mississippi, No. 88-0219 (May 20, 1988); and *State v. Young*, Hinds County Circuit Court Crim. No. 825 (Mar. 16, 1988).

B. Absolute or qualified privilege

In line with the opinions from the Fifth Circuit Court of Appeals and federal district courts in Mississippi, trial courts recognize a qualified privilege for reporters. "This privilege is not absolute." *Brinston v. Dunn*, 919 F. Supp. 240, 242 (S.D. Miss. 1996). No order has been found which recognizes an absolute privilege.

C. Type of case

1. Civil

The trial court orders do not distinguish between civil cases and criminal cases regarding the qualified privilege, although most of these orders appear in civil matters. The only reported cases from the federal district courts of Mississippi were civil matters. *Brinston v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996); *McKee v. Starkville*, 11 Med. L. Rptr. 2312, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985).

2. Criminal

The trial court orders from criminal matters apply the same qualified privilege analysis used in civil cases. *State v. Byron de la Beckwith*, Hinds County Circuit Court, No. 90-3-495CR H (July 28, 1993); *State v. Hand*, Tallahatchie County Circuit Court, No. CR89-49-C (T-2) (July 31, 1990); *State v. Young*, Hinds County Circuit Court Crim. No. 825 (Mar. 16, 1988).

3. Grand jury

One trial court order referenced in this summary involves a grand jury subpoena where the court upheld the qualified privilege of a television journalist. *In re Grand Jury Subpoena*, Hinds County Circuit Court, No. 38,664 (Oct. 4, 1989).

D. Information and/or identity of source

The qualified privilege appears to apply to both information and the identity of a source. In *Brinston v. Dunn*, the federal district court applied the qualified privilege analysis to information gathered in the course of writing an article. 919 F. Supp. 240, 244 (S.D. Miss. 1996). In *McKee v. Starkville*, another federal court in Mississippi applied the qualified privilege to protect the disclosure of the identity of a confidential source. 11 Med. L. Rptr. 2312, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985). Only one of the trial court orders delineates between information and the identity of source, *State v. Byron de la Beckwith*, Hinds County Circuit Court, No. 90-3-495CR H (July 28, 1993), which protected a journalist from divulging "the source of information that he obtained in the course of his professional newsgathering activities."

E. Confidential and/or non-confidential information

In *Brinston v. Dunn*, the federal district court noted that "the Fifth Circuit has not yet addressed the issue of compelled disclosure of a nonconfidential source by a journalist . . ." 919 F. Supp. 240, 243 (S.D. Miss. 1996). The court did not apply the qualified privilege test based on whether the information sought was confidential or non-confidential but on the fact that it was unpublished. *Id.* at 244. The reporter was required to "answer questions regarding the truthfulness and accuracy of the contents of the article he authored . . . since this does not impermissibly infringe on the First Amendment right to freedom of the press." *Brinston v. Dunn*, 919 F. Supp. 240, 244 (S.D. Miss. 1996).

In *McKee v. Starkville*, however, the Court focused upon the confidentiality aspect of the information sought and held that "there is no right to refuse to answer relevant questions pertaining to matters other than confidential sources." 11 Med. L. Rptr. 2312, 2313, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985). The reporter was required answer all relevant deposition questions not related to the identity of a confidential source, including inquiries about authorship of articles and the reporter's general knowledge of how executive meetings were conducted by a city's governing council. *Id.*

Only one of the selected trial court orders makes reference to the confidentiality of a source. In *Hersdorffer v. Mississippi Publishers Corp.*, the trial court found that "[t]he information sought is protected by the journalist's constitutional privilege not to reveal *confidential sources*." Hinds County Circuit Court, No. 29,251 (Apr. 7, 1983) (emphasis added). It is unclear whether the information protected in the other trial court orders was confidential or nonconfidential.

F. Published and/or non-published material

In *Brinston v. Dunn*, the federal district court held that "it was contrary to law to compel [the reporter] to disclose *unpublished information* obtained in the course of writing the article without weighing the relative interests of the defendant against potential infringements on the protection afforded to the press by the First Amendment." 919 F. Supp. 240, 244 (S.D. 1996) (emphasis added). The trial court in *City of Jackson v. Crawford* upheld the qualified privilege of a news photographer from divulging "unpublished news photographs." Municipal Court of Jackson, Mississippi, No. 88-0219 (May 20, 1988). No other opinion from the federal district courts of Mississippi or the selected trial court opinions discuss the applicability of the qualified privilege to unpublished information.

G. Reporter's personal observations

In *McKee v. Starkville*, a terminated city employee sought information from a newspaper journalist who reported on the board of aldermen's executive session in which the employee was fired. The employee wanted to know what occurred during the executive session and who gave the reporter information from the executive session. 11 Med. L. Rptr. 2312, 2313, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985). The federal district court found that information sought was relevant and that a compelling interest existed as the reporter was "the percipient witness to a fact in issue, i.e., the identity of the confidential source(s)." *Id.* The court upheld the qualified privilege as to

this information, however, finding that the seeking party had not exhausted all avenues for obtaining the information. *Id.*

A trial court quashed a subpoena issued to a news photographer who witnessed an incident in her capacity as a photojournalist. *Hawkins v. Williams*, Hinds County Circuit Court, No. 29,054 (Mar. 16, 1983). The court found that the party had other sources for the information sought, the proffer of the photographer's testimony was purely cumulative of other testimony, and there was no compelling necessity for her testimony. *Id.*

H. Media as a party

Neither the two opinions from the federal district courts of Mississippi nor the selected trial court orders involve the media as a party to a lawsuit. In *Brinston v. Dunn*, however, the federal district court framed the analysis as "to what extent qualified privilege protects a *non-party* journalist against compelled disclosure of information obtained in the course of reporting a story." *Brinston v. Dunn*, 919 F. Supp. 240, 242 (S.D. Miss. 1996) (emphasis added).

I. Defamation actions

Neither the two opinions from the federal district courts of Mississippi nor the selected trial court orders involve a claim for defamation. In *Brinston v. Dunn*, however, the federal district court noted that "the Fifth Circuit recognized that journalists generally have a qualified privilege not to reveal the identity of a confidential source in a civil case but found that the privilege may be outweighed by necessity and relevance in a libel case." *Brinston v. Dunn*, 919 F. Supp. 240, 243 (S.D. Miss. 1996) (emphasis added) (referring to *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980)).

Please refer to relevant decisions from the Fifth Circuit Court of Appeals for guidance on how Mississippi courts may approach this issue.

IV. Who is covered

A. Statutory and case law definitions

No Mississippi statutory law defines the person or entities covered by the qualified privilege.

