

# REPORTER'S PRIVILEGE: NORTH CAROLINA

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

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

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

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Executive Director: Lucy A. Dalglish

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

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

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

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

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

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

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

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

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

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

### What is a subpoena?

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

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

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# REPORTER'S PRIVILEGE COMPENDIUM

# NORTH CAROLINA

*Prepared by:*

Marcus W. Trathen  
 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.  
 Post Office Box 1800  
 Suite 1600, First Union Capitol Center  
 150 Fayetteville Street (zip 27601)  
 Raleigh, North Carolina 27602  
 (919) 839-0300 (telephone)  
 (919) 839-0304 (fax)

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## I. Introduction: History & Background

North Carolina's statutory "reporter's privilege" or "shield law" became effective on October 1, 1999. This law was a reaction to a decision of the North Carolina Court of Appeals (later affirmed by the North Carolina Supreme Court) that held that reporters do not enjoy a privilege with respect to non-confidential information obtained from non-confidential sources in criminal cases. The court's surprising decision was contrary to some 14 years of consistent lower court decisions that had recognized a reporter's privilege under the federal and state constitutions in civil and criminal proceedings.

The shield law enacted in reaction to this adverse decision is quite expansive in the protection granted to journalists. It applies to virtually everyone connected with the publication or distribution of information via any news medium; it protects confidential as well as non-confidential information; it applies to judicial and quasi-judicial proceedings; and it can only be overcome by a specific showing of need by the party seeking the information.

While the experience of North Carolina's trial courts in interpreting this statute has been limited, the law seems to have been successful in clarifying the circumstances under which reporters may be compelled to disclose information obtained in the course of their newsgathering activities. Thus far, trial courts have had little difficulty in following the requirements of the statute, and journalists have been generally successful in protecting the fruits of their newsgathering labor.

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## II. Authority for and source of the right

### A. Shield law statute

North Carolina's "reporter's privilege" or "shield law" is codified at N.C. Gen. Stat. § 8-53.11. This statute provides as follows:

*Persons, companies, or other entities engaged in gathering or dissemination of news.*

(a) Definitions. - The following definitions apply in this section:

(1) Journalist. - Any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.

(2) Legal proceeding. - Any grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency, or tribunal.

(3) News medium. - Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public.

(b) A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist.

(c) In order to overcome the qualified privilege provided by subsection (b) of this section, any person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

(2) Cannot be obtained from alternate sources; and

(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.

Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

(d) Notwithstanding subsections (b) and (c) of this section, a journalist has no privilege against disclosure of any information, document, or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of the observed conduct.

The shield law became effective October 1, 1999, and applies only to information or documents prepared while acting as a journalist on or after that date. See An Act to Promote the Free Flow of Information to the People of North Carolina by Codifying the Journalists' Testimonial Privilege, ch. 267, 1999 N.C. Sess. Laws 359, s. 2. Although it may be unlikely that information gathered before October 1, 1999 would be the subject of a subpoena, it is important to remember that the statutory privilege would not apply to such information, and any motion to quash a subpoena issued for such information would have to be argued on the basis of the common law privilege arising from the federal or state constitutions. Similarly, should a judge determine that the shield law does not apply to any other particular situation, a journalist could still assert a constitutional privilege.

In summary, the shield law grants journalists a broad but qualified privilege against disclosure of newsgathering information. The protection extends to virtually everyone connected with the publication or distribution of news information, including, but not limited to, reporters, photographers, stringers, and freelance reporters. All newsgathering activity is protected, so long as the activity is related to the business of publication or distribution of news via print, broadcast, or other electronic means. In addition, the statute protects all newsgathering information, regardless of whether the information is confidential or non-confidential. Finally, the protection extends to all legal proceedings, including criminal, civil, grand jury and quasi-judicial (i.e., administrative) proceedings.

To overcome the privilege, the party seeking the information must show: (1) that it is relevant and material to the proper administration of the legal proceeding; (2) that it cannot be obtained from alternative sources; and (3) that it is essential to the maintenance of a claim or defense. An order compelling the production of newsgathering information can only be made after notice and a hearing and upon "clear and specific" findings as to the showing made by the person seeking the information. However, no privilege exists for information or documents that result from a journalist's eyewitness observations of criminal or tortious conduct, including any recordings of the observed conduct.