1. Traditional news gatherers

a. Reporter

Both decisions from the federal district courts of Mississippi apply the qualified privilege to reporters, *Brinston v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996); *McKee v. Starkville*, 11 Med. L. Rptr. 2312, No. EC-82-36-NB-D, (N.D. Miss. Jan. 27, 1985), and the majority of the selected trial court orders apply the qualified privilege to reporters. *Charles R. Pope v. Village Apartments*, Hinds County Circuit Court, No.92-72-436CV (Jan. 23,1995); *Mary Doe v. Maurin-Ogden Mgmt. Corp.*, Hinds County Circuit Court, No. 90-64-502 (Feb. 8, 1991); *State v. Young*, Hinds County Circuit Court Crim. No. 825 (Mar. 16, 1988). These cases do not discuss who meets the definition of a "reporter."

b. Editor

Neither the two opinions from the federal district courts of Mississippi nor the selected trial court orders discuss the application of the qualified privilege to editors or the definition of an "editor."

c. News

Neither the two opinions from the federal district courts of Mississippi nor the selected trial court orders define "news" for purposes of applying the qualified privilege.

d. Photo journalist

Neither the two opinions from the federal district courts of Mississippi nor the selected trial court orders define "photojournalist" for purposes of applying the qualified privilege; however, in *City of Jackson v. Crawford*, Mu-

unicipal Court of Jackson, Mississippi, No. 88-0219 (May 20, 1988), the trial court applied the three-part analysis and found that the party seeking unpublished news photographs from a news photographer had not overcome the qualified privilege. Additionally, in *Hawkins v. Williams*, Hinds County Circuit Court, No. 29,054 (Mar. 16, 1983), a photographer for a newspaper successfully preserved her qualified privilege from testifying about an incident she witnessed in her capacity as a photographer.

e. News organization / medium

Neither the two opinions from the federal district courts of Mississippi nor the selected trial court orders further define or discuss "news organization" or "news medium" for purposes of applying the qualified privilege.

2. Others, including non-traditional news gatherers

Neither the two opinions from the federal district courts of Mississippi nor the selected trial court orders further discuss the application the reporters' qualified privilege in the context of other, nontraditional newsgatherers.

B. Whose privilege is it?

Both opinions from the federal district courts of Mississippi and the selected trial court orders discuss the qualified privilege in terms of it being asserted by and in favor of the reporter. No reported case from the appellate courts of Mississippi or the federal district courts of Mississippi have considered whether the privilege may be asserted by the source of the information.

V. Procedures for issuing and contesting subpoenas

Miss. R. Civ. P. 45 governs the issuing of subpoenas in Mississippi. There is no Mississippi statutory or case law distinguishing subpoenas issued on members of the media. Miss. R. Civ. P. reads:

(a) Form; Issuance.

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) Subpoenas for attendance at a trial or hearing, for attendance at a deposition, and for production or inspection shall issue from the court in which the action is pending. In the case of a deposition to be taken in foreign litigation the subpoena shall be issued by a clerk of a court for the county in which the deposition is to be taken.

(b) Place of Examination.

A resident of the State of Mississippi may be required to attend a deposition, production or inspection only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) Service.

(1) A subpoena may be served by a sheriff, or by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the person served may acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally. Except when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee

for one day's attendance plus mileage allowed by law. When the subpoena is issued on behalf of the State of Mississippi or an officer or agency thereof, fees and mileage need not be tendered in advance.

(2) Proof of service shall be made by filing with the clerk of the court from which the subpoena was issued a statement certified by the person who made the service, setting forth the date and manner of service, the county in which it was served, the names of the persons served, and the name, address and telephone number of the person making the service.

(d) Protection of Persons Subject to Subpoenas.

(1) In General.

(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance, (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may order appearance or production only upon specified conditions.

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or to permit inspection of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court shortens the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. A subpoena commanding production or inspection will be subject to the provisions of Rule 26(d).

(B) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move at any time upon notice to the person served for an order to compel the production or inspection. (C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(e) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, 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.

(f) Sanctions.

On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

(g) Contempt.

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

A. What subpoena server must do

1. Service of subpoena, time

Miss. R. Civ. P. 45(d)(1)(A) provides that the court by which a subpoena was issued shall quash or modify the subpoena if it "fails to allow reasonable time for compliance."

2. Deposit of security

There is no statutory or case law addressing this issue, other than Miss. R. Civ. P. 45(c)(1), which states that "[e]xcept when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee for one day's attendance plus mileage allowed by law."

3. Filing of affidavit

Filing an affidavit is not required.

4. Judicial approval

Judicial approval is not required.

5. Service of police or other administrative subpoenas

Miss. R. Civ. P. 45 has no application to subpoenas issued in support of administrative hearings or by administrative agencies; those subpoenas are governed by statute:

Miss. Code Ann. § 5-1-21 (Supp. 2006) (witnesses before legislative bodies):

A subpoena requiring the attendance of any witness before either house of the legislature, or a committee thereof, may be issued by the presiding officer or the chairman of any committee before which the attendance of the witness is desired. Such subpoena may be served by any person who might be a witness in the matter of its service, and his affidavit that he delivered a copy to the witness shall be evidence of service

Miss. Code Ann. § 7-1-49 (Supp. 2006) (examiner of public accounts):

A commission shall issue to the examiner, vesting in him authority to do and perform the duties for which he may be appointed. He shall have authority to issue subpoenas for witnesses whom he may wish to examine, administer oaths to them, and to compel their attendance; and shall have full authority to require officers whose books and accounts are being examined, and their deputies and clerks, to render him assistance and give him information needed in the prosecution of his investigations. The examiner shall have the same power to punish a witness who fails or refuses to attend and testify before him as conferred by law on justices of the peace; and an officer, his deputy or clerk, failing to give assistance or information to the examiner when required shall be punished as for a failure or refusal to perform official duty.

Miss. Code Ann. § 19-3-51 (Supp. 2006) (county boards of supervisors):

The board of supervisors shall have power to subpoena witnesses in all matters coming under its jurisdiction and to fine and imprison any person for a contempt committed while they are in session, the fine not to exceed fifty dollars, and the imprisonment not to extend beyond the continuance of the term. The person so

fined or imprisoned may appeal to the circuit court, as in other cases, from the order or judgment of the board, and such appeal shall operate as a supersedeas.

Miss. Code Ann. § 27-3-35 (Supp. 2006) (tax commission):

In all cases of valuation or ownership of property which has escaped taxation, the state tax commission may have subpoenaed witnesses to testify before any board of supervisors, board of mayor and aldermen, or other municipal governing authority, or before the state tax commission itself, or any other lawful taxing authority.

Miss. Code Ann. § 31-3-13(c) (Supp. 2006) (state board of public contracts):

To obtain information concerning the responsibility of any applicant for a certificate of responsibility or a holder of a certificate of responsibility under this chapter. Such information may be obtained by investigation, by hearings, or by any other reasonable and lawful means. The board shall keep such information appropriately filed and shall disseminate same to any interested person. The board shall have the power of subpoena.

Miss. Code Ann. § 43-9-13 (Supp. 2006) (old age assistance investigations):

Whenever a county welfare agent receives an application for assistance under this chapter, an investigation and record shall promptly be made of the circumstances of the applicant to ascertain the facts supporting the application made under this chapter and such other information as may be required by the rules of the state board.

The county department and the state department shall have the power to conduct examinations, subpoena witnesses, require the attendance of witnesses, and the production of books, records and papers, and make application to the circuit court of the county to compel the attendance of witnesses and the production of such books, records and papers. The county board and such officers and employees as are designated by the state commissioner may also administer oaths and affirmations.

Miss. Code Ann. § 43-11-11 (Supp. 2006) (investigations of institutions for the aged or infirm):

The licensing agency after notice and opportunity for a hearing to the applicant or licensee is authorized to deny, suspend or revoke a license in any case in which it finds that there has been a substantial failure to comply with the requirements established under this chapter.