As noted above, the North Carolina shield law statute was introduced and enacted in response to a decision of the North Carolina Court of Appeals refusing to recognize the reporter's privilege with respect to non-confidential information obtained from non-confidential sources in a criminal case. *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592, 26 Media L. Rep. 1953 (1998). In that case, television reporter Sarah Owens had taped an interview with the attorney of a murder suspect, and the prosecutor in the case issued a subpoena demanding that she testify about the tape. She appeared at a hearing, but refused to testify, claiming that her testimony was privileged. The trial court judge held the reporter in contempt of court and sentenced her to 30 days in jail, which was later reduced to 2 hours. The reporter appealed the contempt order to the Court of Appeals, which issued a decision on February 17, 1998, affirming the trial court's decision, albeit on the narrow ground that in a criminal case a reporter enjoys no privilege for non-confidential information obtained from non-confidential sources.

A few days after the Court of Appeals decision in *Owens*, a reporter for the *Raleigh News & Observer*, Andy Curliss, received a subpoena in another capital murder case. The prosecution sought Mr. Curliss' notes from a jailhouse interview with the defendant, Derrick Allen. The trial court undertook an *in camera* review of the notes in issue and, without clearly ruling whether it recognized a privilege at all, ruled that the reporter must turn over his notes. The court granted the newspaper's motion for a stay of this ruling and, acting under a provision allowing matters ancillary to capital murder cases to go directly to the North Carolina Supreme Court, the newspaper petitioned the Supreme Court for certiorari. The court granted certiorari, and oral argument was heard in the end of May 1998 after an expedited briefing schedule.

The North Carolina Supreme Court also granted review in *Owens* and heard oral argument in in September 1998. After months went by without a decision from the Supreme Court in either *Owens* or *Curliss*, the North Carolina Press Association and the North Carolina Association of Broadcasters worked with key legislators to craft legislation to overrule the *Owens* decision and codify the journalist's testimonial privilege. The result of this effort was the enactment of the shield law, which was ratified by the legislature on June 30, 1999, and signed into law by the Governor on July 9, 1999.

Immediately after enactment of the shield law, on July 23, 1999, the Supreme Court issued a one sentence decision affirming *Owens* but noting the enactment of the shield law. *See In re Owens*, 350 N.C. 656, 517 S.E.2d 605, 27 Media L. Rep. 2340 (July 23, 1999) (the lower's court's decision in *Owens* was affirmed, despite the passage of the shield law, because the reporter's material in *Owens* was gathered before the shield law's October 1, 1999 effective date). On the same day, the Supreme Court entered an order in *Curliss* holding that certiorari had been improvidently granted, therefore sending the matter back to the trial court. *See In re Curliss*, 350 N.C. 655, 517 S.E.2d 381 (1999).

No formal legislative history exists to provide additional context and explanation of the shield law. However, some guidance concerning the legislature's intent may be obtained by comparing the Bill that was ultimately enacted, Senate Bill 1009, with the companion House Bill 1200 that was passed by the House but ultimately rejected in favor of the Senate version. There were three principal substantive differences between these Bills:

- (1) In the House Bill, the definition of "journalist" lacked the phrase: "or the employees, independent contractors or agents of that person, company or entity;"
- (2) The House Bill lacked a provision specifying that a journalist has no privilege against disclosure of the journalist's eyewitness observations of criminal or tortious conduct; and
- (3) The House Bill had a provision allowing the award of reasonable attorneys' fees and expenses to the prevailing party.

There have been no substantive amendments to the shield law statute since it was enacted in 1999, although the statute was initially codified as G.S. § 8-53.9 and subsequently was recodified as G.S. § 8-53.11.

## **B. State constitutional provision**

The North Carolina Constitution contains no explicit shield law provision. However, Article I, Section 14 of the State Constitution contains protections of freedom of speech and freedom of the press:

*Freedom of speech and press.* Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never restrained, but every person shall be held responsible for their abuse.

Various North Carolina trial courts have recognized that a journalist's testimonial privilege is based, in part, on Article I, Section 14 of the North Carolina Constitution. *See Higgins v. Young*, 29 Media L. Rep. 2528 (2001) (stating that N.C. Gen. Stat. § 8-53.11 codified the common law reporter's privilege under, *inter alia*, Article I, Section 14 of the North Carolina Constitution; quashing defendant's subpoena of newspaper reporter in civil case seeking testimony concerning three published articles); *State v. McLeod Oil Co.*, 34 Media L. Rep. 1703 (N.C. Superior Ct. 2006) (quashing subpoena seeking copy of interview broadcast on radio); *State v. Peterson*, 31 Media L. Rep. 2501 (N.C. Superior Ct. 2003) (quashing subpoena seeking notes or memoranda that would reflect contact between law enforcement officials and members of the news media); *State v. McKillop*, 24 Media L. Rep. 1638 (N.C. Dist. Ct. 1995) (quashing subpoena by prosecutor in criminal case seeking testimony of newspaper reporter concerning statements made by defendant accused of operating a sexually oriented business within 1,000 feet of a residence); *State v. Wallace*, 23 Media L. Rep. 1473 (N.C. Superior Ct. 1995) (protecting journalist's confidential police sources from disclosure in change of venue hearing in criminal case where defendant was charged with the murder of ten women over a two-year period); *State v. Demery*, 23 Media L. Rep. 1958 (N.C. Superior Ct. 1995) (quashing defense subpoena in criminal case seeking reporter's testimony concerning telephone interview with defendant accused of murdering James Jordan, Michael Jordan's father); *State v. Smith*, 13 Media L. Rep. 1942 (N.C. Superior Ct. 1987) (quashing defendant's subpoena in criminal case seeking testimony of reporter concerning his investigation concerning theft of narcotics from a State Bureau of Investigation laboratory); *Locklear v. Waccamaw Siouan Dev. Ass'n*, 12 Media L. Rep. 2391 (N.C. Superior Ct. 1986) (quashing

plaintiff's subpoena in civil case seeking newspaper reporter's testimony in order to impeach testimony given by the chairman of defendant's board of directors in breach of contract claim); *Johnson v. Skurow*, 10 Media L. Rep. 2463 (N.C. Superior Ct. 1984) (quashing plaintiff's subpoena in civil case seeking testimony of newspaper reporter concerning his investigation of the incident giving rise to the lawsuit and to verify the accuracy of certain statements by several witnesses which were printed in a published news article); *State v. Hagaman*, 9 Media L. Rep. 2525 (N.C. Superior Ct. 1983) (quashing defendant's subpoena in criminal case seeking testimony of newspaper reporter concerning confidential source in murder case); *Chappell v. Brunswick Bd. of Educ.*, 9 Media L. Rep. 1753 (N.C. Superior Ct. 1983) (quashing plaintiff's subpoena in civil case seeking a newspaper reporter's testimony and notes about her conversations with school board members concerning a teacher's firing by the board).

No state appellate court has explicitly ruled on whether or not the state constitution establishes a reporter's privilege. The Supreme Court, however, has affirmed without explanation or comment a Court of Appeals decision implicitly refusing to recognize a reporter's testimonial privilege based on the state constitution with respect to non-confidential information obtained from a non-confidential source in a criminal proceeding. *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592, 26 Media L. Rep. 1953 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605, 27 Media L. Rep. 2340 (1999). In *Owens*, the Court of Appeals rejected the reporter's argument that a trial court contempt order was invalid under the North Carolina Constitution, but, in doing so, the Court did not analyze the state constitution and did not explicitly hold that no privilege exists under the state constitution. As a result, reporters may still assert protection under the state constitution in instances where the shield law does not apply.

### C. Federal constitutional provision

The North Carolina Court of Appeals has considered, and rejected in part, a reporter's privilege under the federal constitution, concluding that "the Supreme Court in *Branzburg* expressly recognized the state's compelling interest in pursuing criminal investigations." *See In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592, 26 Media L. Rep. 1953 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605, 27 Media L. Rep. 2340 (1999). The court in *Owens* limited its holding to non-confidential information obtained from a non-confidential source in a criminal proceeding and it is possible to read the court's decision as simply a determination that the state's interest under the facts of this case outweighed the reporter's interest in non-disclosure. As a result, at least in criminal cases involving the disclosure of non-confidential information, it is uncertain whether North Carolina courts will continue to recognize a reporter's privilege based on the federal constitution.

The result in *Owens* has been effectively overruled by the enactment of the shield law. For example, in *State v. Wiggins*, 29 Media L. Rep. 1597 (N.C. Superior Ct. 2001), a Mecklenburg County Superior Court judge found that, despite the Supreme Court's ruling in *Owens*, the shield law does indeed protect non-confidential information obtained from non-confidential sources, even in criminal cases.

Prior to enactment of the shield law and the *Owens* decision, the North Carolina trial courts had on a consistent basis recognized the reporter's privilege based on the United States Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) and the First Amendment. One of the first of these cases was *State v. Rogers*, 9 Media L. Rep. 1254 (N.C. Superior Ct. 1983). In that case, a Wake County Superior court judge quashed a subpoena issued to a reporter for the *Raleigh News & Observer* in a criminal case, citing *Branzburg* to support the decision. The court recognized that journalists have a qualified First Amendment privilege to refuse to testify or disclose unpublished material, and that testimony or production of materials can be required only when the requesting party demonstrates: (1) that the information to be obtained is material and relevant; (2) that there is an important state interest in compelling the journalist's testimony; and (3) that the information sought is not available from other sources. *Id.* at 1255. This three part test was later codified in the shield law.