Such notice shall be effected by registered mail, or by personal service setting forth the particular reasons for the proposed action and fixing a date not less than thirty (30) days from the date of such mailing or such service, at which time the applicant or licensee, shall be given an opportunity for a prompt and fair hearing. On the basis of any such hearing, or upon default of the applicant or licensee, the licensing agency shall make a determination specifying its findings of fact and conclusions of law. A copy of such determination shall be sent by registered mail or served personally upon the applicant or licensee. The decision revoking, suspending or denying the license or application shall become final thirty (30) days after it is so mailed or served, unless the applicant or licensee, within such thirty (30) day period, appeals to the decision to the chancery court; pursuant to section 43-11-23.

The procedure governing hearings authorized by this section shall be in accordance with rules promulgated by the licensing agency. A full and complete record shall be kept of all proceedings, and all testimony shall be recorded but need not be transcribed unless the decision is appealed pursuant to section 43-11-23. Witnesses may be subpoenaed by either party. Compensation shall be allowed to witnesses as in cases in the chancery court. Each party shall pay the expense of his own witnesses. The cost of the record shall be paid by the licensing agency provided any other party desiring a copy of the transcript shall pay therefor the reasonable cost of preparing the same.

Miss. Code Ann. § 43-13-121(o)(4) (Supp. 2001, as amended) (medical commission):

The division and its hearing officers shall have power to preserve and enforce order during hearings; to issue subpoenas for, to administer oaths to and to compel the attendance and testimony of witnesses, or the production of books, papers, documents and other evidence, or the taking of depositions before any designated individual competent to administer oaths; to examine witnesses; and to do all things conformable to law that may

be necessary to enable them effectively to discharge the duties of their office. In compelling the attendance and testimony of witnesses, or the production of books, papers, documents and other evidence, or the taking of depositions, as authorized by this section, the division or its hearing officers may designate an individual employed by the division or some other suitable person to execute and return that process, whose action in executing and returning that process shall be as lawful as if done by the sheriff or some other proper officer authorized to execute and return process in the county where the witness may reside. In carrying out the investigatory powers under the provisions of this article, the executive director or other designated person or persons may examine, obtain, copy or reproduce the books, papers, documents, medical charts, prescriptions and other records relating to medical care and services furnished by the provider to a recipient or designated recipients of Medicaid services under investigation. In the absence of the voluntary submission of the books, papers, documents, medical charts, prescriptions and other records, the Governor, the executive director, or other designated person may issue and serve subpoenas instantly upon the provider, his agent, servant or employee for the production of the books, papers, documents, medical charts, prescriptions or other records during an audit or investigation of the provider. If any provider or his agent, servant or employee refuses to produce the records after being duly subpoenaed, the executive director may certify those facts and institute contempt proceedings in the manner, time and place as authorized by law for administrative proceedings. As an additional remedy, the division may recover all amounts paid to the provider covering the period of the audit or investigation, inclusive of a legal rate of interest and a reasonable attorney's fee and costs of court if suit becomes necessary. Division staff shall have immediate access to the provider's physical location, facilities, records, documents, books, and any other records relating to medical care and services rendered to recipients during regular business hours.

Miss. Code Ann. § 43-33-11(g) (Supp. 2006) (housing authority):

Acting through one or more commissioners or other person or persons designated by the authority: to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material to its information; to administer oaths, issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are outside of the state or unable to attend before the authority, or excused from attendance; to make available to appropriate agencies (including those charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or unsanitary structures within its area of operation) its findings and recommendations with regard to any building or property where conditions exist which are dangerous to the public health, morals, safety or welfare.

Miss. Code Ann. § 49-1-43 (Supp. 2006) (wildlife, fisheries and parks board):

...

(4) The director and each conservation officer shall have power, and it shall be the duty of the director and of each conservation officer:

(a) To execute all warrants and search warrants for a violation of the laws and regulations relating to wild animals, birds and fish and to serve subpoenas issued for the examination and investigation or trial of offenses against any of the laws or regulations;

...

Miss. Code Ann. § 49-17-21 (Supp. 2006) (air and water pollution board):

(a) The commission or its duly authorized representative shall have the power to enter at reasonable times upon any private or public property, and the owner, managing agent or occupant of any such property shall permit such entry for the purpose of inspecting and investigating conditions relating to pollution or the possible pollution of any air or waters of the state and to have access to such records as the commission may require under subsection (b) of this section.

(b) The commission may require the maintenance of records relating to the operation of air contamination sources or water disposal systems, and any authorized representative of the commission may examine and copy any such records or memoranda pertaining to the operation of such air contamination source or water

disposal system. The records shall contain such information as the commission may require. Copies of such records shall be submitted to the commission upon request.

(c) The commission may conduct, authorize or require tests and take samples of air contaminants or waste waters, fuel, process material or other material which affects or may affect (1) emission of air contaminants from any source, or (2) waste water disposal systems. Upon request of the commission, the person responsible for the source to be tested shall provide necessary sampling ports in stacks or ducts and such other safe and proper sampling and testing facilities as may be necessary for proper determination of the emission of air contaminants. If an authorized employee of the commission during the course of any inspection obtains a sample of air contaminant, fuel, process material or other material, he shall give the owner or operator of the equipment or fuel facility a receipt for the sample obtained.

(d) The commission may require the installation, maintenance and use of such monitoring equipment and methods at such locations and intervals as the commission deems necessary.

Miss. Code Ann. § 51-3-51 (Supp. 2006) (water commission):

The procedures whereby the commission or an employee thereof may obtain a hearing before the commission on a violation of any provisions of this chapter, including a violation of the terms and conditions of any water permit issued by the board, or of a regulation or of any order of the commission or whereby any interested person may obtain a hearing on matters within the jurisdiction of the commission or a hearing on any order of the commission shall be as prescribed in Sections 49-17-31 through 49-17-41. Further, all proceedings before the permit board shall be conducted in the manner prescribed by Section 49-17-29.

Miss. Code Ann. § 53-1-35 (Supp. 2006) (oil and gas board):

(a) The board, or any member thereof, or the supervisor is hereby empowered to issue subpoenas for witnesses, to require their attendance and the giving of testimony before the board, and to require the production of such books, papers and records in any proceeding before the board as may be material upon questions lawfully before the board. Such subpoenas shall be served by the sheriff or any other officer authorized by law to serve process in this state. No person shall be excused from attending and testifying, or from producing books, papers and records before the board or a court, or from obedience to the subpoena of the board, or any member thereof, or the supervisor or a court on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. However, nothing herein contained shall be construed as requiring any person to produce any books, papers or records, or to testify in response to any inquiry, not pertinent to some question lawfully before such board or court for determination. No natural person shall be subject to criminal prosecution or to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may be required to testify or produce evidence, documentary or otherwise, before the board or court, or in obedience to any such subpoena, but no person testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

(b) In case of failure or refusal on the part of any person to comply with any subpoena issued by the board, or any member thereof, or the supervisor, or in case of the refusal of any witness to testify or answer to any matter regarding which he may be lawfully interrogated, the judge of the chancery court of the county of the residence of such person, if a resident of Mississippi, or the judge of the chancery court of the county in which the land lies, or any portion thereof, out of which the controversy arises, if such person is not a resident of the State of Mississippi, on application of the board, or any member thereof, or the supervisor, may, in termtime or vacation, issue an attachment for such person and compel him to comply with such subpoena and to attend before the board and produce such documents, and give his testimony upon such matters, as may be lawfully required; and such court shall have the power to punish for contempt as in case of disobedience of like subpoenas issued by or from such court, or for a refusal to testify therein.

Miss. Code Ann. § 59-21-127 (Supp. 2006) (boat and water safety commission):

It shall be the duty of all enforcement officers to enforce, and to obey and carry out all instructions, directions, rules and regulations of the commission with respect to the enforcement of the provisions of this chapter.

Each enforcement officer shall account for and pay over, pursuant to law, all monies received by him under this chapter.

Such enforcement officers shall have the power, and it shall be their duty, to execute all warrants for violations of the rules and regulations of the commission and the provisions of this chapter; to serve subpoenas issued for the examination and investigation or trial of such violations; to board and examine, without warrant, any vessel required to be numbered under this chapter, to ascertain whether any of the provisions of this chapter or any rule or regulation of the commission has been or is being violated, and to use such force as may be necessary for the purpose of such examination and inspection; to arrest, without warrant, any person committing a violation of this chapter or the rules and regulations of the commission in the presence of the enforcement officers, and to take such person before a magistrate or court having jurisdiction for trial or hearing; and to exercise such other powers of peace officers in the enforcement of this chapter and the rules and regulations of the commission or of a judgment for the violation thereof, as are not herein specifically provided. No enforcement officers shall compromise or settle out of court any violation of the provisions of this chapter or any rule or regulation promulgated by the commission.

Miss. Code Ann. § 61-1-35 (Supp. 2006) (aeronautics commission):

The commission, any member thereof, the director or any officer or employee of the commission designated by it, shall have the power to hold investigations, inquiries and hearings concerning matters covered by the provisions of this chapter and the rules, regulations and orders of the commission, and concerning accidents in aeronautics within this state. Hearings shall be open to the public, and, except as provided in this chapter, shall be held upon such call or notice as the commission shall deem advisable. Each member of the commission, the director and every officer or employee of the commission designated by it to hold any inquiry, investigation or hearing shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, and order the attendance and testimony of witnesses and the production of papers, books and documents. In case of the failure of any person to comply with any subpoena or order issued under the authority of this section, the commission or its authorized representative may invoke the aid of any court of this state of general jurisdiction. The court may thereupon order such person to comply with the requirements of the subpoena or order or to give evidence touching the matter in question. Failure to obey the order of the court may be punished by the court as a contempt thereof.

Miss. Code Ann. § 63-1-53(3) (Supp. 2006) (hearings to suspend driver's license):

(3) Notice that a person's license is suspended or will be suspended under subsection (2) of this section shall be given by the commissioner in the manner and at the time provided for under Section 63-1-52, and upon such person's request, he shall be afforded an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county. Upon such hearing the commissioner, or his duly authorized agent, may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the commissioner shall either rescind any order of suspension or, good cause appearing therefor, may extend any suspension of such license or revoke such license.

Miss. Code Ann. § 63-17-97 (Supp. 2006) (motor vehicle commission):

It shall be the duty of the sheriffs and constables of the counties of this state and of any employee of the commission, when so directed by the commission, to execute any summons, citation or subpoena which the commission may cause to be issued and to make return thereof to the commission. The sheriffs and constables so serving and returning same shall be paid for so doing the fees provided for such services in the circuit court. Any person who appears before the commission or a duly designated employee thereof in response to a summons, citation or subpoena shall be paid the same witness fee and mileage allowance as witnesses in the circuit court.

In case of failure or refusal on the part of any person to comply with any summons, citation or subpoena issued and served as above authorized or in the case of the refusal of any person to be sworn or affirmed as a witness, or testify or answer to any matter regarding which he may be lawfully interrogated as a witness, or

the refusal of any person to produce his record books and accounts relating to any matter regarding which he may be lawfully interrogated as a witness, the chancery court of any county of the State of Mississippi, or any chancellor of any such court in vacation, may, on application of the commission or of the executive director thereof, issue an attachment for such person and compel him to comply with such summons, citation or subpoena and to attend before the commission or its designated employee and to produce the documents specified in any subpoena duces tecum and to be sworn or affirmed as a witness or to give his testimony upon such matters as he may be lawfully required. Any such chancery court, or any chancellor of any such court in vacation, shall have the power to punish for contempt as in case of disobedience of like process issued from or by any such chancery court, or as in case of refusal to be sworn or affirmed as a witness, or as in case of refusal to testify as a witness therein in response to such process, and such person shall be taxed with the costs of such proceedings.

Miss. Code Ann. § 63-19-29 (Supp. 2006) (motor vehicle sales finance law administrator):

The administrator shall have power to issue subpoenas to compel the attendance of witnesses and the production of documents, papers, books, records and other evidence before him in any matter over which he has jurisdiction, control or supervision pertaining to this chapter. The administrator shall have the power to administer oaths and affirmations to any person whose testimony is required.

If any person shall refuse to obey any such subpoena, or to give testimony, or to produce evidence as required thereby, any judge or chancellor of the chancery court of the first judicial district of Hinds County may, upon application and proof of such refusal, make an order awarding process of subpoena, or subpoena duces tecum, out of said court, for the witness to appear before the administrator and to give testimony, and to produce evidence as required thereby. Upon filing such order in the office of the clerk of the said chancery court, the clerk shall issue process of subpoena, as directed, under the seal of said court, requiring the person to whom it is directed, to appear at the time and place therein designated.

If any person served with any such subpoena shall refuse to obey the same, and to give testimony, and to produce evidence as required thereby, the administrator may apply to any judge or chancellor of the chancery court of the first judicial district of Hinds County for an attachment against such person, as for a contempt. The judge, or chancellor, upon satisfactory proof of such refusal, shall issue an attachment, directed to any sheriff, constable or police officer, for the arrest of such person, and upon his being brought before such judge, proceed to a hearing of the case. The judge, or chancellor, shall have power to enforce obedience to such subpoena, and the answering of any question, and the production of any evidence, that may be proper by imposition of a fine, not exceeding one hundred dollars (\$100.00), or by imprisonment in the county jail, or by both imposition of a fine and imprisonment, and to compel such witness to pay the costs of such proceeding to be taxed.

Miss. Code Ann. § 67-1-37(1) (Supp. 2006) (alcoholic beverage commission):

In the conduct of any hearing authorized to be held by the commission, to hear testimony and take proof material for its information in the discharge of its duties under this chapter; to issue subpoenas, which shall be effective in any part of this state, requiring the attendance of witnesses and the production of books and records; to administer or cause to be administered oaths; and to examine or cause to be examined any witness under oath. Any court of record, or any judge thereof, may by order duly entered require the attendance of witnesses and the production of relevant books subpoenaed by the commission, and such court or judge may compel obedience to its or his order by proceedings for contempt.

Miss. Code Ann. § 73-7-27 (Supp. 2006) (cosmetology license revocation or suspension):

....

(5) The board is hereby authorized and empowered to issue subpoenas for the attendance of witnesses and the production of books and papers. The process issued by the board shall extend to all parts of the state and such process shall be served by any person designated by the board for such service. The person serving such process shall receive such compensation as may be allowed by the board, not to exceed the fee prescribed by law

for similar services. All witnesses who shall be subpoenaed, and who shall appear in any proceedings before the board, shall receive the same fees and mileage as allowed by law.

(6) Where in any proceeding before the board any witness shall fail or refuse to attend upon subpoena issued by the board, shall refuse to testify, or shall refuse to produce any books and papers, the production of which is called for by the subpoena, the attendance of such witness and the giving of his testimony and the production of the books and papers shall be enforced by any court of competent jurisdiction of this state, in manner as are enforced the attendance and testimony of witnesses in civil cases in the courts of this state.