Subsequent cases in the trial courts affirmed this privilege based on the First Amendment (in addition to Article I, Section 14 of the North Carolina Constitution). *See, e.g., Higgins v. Young*, 29 Media L. Rep. 2528 (2001) (stating that N.C. Gen. Stat. § 8-53.11 codified the common law reporter's privilege under, *inter alia*, the First Amendment of the United States Constitution and quashing defendant's subpoena of newspaper reporter in civil case seeking testimony concerning three published articles); *State v. McLeod Oil Co.*, 34 Media L. Rep. 1703 (N.C. Superior Ct. 2006) (quashing subpoena seeking copy of interview broadcast on radio); *State v. Peterson*, 31 Me-

dia L. Rep. 2501 (N.C. Superior Ct. 2003) (quashing subpoena seeking notes or memoranda that would reflect contact between law enforcement officials and members of the news media); *Shinn v. Price*, 27 Media L. Rep. 2341 (N.C. Superior Ct. 1999) (quashing plaintiff's subpoena in civil case seeking testimony from newspaper reporter concerning confidential and non-confidential information and sources in connection with the reporter's investigation into defendant's allegations that the plaintiff sexually assaulted her); *State v. McKillop*, 24 Media L. Rep. 1638 (N.C. District Ct. 1995) (quashing subpoena by prosecutor in criminal case seeking testimony of newspaper reporter concerning statements made by defendant accused of operating a sexually oriented business within 1,000 feet of a residence); *State v. Wallace*, 23 Media L. Rep. 1473 (N.C. Superior Ct. 1995) (protecting journalist's confidential police sources from disclosure in change of venue hearing in criminal case where defendant was charged with the murder of ten women over a two-year period); *State v. Demery*, 23 Media L. Rep. 1958 (N.C. Superior Ct. 1995) (quashing defense subpoena in criminal case seeking reporter's testimony concerning telephone interview with defendant accused of murdering James Jordan, Michael Jordan's father); *State v. Smith*, 13 Media L. Rep. 1942 (N.C. Superior Ct. 1987) (quashing defendant's subpoena in criminal case seeking testimony of reporter concerning his investigation concerning theft of narcotics from a State Bureau of Investigation laboratory); *Locklear v. Waccamaw Siouan Dev. Ass'n*, 12 Media L. Rep. 2391 (N.C. Superior Ct. 1986) (quashing plaintiff's subpoena in civil case seeking newspaper reporter's testimony in order to impeach testimony given by the chairman of defendant's board of directors in breach of contract claim); *Johnson v. Skurow* 10 Media L. Rep. 2463 (N.C. Superior Ct. 1984) (quashing plaintiff's subpoena in civil case seeking testimony of newspaper reporter concerning his investigation of the incident giving rise to the lawsuit and to verify the accuracy of certain statements by several witnesses which were printed in a published news article); *State v. Hagaman*, 9 Media L. Rep. 2525 (N.C. Superior Ct. 1983) (quashing defendant's subpoena in criminal case seeking testimony of newspaper reporter concerning confidential source in murder case); *Chappell v. Brunswick Bd. of Educ.*, 9 Media L. Rep. 1753 (N.C. Superior Ct. 1983) (quashing plaintiff's subpoena in civil case seeking a newspaper reporter's testimony and notes about her conversations with school board members concerning a teacher's firing by the board).

Several federal court cases arising in North Carolina have also recognized a reporter's privilege based on the federal constitution. The first such case, and the only federal case to discuss the privilege at length, was *Miller v. Mecklenburg County*, 602 F. Supp. 675 (W.D.N.C. 1985) and 606 F. Supp. 488 (W.D.N.C. 1985), *aff'd*, 813 F.2d 402 (4th Cir. 1986) (not addressing the reporter's privilege issue), *cert. denied*, 479 U.S. 1100 (1987). The case arose out of a civil suit against various police officials alleging that the defendants had caused the death of plaintiff's father by administering a "choke hold" while decedent was in police custody. Tex O'Neill, a newspaper reporter for *The Charlotte Observer*, investigated the allegations and published a story almost two years after the death revealing that while he was investigating the story he met someone who provided him information on a confidential basis concerning the alleged incident in addition to other non-confidential information. In the first decision in this case, the court recognized a qualified privilege against disclosure based on the *Branzburg* case both as to confidential source and non-confidential information, but concluded that plaintiff had met her burden to overcome the privilege with respect to the non-confidential identity of a potential witness to alleged "choke hold" obtained from the confidential source by showing that she had exhausted all potential alternative sources of information. In the second decision after additional discovery based on the non-confidential information did not reveal helpful information, the court, acting with great "reluctance," required the reporter to reveal the identity of the confidential source but issued a protective order prohibiting the release of the confidential information to anyone but the attorneys involved in the case. *See also Ashcroft v. Conoco*, 218 F.3d 282, 28 Media L. Rep. 2103 (4th Cir. 2000) (district court recognized qualified privilege against disclosure of the source of information relating to \$36 million court settlement ordered to be kept confidential, but, after investigation by the court and the parties, concluded that the reporter was the only means of identifying the source of the information; contempt order reversed by Fourth Circuit); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1211 (M.D.N.C. 1996) (case arising out of ABC network's *Prime Time Live* program in which journalists used hidden cameras and "undercover" employees to suggest that Food Lion's corporate goals of promoting efficiency and reducing waste result in the sale of unsanitary food to consumers; the federal district court recognized the reporter's testimonial privilege, and applied the familiar three-part test, but ruled that the moving party had met its burden and allowed the journalists' materials concerning two unrelated hidden camera investigations to be subpoenaed); *Penland v. Long*, 922 F. Supp. 1080 (W.D.N.C. 1995) (quashing subpoenas issued by plaintiffs in civil case to newspaper

and television reporters seeking testimony concerning unpublished conversations with the defendant sheriff in action arising out of the termination of the plaintiff deputy sheriffs by the defendant).

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

Prior to the shield law, the journalist's testimonial privilege in North Carolina had been based on the federal and state constitutions. The privilege has not been based on other sources such as court rules, state bar guidelines, or administrative procedures.

### **III. Scope of protection**

#### **A. Generally**

In general, the shield law in North Carolina is very strong. The statute extends to virtually everyone connected with the publication or distribution of news information, including, but not limited to, reporters, photographers, stringers, and freelance reporters; it extends to all newsgathering activity, so long as the activity is related to the business of publication or distribution of news via print, broadcast, or other electronic means; it protects all newsgathering information, regardless of whether the information is confidential or non-confidential; and it extends to all legal proceedings, including criminal, civil, grand jury and quasi-judicial (i.e., administrative) proceedings. Nonetheless, despite the clarity and strength of the statute, the application of the statute to a specific set of facts is always subject to the vagaries of the judicial process and the temperament of specific judges.

#### **B. Absolute or qualified privilege**

In any legal or quasi-judicial proceeding in North Carolina, a journalist has a qualified privilege against disclosure of any confidential or non-confidential information, document or item obtained or prepared while working as a journalist. N.C. Gen. Stat. § 8-53.11(b). This privilege is not absolute, but to overcome the privilege, the party seeking the information must show (1) that it is relevant and material to the proper administration of the legal proceeding, (2) that it cannot be obtained from alternative sources, and (3) that it is essential to the maintenance of a claim or defense. N.C. Gen. Stat. § 8-53.11(c). However, no privilege exists for information or documents which result from a journalist's eyewitness observations of criminal or tortious conduct, including any recordings of the observed conduct. N.C. Gen. Stat. § 8-53.11(d).

#### **C. Type of case**

##### **1. Civil**

The North Carolina shield law statute draws no distinction between civil and criminal cases, specifying that the privilege applies in all legal and quasi-judicial proceedings in the state. N.C. Gen. Stat. § 8-53.11(a)(2).

##### **2. Criminal**

The North Carolina shield law statute draws no distinction between civil and criminal cases, specifying that the privilege applies in all legal and quasi-judicial proceedings in the state. N.C. Gen. Stat. § 8-53.11(a)(2). In *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592, 26 Media L. Rep. 1953 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605, 27 Media L. Rep. 2340 (1999), the Court of Appeals refused to recognize a reporter's privilege in the case of non-confidential information obtained from non-confidential sources in a criminal case, and that ruling was affirmed by the state supreme court. This ruling, however, was effectively overruled by the enactment of the shield law.

##### **3. Grand jury**

North Carolina's shield law specifically applies to "any grand jury proceeding or grand jury investigation," and no distinction is made between grand jury investigations, criminal trials, and civil actions. N.C. Gen. Stat. § 8-53.11(a)(2).