Miss. Code Ann. § 73-13-15 (Supp. 2006) (engineer and land surveyor registration board):

...

In carrying into effect the provisions of this chapter, the board, under the hand of its president or secretary and the seal of the board may subpoena witnesses and compel their attendance, and also may require the production of books, papers, documents, etc., in any case involving the disciplinary actions provided for in Section 73-13-37 or 73-13-89 or practicing or offering to practice without registration. Any member of the board may administer oaths or affirmations to witnesses appearing before the board. If any person shall refuse to obey any subpoena so issued, or shall refuse to testify or produce any books, papers, or documents, the board may present its petition to such authority as may have jurisdiction, setting forth the facts, and thereupon such authority shall, in a proper case, issue its subpoena to such person, requiring his attendance before such authority and there to testify or to produce such books, papers, and documents, as may be deemed necessary and pertinent by the board. Any person failing or refusing to obey the subpoena or order of the said authority may be proceeded against in the same manner as for refusal to obey any other subpoena or order of the authority.

Miss. Code Ann. § 73-21-99 (Supp. 2006) (disciplinary proceedings against pharmacists):

....

(4) The board, acting by and through its executive director, is hereby authorized and empowered to issue subpoenas for the attendance of witnesses and the production of books and papers at such hearing. Process issued by the board shall extend to all parts of the state and shall be served by any person designated by the board for such service.

(5) The accused shall have the right to appear either personally or by counsel or both to produce witnesses or evidence in his behalf, to cross-examine witnesses and to have subpoenas issued by the board.

(6) At the hearing, the board shall administer oaths as may be necessary for the proper conduct of the hearing. All hearings shall be conducted by the board, which shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings, but the determination shall be based upon sufficient evidence to sustain it.

(7) Where, in any proceeding before the board, any witness fails or refuses to attend upon a subpoena issued by the board, refuses to testify, or refuses to produce any books and papers the production of which is called for by a subpoena, the attendance of such witness, the giving of his testimony or the production of the books and papers shall be enforced by any court of competent jurisdiction of this state in the manner provided for the enforcement of attendance and testimony of witnesses in civil cases in the courts of this state.

(8) The board shall, within thirty (30) days after conclusion of the hearing, reduce its decision to writing and forward an attested true copy thereof to the last known residence or business address of such licensee or permit holder by way of United States first class, certified mail, postage prepaid.

Miss. Code Ann. § 73-25-27 (Supp. 2006) (disciplinary proceedings against physicians):

The Mississippi State Board of Medical Licensure after notice and opportunity for a hearing to the licentiate, is authorized to suspend or revoke for any cause named herein any license it has issued, or the renewal thereof, that authorizes any person to practice medicine, osteopathy, or any other method of preventing, diagnosing, relieving, caring for, or treating, or curing disease, injury or other bodily condition. . . . For the purpose of such hearing the board, acting by and through its executive office, may subpoena persons and papers on its

own behalf and on behalf of licentiate, including records obtained pursuant to Section 73-25-28, may administer oaths and such testimony when properly transcribed, together with such papers and exhibits, shall be admissible in evidence for or against the licentiate.

Miss. Code Ann. § 73-29-37(b) (Supp. 2006) (disciplinary proceedings against polygraph examiners):

The board shall conduct the administrative hearings and it is authorized to administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books, papers, documents, etc. On the basis of the evidence submitted at the hearing, the board shall take whatever action it deems necessary in refusing the application or suspending or revoking the license.

Miss. Code Ann. § 73-35-23 (Supp. 2006) (disciplinary proceedings against real estate brokers):

...

(3) The commission is hereby authorized and empowered to issue subpoenas for the attendance of witnesses and the production of books and papers. The process issued by the commission shall extend to all parts of the state, and such process shall be served by any person designated by the commission for such service. The person serving such process receive such compensation as may be allowed by the commission, not to exceed the fee prescribed by law for similar services. All witnesses who are subpoenaed and who appear in any proceedings before the commission receive the same fees and mileage as allowed by law, and all such fees shall be taxed as part of the costs in the case.

(4) Where in any proceeding before the commission any witness shall fail or refuse to attend upon subpoena issued by the commission, shall refuse to testify, or shall refuse to produce any books and papers the production of which is called for by the subpoena, the attendance of such witness and the giving of his testimony and the production of the books and papers shall be enforced by any court of competent jurisdiction of this state in the same manner as the attendance and testimony of witnesses in civil cases are enforced in the courts of this state. . . .

Miss. Code Ann. § 75-35-315 (Supp. 2006) (meat inspections):

(1) For the purposes of this chapter, the commissioner shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of any person, firm, or corporation being investigated or proceeded against, and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person, firm, or corporation relating to any matter under investigation. The commissioner may issue and sign subpoenas and may administer oaths and affirmations, examine witnesses, and receive evidence.

(2) Such attendance of witnesses, and the production of such documentary evidence, may be required at any designated place of hearing. In case of disobedience to a subpoena, the commissioner may invoke the aid of any court designated in section 75-35-307 of this chapter in requiring the attendance and testimony of witnesses and the production of documentary evidence.

(3) Any of the courts designated in section 75-35-307 of this chapter within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, firm, or corporation, issue an order requiring such person, firm, or corporation to appear before the commissioner, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

...

Miss. Code Ann. § 75-49-13(8) (Supp. 2006) (proceedings involving mobile homes):

It shall be the duty of the sheriffs and constables of the counties of this state and of any employee of the commissioner, when so directed by the commissioner, to execute any summons, citation or subpoena which the commissioner may cause to be issued and to make his return thereof to the commissioner. The sheriffs and constables so serving and returning same shall be paid for so doing fees provided for such services in the circuit court. Any person who appears before the commissioner or a duly designated employee of his department

in response to a summons, citation or subpoena shall be paid the same witness fee and mileage allowance as witnesses in the circuit court. In case of failure or refusal on the part of any person to comply with any summons, citation or subpoena issued and served as above authorized or in the case of the refusal of any person to testify or answer to any matter regarding which he may be lawfully interrogated or the refusal of any person to produce his record books and accounts relating to any matter regarding which he may be lawfully interrogated, the chancery court of any county of the State of Mississippi, or any chancellor of any such court in vacation, may, on application of the commissioner, issue an attachment for such person and compel him to comply with such summons, citation or subpoena and to attend before the commissioner or his designated employee and to produce the documents specified in any subpoena duces tecum and give his testimony upon such matters as he may be lawfully required. Any such chancery court, or any chancellor of any such court in vacation, shall have the power to punish for contempt as in case of disobedience of like process issued from or by any such chancery court, or by refusal to testify therein in response to such process, and such person shall be taxed with the costs of such proceedings.

Miss. Code Ann. § 75-67-223 (Supp. 2006) (hearings on denials of small loan licenses):

All such hearings shall be held and conducted in the office of the comptroller, and the applicant and any and all other interested persons may appear and present such evidence as shall be relevant and material and the comptroller may cause the production and presentation of such evidence as he may deem relevant and material. At all such hearings, the applicant shall have the right to be represented by counsel and to examine and cross-examine any and all witnesses that may testify at such hearing. For the purpose of compelling the attendance of witnesses at such hearing, the comptroller shall have the power to issue subpoenas therefor in the same manner as subpoenas are issued in circuit courts. All witnesses who shall testify at any such hearing shall be sworn in the same manner as witnesses are sworn in the circuit courts and shall be subject to penalties for perjury as is otherwise provided under the laws of this state.