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

While the shield law does not specifically discuss protecting the identity of sources or material that implicitly identifies sources, it protects "any confidential or non-confidential information . . . obtained . . . while acting as a journalist." N.C. Gen. Stat. § 8-53.11(b). This "information" includes the identity of a reporter's sources, and North Carolina trial courts have consistently recognized a reporter's privilege to protect the identity of sources. *See, e.g., State v. Peterson*, 31 Media L. Rep. 2501 (N.C. Superior Ct. 2003) (quashing subpoena seeking notes or memoranda that would reflect contact between law enforcement officials and members of the news media); *State v. Wallace*, 23 Media L. Rep. 1473 (N.C. Superior Ct. 1995) (protecting journalist's confidential police sources); *State v. Hagaman*, 9 Media L. Rep. 2525 (N.C. Superior Ct. 1983) (quashing defendant's subpoena demanding that reporter testify about his confidential sources).

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

The North Carolina shield law protects journalists against the disclosure "of any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist." N.C. Gen. Stat. § 8-53.11(b). Confidential information is any information obtained by a reporter with a promise that the source will not be disclosed. *See State v. Wallace*, 23 Media L. Rep. 1473 (N.C. Superior Ct. 1995); *State v. Hagaman*, 9 Media L. Rep. 2525 (N.C. Superior Ct. 1983). Non-confidential information is information obtained by any other means.

The North Carolina Supreme Court has affirmed a Court of Appeals decision that there is no federal constitutional privilege protecting reporters from providing non-confidential information obtained from non-confidential sources in criminal cases. *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592, 26 Media L. Rep. 1953 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605, 27 Media L. Rep. 2340 (1999). While the *Owens* decision came after the shield law had been enacted, the reporter's material was gathered before the shield law's October 1, 1999 effective date and, therefore, was not applicable. In *State v. Wiggins*, 29 Media L. Rep. 1597 (N.C. Superior Ct. 2001), a Mecklenburg County Superior Court judge found that, despite the North Carolina Supreme Court's ruling in *Owens*, the shield law does indeed protect non-confidential information obtained from non-confidential sources, even in criminal cases. As a result, only in a case where the shield law does not apply, would the *Owens* distinction between confidential information and confidential sources and non-confidential information and non-confidential sources in criminal cases matter.

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

The shield law does not distinguish between material that has been published and material that has not, and the privilege extends to "any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist." N.C. Gen. Stat. § 8-53.11(b). A North Carolina trial court has quashed a subpoena in a civil matter seeking a copy of an interview broadcast over the radio, where the party who issued the subpoena could not establish that it had exhausted alternate sources for the information contained in the interview or that the information sought was essential to its case. *See State v. McLeod Oil Co.*, 34 Media L. Rep. 1703 (N.C. Superior Ct. 2006).

#### **G. Reporter's personal observations**

Pursuant to the shield law, the qualified testimonial privilege does not apply to a reporter's eyewitness observation of criminal or tortious conduct. N.C. Gen. Stat. § 8-53.11(d).

If a reporter is on location and records a crime as it happens, there is no privilege against disclosure of any information, including audio or visual recordings resulting from the reporter's eyewitness observation of the crime. However, if the reporter arrives late and merely photographs, for example, the crime scene or accident site, the privilege should apply, because the reporter observed and recorded the result of the crime or accident and not the event itself.

#### **H. Media as a party**

The shield law makes no distinction between cases where the media is a party and cases where journalists have been issued third party subpoenas. However, the privilege only extends to information and documents obtained or prepared while a journalist is acting as a journalist, so it does not present the media with a shield against discovery generally. N.C. Gen. Stat. § 8-53.11(b).

## I. Defamation actions

There are no North Carolina cases applying a defamation (or libel) "exception" to the reporter's privilege. The protection of the shield law is broad and covers all legal proceedings, even where the media is a defendant in a defamation action. However, the privilege only extends to information and documents obtained or prepared while a journalist is acting as a journalist, so it does not present the media with a shield against discovery generally. *See* N.C. Gen. Stat. § 8-53.11(b). Moreover, the privilege does not apply to a journalist's "eyewitness observations of . . . tortious conduct," so the privilege would not protect a journalist's direct observations of alleged defamatory statements.

## IV. Who is covered

### A. Statutory and case law definitions

#### 1. Traditional news gatherers

##### a. Reporter

The North Carolina shield law uses the term "journalist" rather than "reporter," but it offers a broad definition, calling any person who is engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium a "journalist." N.C. Gen. Stat. § 8-53.11(a)(1). Any company that is engaged in the business of news gathering, as well as the employees, independent contractors and agents of that company, is also a "journalist" under the shield law. *Id.*

##### b. Editor

Editors fall within the definition of "journalist" under the law, and may also claim a "journalist's" privilege. N.C. Gen. Stat. § 8-53.11(a)(1).

##### c. News

Under the shield law, news is any information gathered, compiled, written, edited, photographed, recorded, or processed for dissemination via any news medium. N.C. Gen. Stat. § 8-53.11(a)(1).

##### d. Photo journalist

Any person who photographs or records information for dissemination via any news medium falls within the definition of "journalist" under the law. Therefore, photojournalists may claim a "journalist's" privilege. N.C. Gen. Stat. § 8-53.11(a)(1).

##### e. News organization / medium

Any business entity that is regularly engaged in the business of publication or distribution of news via print, broadcast or other electronic means accessible to the general public is a "news medium" under the shield law. N.C. Gen. Stat. § 8-53.11(a)(3).

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

Although case law in North Carolina has principally dealt with traditional journalists, the statute's broad definitions of "journalist" and "news medium" are meant to be inclusive of all individuals and media involved in the distribution of news. Any person who is engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium is considered a journalist under the shield law. N.C. Gen. Stat. § 8-53.11(a)(1). Any company or entity that is engaged in the business of news gathering, as well as the employees, independent contractors and agents of that company or entity, is also a "journalist" under the shield law. *Id.* The agents, independent contractors or employees of a person who is a journalist may also claim the protection of the shield law. *Id.*

## B. Whose privilege is it?

The privilege belongs to the reporter and not the source of the information. N.C. Gen. Stat. § 8-53.11(b). *See also State v. Demery*, 23 Media L. Rep. 1958 (N.C. Superior Ct. 1995) (murder case involving the death of Michael Jordan's father). In *Demery*, a reporter used an interview with the criminal defendant as the basis for an article. Although the reporter voluntarily provided a tape recording and transcript of the interview to both prosecution and defense, the defendant attempted to subpoena the reporter to appear at a hearing to suppress the tapes. The court quashed the subpoena, citing the reporter's privilege to not disclose information about his sources.

## V. Procedures for issuing and contesting subpoenas

### A. What subpoena server must do

#### 1. Service of subpoena, time

In North Carolina, the issuance and form of subpoenas for both civil and criminal trials are controlled by Rule 45 of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. §§ 15A-801 (subpoena for witness in criminal cases) & 15A-802 (subpoena for production of documentary evidence in criminal cases). A subpoena can require a witness to testify (subpoena *ad testificandum*) or require the witness to produce documentary evidence (subpoena *duces tecum*). The procedure for service differs for each type.

A subpoena for a witness may be served in three ways: (1) any person 18 or older who is not a party may serve the subpoena in person by the actual delivery of a copy; (2) any person 18 or older who is not a party may serve the subpoena by certified mail or by registered mail, return receipt requested; and (3) the subpoena may be served by direct telephone conversation with the party. *See* N.C. R. Civ. P. 45(e). In civil cases, telephone service can only be made by the sheriff, his designee who is 18 or older, or by the coroner, while in criminal cases, any employee of a local law enforcement agency can effect telephone service. *Id.*; N.C. Gen. Stat. § 8-59. In a criminal case, even if a person has been served by telephone, neither an order to show cause nor an order for arrest can be issued until that person has also been personally served with the written subpoena. N.C. Gen. Stat. § 8-59.

A subpoena for the production of documentary evidence may be served either (1) by the actual delivery of a copy to the person, or (2) by certified mail or by registered mail, return receipt requested. N.C. R. Civ. P. 45(e). Service may be effected by any person 18 or older who is not a party.

The district attorney may subpoena grand jury witnesses, and the subpoena must be served by the investigative grand jury officer, who is appointed by the court. N.C. Gen. Stat. § 15A-623(h). The witness herself is the only person who may disclose the fact that she has been subpoenaed. Otherwise, the method of service is the same as that of any other subpoena issued in a criminal matter.

#### 2. Deposit of security

State law does not require that the subpoenaing party deposit any security in order to procure the testimony or materials of a reporter. However, Rule 45(c)(2) of the North Carolina Rules of Civil Procedure provides that, in response to a motion to quash a subpoena *duces tecum*, a judge may require the requesting party to advance the reasonable cost of producing the records or other tangible things.