Miss. Code Ann. § 75- 71-709 (securities regulations hearings):

For the purpose of any investigation or proceeding under this chapter, the secretary of state or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the secretary of state deems relevant or material to the inquiry.

Miss. Code Ann. § 77-5-17 (Supp. 2006) (board of directors of rural electrification authority):

The board shall have power to do all things necessary or convenient in conducting the business of the authority, including, but not limited to:

....

(4) To inquire into any matter relating to the affairs of the authority, to compel by subpoena the attendance of witnesses and the production of books and papers material to any such inquiry, to administer oaths to witnesses and to examine witnesses and such books and papers;

....

Miss. Code Ann. § 81-1-85 (Supp. 2006) (bank examinations):

The commissioner or an examiner shall have the authority to administer oaths and to examine under oath the officers, agents, clerks, employees and stockholders of any bank, or any other person touching the matters into which he is directed to examine by law. Any person who willfully makes any false statement under oath in such examination shall be deemed guilty of perjury, and upon conviction thereof shall be punished as provided by law. If any officer, agent, clerk or stockholder of any bank, when under oath, willfully misrepresents in any manner to the commissioner, an examiner, or his assistant, the condition of the bank, or any of its property, or purposely misleads the commissioner or any examiner, or makes false statements regarding the condition of the bank, or any part of its business, such person shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of competent jurisdiction, shall be fined not less than One Thousand Dollars

(\$1,000.00) nor more than Two Thousand Five Hundred Dollars (\$2,500.00) or imprisoned in the county jail not less than six (6) months nor more than one (1) year, or by both such fine and imprisonment.

Miss. Code Ann. § 81-13-1 (Supp. 2006) (hearings on denial of application for license of credit union):

All such hearings shall be held and conducted in the office of the commissioner, and the applicant and any and all other interested persons may appear and present such evidence as shall be relevant and material and the commissioner may cause the production and presentation of such evidence as deemed relevant and material. At all such hearings the applicant shall have the right to be represented by counsel and to examine and cross-examine any and all witnesses that may testify at such hearing. For the purpose of compelling the attendance of witnesses at such hearing the commissioner shall have the power to issue subpoenas therefor in the same manner as subpoenas are issued in circuit courts. All witnesses who shall testify at any such hearing shall be sworn in the same manner as witnesses are sworn in the circuit courts and shall be subject to penalties for perjury as is otherwise provided under the laws of this state.

Miss. Code Ann. § 81-13-17 (Supp. 2006) (examination of credit union license applications by department of bank supervision):

Each credit union shall be examined at least once per eighteen-month period by the Commissioner of Banking and Consumer Finance. The commissioner may conduct other examinations and the commissioner or examiners of the Department of Banking and Consumer Finance shall at all times be given free access to all the books, papers, securities and other sources of information in respect to the credit union. For that purpose he shall have the power to subpoena and examine personally or through one (1) of his deputies, or examiners, duly authorized, witnesses on oath and documents pertaining to the business of the credit union. . . .

Miss. Code Ann. § 83-5-39(4) (Supp. 2006) (hearing on charges of unfair business practices by insurance companies):

The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the circuit court of Hinds County, on application of the commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

B. How to Quash

Miss. R. Civ. P. 45(d)(1)(A) states that "[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance, (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense."

Also, several Mississippi courts have held that journalists enjoy a "qualified privilege." The criteria necessary to overcome such a qualified privilege, and the burden of proof one must meet, is to show (1) that the testimony of the reporter is highly relevant to the seeking parties case; (2) there is a compelling need for the testimony sufficient to override the reporter's first amendment privilege; and (3) the seeking party has unsuccessfully attempted to obtain the information possessed by the reporter from other sources. *See Charles R. Pope v. The Village Apartments, Ltd., and other Unknown Persons*, Hinds County Circuit Court No. 92-71-436 CV, January 3, 1995; *Mary Doe v. Maurin-Ogden Management Corp.*, Hinds County Circuit Court No. 90-64-502, February 8, 1991; *State of Mississippi v. Ralph Hand III*, Circuit Court of Tallahatchie County, No. CR89-49-C (T-2), July 31, 1990; *In re Grand Jury Subpoena*, Hinds County Circuit Court, No. 38664, October 4, 1989.

1. Contact other party first

There is no statutory or case law addressing this issue.

2. Filing an objection or a notice of intent

A notice of intent is not required before a party files a motion to quash.

The service of an objection is sufficient. Miss. R. Civ. P. 45(d)(2)(B) states that "[t]he person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued."

3. File a motion to quash

a. Which court?

A motion to quash should be filed in the same court. Miss. R. Civ. P. 45(d)(1)(A) states that "[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena. . . ." (Emphasis added).

b. Motion to compel

Although there is no statutory or case law addressing this issue, the media party, in order to protect its rights, would be best served to file a motion to quash upon receiving the subpoena and not wait for a motion to compel.

c. Timing

Miss. R. Civ. P. 45(d)(2)(C) states that a motion to quash is timely if made "at or before the time specified in the subpoena for compliance therewith."

d. Language

There is no stock language or preferred text that should be included in a motion other than what is provided for in Miss. R. Civ. P. 45(e)(2), which states that "[w]hen information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, 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." One should also include the criteria necessary to overcome a journalist's qualified privilege: (1) the testimony of the reporter is highly relevant to the seeking parties case; (2) there is a compelling need for the testimony sufficient to override the reporter's First Amendment privilege; and (3) the seeking party has unsuccessfully attempted to obtain the information possessed by the reporter from other sources.

e. Additional material

There is no statutory or case law addressing this issue.

4. In camera review

a. Necessity

There is no statutory or case law addressing this issue.

b. Consequences of consent

There is no statutory or case law addressing this issue.

c. Consequences of refusing

There is no statutory or case law addressing this issue.

5. Briefing schedule

Rule 4.03(3) of the Mississippi Uniform Circuit and County Court Rules, as amended, provides that "[w]here movant has served a memorandum or brief, respondent may serve a reply within ten (10) days after service of

movant's memorandum or brief. A rebuttal memorandum or brief may be served within five (5) days of service of the reply memorandum."

6. Amicus briefs

The Mississippi Court of Appeals and the Mississippi Supreme Court accept, although not routinely, amicus briefs under Rule 29 of the Mississippi Rules of Appellate Procedure, which states:

(a) Grounds for Filing.

A brief of an amicus curiae may be filed only by leave of the appropriate appellate court, except that leave shall not be required when the brief is presented by the state and sponsored by the Attorney General or by a guardian ad litem who is not otherwise a party to the appeal. A motion for leave shall demonstrate that (1) amicus has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the amicus has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.

(b) How and When Filed.

A motion for leave to file an amicus brief shall be filed no later than seven (7) days after filing of the initial brief of the party whose position the amicus brief will support. The motion must be accompanied by the proposed brief of amicus curiae which shall be a concise statement not to exceed 15 pages. The party filing the motion shall also file with the motion a brief stating why the motion satisfies the requirements of Rule 29(a).

(c) Response to Motion.

An opposing party who does not object to the motion for leave may respond to the amicus brief in the opposing party's response or reply brief pursuant to Rule 28(b) or 28(c). An opposing party who objects to the motion for leave shall file a timely response in opposition pursuant to Rule 27 stating why the requirements of Rule 29(a) have not been met. For the purpose of Rule 31(a), the time for filing the next brief will run from the date the appropriate court enters an order on the motion for leave.

(d) Oral Argument.

A motion of amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

There are no organizations that regularly file amicus briefs opposing the subpoenaing of reporters.

VI. Substantive law on contesting subpoenas

Mississippi courts have held that journalists enjoy a "qualified privilege." The criteria necessary to overcome such a qualified privilege, and the burden of proof one must meet, is to show (1) that the testimony of the reporter is highly relevant to the seeking parties case; (2) there is a compelling need for the testimony sufficient to override the reporter's First Amendment privilege; and (3) the seeking party has unsuccessfully attempted to obtain the information possessed by the reporter from other sources. See *Charles R. Pope v. The Village Apartments, Ltd., and other Unknown Persons*, Hinds County Circuit Court No. 92-71-436 CV, January 3, 1995; *Mary Doe v. Maurin-Ogden Management Corp.*, Hinds County Circuit Court No. 90-64-502, February 8, 1991; *State of Mississippi v. Ralph Hand III*, Circuit Court of Tallahatchie County, No. CR89-49-C (T-2), July 31, 1990; *In re Grand Jury Subpoena*, Hinds County Circuit Court, No. 38664, October 4, 1989..

A. Burden, standard of proof

(1) The testimony of the reporter is highly relevant to the seeking parties case; (2) there is a compelling need for the testimony sufficient to override the reporter's first amendment privilege; and (3) the seeking party has unsuccessfully attempted to obtain the information possessed by the reporter from other sources.

B. Elements

1. Relevance of material to case at bar

There is no statutory or case law addressing this issue.

2. Material unavailable from other sources

There is no statutory or case law addressing this issue.

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?

There is no statutory or case law addressing this issue.

c. Source is an eyewitness to a crime

There is no statutory or case law addressing this issue.

3. Balancing of interests

There is no statutory or case law addressing this issue.

4. Subpoena not overbroad or unduly burdensome

There is no statutory or case law addressing this issue.

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

Miss. R. Civ. P. 45(f) provides that "upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction."

8. Other elements

There is no statutory or case law addressing this issue.

C. Waiver or limits to testimony

There is no statutory or case law addressing this issue.

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?

Miss. R. Civ. P. 45(e)(2) states:

e) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, 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.

A. Newspaper articles

Miss. R. Evid. 902(6) provides that newspapers and periodicals, "[p]rinted materials purporting to be newspapers or periodicals," are self-authenticating.

B. Broadcast materials

Miss. R. Evid. 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Other than this rule, there is no statutory or case law addressing this issue.

C. Testimony vs. affidavits

Miss. R. Civ. P. 43(e) states that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or the Mississippi Rules of Evidence."

D. Non-compliance remedies

The purpose for which the court's power is exercised is a determining factor in classifying contempt as either civil or criminal. *Common Cause of Mississippi v. Smith*, 548 So. 2d 412, 415 (Miss. 1989).

1. Civil contempt

If the primary purpose is to enforce the rights of private party litigants or to enforce compliance with a court order, the contempt is civil. *Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1994) (emphasis added) (citing *Hinds County Bd. of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107, 120 (Miss.1989)).

Miss. R. Civ. P. 45(g) states that "[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued." Furthermore, the comment to Miss. R. Civ. P. 45(g) states, "An order for contempt may require the person subject to the subpoena to pay the attorney's fees and costs incurred by the party seeking to enforce the subpoena[, but the] rule leaves undefined what is an adequate excuse for failure to obey a subpoena."

a. Fines

Other than the comment to Miss. R. Civ. P. 45(g) suggesting that an order for contempt may require one to "pay the attorney's fees and costs," there is no statutory or case law addressing this issue. However, the contemnor must be relieved of the penalty when he performs the required act. *Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1994) (emphasis added) (citing *Hinds County Bd. of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107, 120 (Miss. 1989)).

Fines are not capped.

b. Jail

One may be jailed for civil contempt; however, the contemnor must be relieved of the penalty when he performs the required act. *Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1994) (emphasis added) (citing *Hinds County Bd. of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107, 120 (Miss. 1989)).

2. Criminal contempt

Conduct directed against the court's dignity and authority is criminal contempt. *Lawson v. State*, 573 So. 2d 684, 686 (Miss.1990). It involves an act "which tends to bring the court into disrepute or disrespect." *Lawson*, 573 So. 2d at 686 (quoting *Cook v. State*, 483 So. 2d 371, 374 (Miss. 1986)). Conduct amounting to criminal contempt must be directed against the court or against a judge acting judicially rather than individually. *Culpepper v. State*, 516 So. 2d 485, 486 (Miss. 1987).

Furthermore, criminal contempt penalties are designed to punish for past offenses, and they do not end when the contemnor has complied with the court order. *Purvis v. Purvis*, 657 So. 2d 794, 796-97 (Miss. 1994) (emphasis added) (citing *Common Cause of Mississippi v. Smith*, 548 So. 2d 412, 416 (Miss. 1989)).

Miss. Code Ann. § 11-51-11 states:

- (1) A person ordered by any tribunal, except the supreme court, to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal. Where the punishment is either a fine only, or jail confinement only, the appeal shall be allowed upon the posting of a bond, payable to the state, with sufficient sureties, not exceeding one thousand dollars (\$1,000.00), conditioned to abide the results of the appeal. Where the punishment is both a fine and jail confinement, the appeal shall be allowed upon the posting of a bond, not exceeding two thousand dollars (\$2,000.00), conditioned to appear in the court to which the appeal is prosecuted and to abide the results of such appeal.
- (2) The amount of the bonds provided for in subsection (1) of this section shall be fixed by the tribunal appealed from, shall be approved by the sheriff or other officer in whose custody the appellant may be and shall not be construed as a limitation on the amount of any fine which may be imposed.
- (3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas.
- (4) The burden of proof in criminal contempt shall be proof beyond a reasonable doubt. A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless the fine exceeds five hundred dollars (\$500.00), or the imprisonment exceeds six (6) months.

Miss. Code Ann. § 11-51-11 (Supp. 2006)

a. Direct Contempt

Direct contempt involves words spoken or actions committed in the presence of the court that are calculated to embarrass or prevent the orderly administration of justice. *Varvaris v. State*, 512 So. 2d 886, 887 (Miss. 1987). The direct contemnor may be summarily punished because no evidence other than the court's own knowledge is required as the conduct was committed in the presence of the court. *Lamar v. State*, 607 So. 2d 129, 130 (Miss. 1992). Direct contempt necessitates an instantaneous response. *Varvaris*, 512 So. 2d at 888. Although direct contempt may be handled by the sitting judge instantly, it is wise for a judge faced with personal attacks, who waits till the end of the proceedings, to have another judge take his place. *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64 (1971); *Purvis v. Purvis*, 657 So. 2d 794, 797 (Miss. 1994).

Because direct contempt necessitates an instantaneous response, the distinction between direct and constructive contempt is important in determining the necessary procedural prerequisites to finding an individual in contempt. *Purvis*, 657 So. 2d at 797.

b. Constructive Contempt

Constructive contempt involves actions that are committed beyond the presence of the court. *Purvis v. Purvis*, 657 So. 2d 794, 797 (Miss. 1994); *Coleman v. State*, 482 So. 2d 221, 222 (Miss. 1986). The Mississippi Supreme Court will normally favor finding that the contemnor's actions involved constructive contempt when there is a

legitimate issue as to whether the contemnor has committed constructive or direct contempt since constructive contempt requires a specification of charges, notice and a hearing. *Purvis*, 657 So. 2d at 797; *Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969). When determining whether a contemnor has the right to a jury trial, the court must look to the maximum sentence possible under the statute, or to the penalty actually imposed if no punishment is provided by statute. *McGowan v. State*, 258 So. 2d 801, 802 (Miss. 1972). Because the ability to punish for criminal contempt is derived from the inherent powers of the court and not from statute, *Melvin v. State*, 48 So. 2d 856 (Miss. 1950), the actual penalty imposed by the trial court must be the focus.

The correct procedural safeguards required for a charge of constructive contempt are "a specific charge, notice and a hearing." *Mississippi Com'n on Judicial Performance v. Byers*, 757 So. 2d 961, 970 (Miss. 2000); *Purvis*, 657 So. 2d at 798. Furthermore, it is necessary to try the individual by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution. *Varvaris v. State*, 512 So.2d 886, 888 (Miss.1987). Where a course of action is aggravated by personal attacks, another judge should be asked to sit at the contempt hearing. *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64 (1971); *Purvis*, 657 So. 2d at 797. See *Jeffries v. State*, 724 So. 2d 897, 899 (Miss. 1998) (where newspaper reporter was convicted in state court of criminal contempt for publishing article about juvenile record in violation of trial court's order, the court held that reporter's conduct in publishing newspaper article could only form basis for constructive contempt charge, and failure to afford reporter procedural safeguards required for constructive contempt required reversal).

3. Other remedies

There is no other statutory or case law addressing this issue. See *Jeffries v. State*, 724 So. 2d 897, 899 (Miss. 1998) (where a trial court's order barring reporter from reporting on juvenile record, after it had been discussed in open court, was presumptively invalid prior restraint on speech).

VIII. Appealing

A. Timing

1. Interlocutory appeals

Miss. R. App. 5(a)(3), provides that an interlocutory appeal "may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 14 days after the entry of such order in the trial court with proof of service on all other parties to the action in the trial court. An order may be amended to include the prescribed certification or denial at any time, and permission to appeal may be sought within 14 days after entry of the order as amended."

2. Expedited appeals

Other than Miss. R. App. 5(d), which states that "[t]he Court may in its discretion expedite the appeal and give it preference over ordinary civil cases," there is no statutory or case law addressing this issue.

B. Procedure

Miss. R. App. 5 states:

(a) Petition for Permission to Appeal. An appeal from an interlocutory order may be sought if the order grants or denies certification by the trial court that a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

- (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or
- (2) Protect a party from substantial and irreparable injury; or
- (3) Resolve an issue of general importance in the administration of justice.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 14 days after the entry of such order in the trial court with proof of service on all other

parties to the action in the trial court. An order may be amended to include the prescribed certification or denial at any time, and permission to appeal may be sought within 14 days after entry of the order as amended.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; and a statement of the reasons why the certification required by Rule 5(a) properly was made or should have been made. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of law or opinion. Within 14 days after service of the petition an adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on all other parties to the action in the trial court. The petition and answer shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) Grant of Permission; Prepayment of Costs; Filing of Record. If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed. The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases.

(e) Effect on Trial Court Proceedings. The petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order.

1. To whom is the appeal made?

Under Miss. R. App. 5(a)(3), the appeal is to be made by filing a petition for permission to appeal with the clerk of the Mississippi Supreme Court.

2. Stays pending appeal

Other than Miss. R. App. 5(e), which states that "[t]he petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order," there is no statutory or case law addressing this issue.

3. Nature of appeal

The comment to Miss. R. App. 5 states that "[t]he rule contemplates that either the trial court will grant an interlocutory appeal subject to appellate review of that decision, *Atwell Transfer Co. v. Johnson*, 124 So. 2d 861, 864 (1960), or the Supreme Court will grant the appeal itself." However, the Supreme Court has, on one occasion, dealt with a situation where a litigant, apparently misconstruing the finality of the trial court's ruling, attempted to appeal the order without first obtaining the supreme court's permission under Rule 5. *See Keyes v. State*, 708 So. 2d 540, 543 (Miss. 1998), where the court concluded that it would advance the ends of justice to reach the merits of the appeal and exercised its authority under Miss. R. App. P. 2 to suspend the appellate rules and decide the case.

The Mississippi Court of Appeals has at least three times concluded that it may suspend the rules for interlocutory appeals even when no petition for such an appeal has been filed. *Hobgood v. Koch Pipeline Southeast, Inc.*, 769 So. 2d 838, 841 (Miss. Ct. App. 2000); *Ann May Enterprises, Inc. v. Caples*, 724 So. 2d 1127, 1130 (Miss. Ct. App. 1998); *McGriggs v. Montgomery*, 710 So. 2d 886, 888 (Miss. Ct. App. 1998).

However, there is no appeal as of right. The Mississippi Court of Appeals's jurisdiction is limited to those cases that are assigned to it for decision by the Mississippi Supreme Court Miss. Code Ann. § 9-4-3 (Supp. 2006). Therefore, Miss. R. App. 5 does not — and legally could not — grant a litigant the right to petition the Mississippi Court of Appeals for an interlocutory appeal. *McGriggs*, 710 So. 2d at 888.

4. Standard of review

When the issues presented on an interlocutory appeal are questions of law, the Mississippi appellate court will review those issues, as all other questions of law, *de novo*. *Stewart ex rel. Womack v. City of Jackson*, 804 So. 2d 1041, (Miss. 2002); *Gant v. Maness*, 786 So. 2d 401, 403 (Miss. 2001). All other matters will be reviewed under an abuse of discretion of standard; the trial judge's ruling will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances. *Stubbs v. Miss. Farm Bureau Cas. Ins. Co.*, 2002 W.L. 1340956, at *3 (Miss. June 20, 2002); *McCain Bldrs., Inc. v. Rescue Rooter, LLC*, 797 So. 2d 952, 954 (Miss. 2001); *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446, 448 (Miss. 1997).

5. Addressing mootness questions

The Official Comment to Miss. R. App. 5 states:

Rule 5(a)(3) provides the Court with flexible authority to grant interlocutory review in situations in which the pertinent interest is the administration of justice. The interest "is that of the proper administration of justice generally — for example, when an order involves a question of procedure that would likely become moot by the time final judgment was entered but should be authoritatively resolved for the purposes of future guidance of courts below." American Bar Ass'n, Standards Relating to Appellate Courts §§ 3.12, at 29

Miss. R. App. 5(a)(3) cmt. (emphasis added). There is no case law addressing this issue.

6. Relief

The reporter's attorney should seek a reversal because the appellate court could order such a contempt citation dissolved. *See Jeffries v. State*, 724 So. 2d 897, 899 (Miss. 1998) (where newspaper reporter was convicted in state court of criminal contempt for publishing article about juvenile record in violation of trial court's order, the court held that reporter's conduct in publishing newspaper article could only form basis for constructive contempt charge, and failure to afford reporter procedural safeguards required for constructive contempt required reversal).

IX. Other issues

A. Newsroom searches

There is no statutory or case law addressing this issue.

B. Separation orders

There is no statutory or case law addressing this issue.

C. Third-party subpoenas

There is no statutory or case law addressing this issue.

D. The source's rights and interests

There is no statutory or case law addressing this issue.