#### 3. Filing of affidavit

Any party may request either a subpoena compelling a witness to testify or a subpoena to produce documentary evidence, and no affidavit need accompany the subpoena attesting that the material sought is relevant and material to a legal action and that attempts to obtain the information from alternative sources have failed. N.C. R. Civ. P. 45(a), 45(b). However, under the North Carolina shield law, no order compelling testimony or production can issue unless a judge finds at a hearing that the person seeking the information has overcome the journalist's qualified privilege. N.C. Gen. Stat. § 8-53.11(c).

#### 4. Judicial approval

A subpoena requiring a witness to testify or produce documentary evidence can be issued at the request of any party by the clerk of the superior court for the county where the trial or hearing is being held. N.C. R. Civ. P. 45(a), 45(c). Any superior court judge, district court judge or magistrate may also issue a subpoena, but they need

not approve the issuance of the subpoena. N.C. R. Civ. P. 45(b). Subpoenas do not have to be signed by a judge or clerk; a subpoena for the attendance of witnesses may be signed by the party or her attorney, and a subpoena for the production of documents may be signed by the party's attorney. N.C. R. Civ. P. 45(a), 45(c).

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

Subpoenas in administrative proceedings governed by the administrative code are issued and served in accordance Rule 45 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 150B-27. State law enforcement officers may serve a subpoena on behalf of an agency that is a party to the contested case by any method by which a sheriff may serve a subpoena, including telephone service.

Subpoenas in administrative proceedings not governed by the administrative code are issued in accordance with the statutes governing that body. *See, e.g.*, N.C. Gen. Stat. § 62-62 (Utilities Commission).

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

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

Under North Carolina law, a party receiving a subpoena does not have to contact requesting party (or any other party) before moving the court to quash or modify a subpoena. *See* N.C. R. Civ. P. 45(c).

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

North Carolina law does not impose any procedural requirements, such as giving a "notice of intent," before a motion to quash or modify a subpoena is filed. The service of an "objection" to a subpoena is not sufficient, by itself, to permit noncompliance with a subpoena.

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

Any person served with a subpoena to produce documents may move to quash or modify the subpoena on the grounds that it is "unreasonable and oppressive." N.C. R. Civ. P. 45(c); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). In addition, a reporter may make a motion to quash a request to produce documents on the grounds that the documents are privileged. *See Whisenhunt v. Zammit*, 86 N.C. App. 425, 358 S.E.2d 114, 116 (N.C. App. 1987) (holding that a subpoena may be quashed if the documents in question are privileged); *Chappell v. Brunswick Bd. of Educ.*, 9 Media L. Rep. 1753 (N.C. Superior Ct. 1983) (quashing plaintiff's subpoena demanding that reporter testify about her investigation and produce her notes).

While Rule 45(c) applies on its face only to subpoenas *duces tecum* (i.e., subpoenas seeking the production of documents or things), the common practice is to file a motion to quash with respect to witness subpoenas as well under Rule 45(c). If a journalist is invoking the reporter's privilege to refuse to testify at a legal proceeding, he may do so through a motion to quash under the same procedure as a subpoena to produce documents. *See, e.g., Shinn v. Price*, 27 Media L. Rep. 2341 (N.C. Superior Ct. 1999); *State v. McKillop*, 24 Media L. Rep. 1638 (N.C. Superior Ct. 1995); *State v. Demery*, 23 Media L. Rep. 1958 (N.C. Superior Ct. 1995); *State v. Smith*, 13 Media L. Rep. 1942 (N.C. Superior Ct. 1987); *Locklear v. Waccamaw Siouan Dev. Ass'n*, 12 Media L. Rep. 2391 (N.C. Superior Ct. 1986).

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

A motion to quash should be filed with the judge in the action in which the subpoena was issued. N.C. R. Civ. P. 45(c). In the case of a grand jury subpoena, the motion should be filed with the presiding superior court judge, who will hear the matter *in camera*. N.C. Gen. Stat. § 15A-623(h).

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

When a reporter is a party to a civil case, for example if a reporter and her newspaper or station are defendants in a libel action, the reporter's testimony may be compelled by the issuance of a notice of deposition and a subpoena. During the course of the deposition, the reporter may assert her privilege not to disclose certain information. The reporter would assert the privilege, decline to answer, and the attorney for the other side could file a motion to compel the reporter to respond. A judge would then decide the reporter's claim of privilege. N.C. R. Civ. P. 37.

##### **c. Timing**

A motion to quash or modify a subpoena must be made promptly, and in any event, it must be made before the time specified for compliance with the subpoena. N.C. R. Civ. P. 45(c).

#### **d. Language**

The North Carolina General Statutes do not prescribe any recommended language for a motion to quash a subpoena. Typically, such motions need only describe the circumstances giving rise to the subpoena, identify the interests of the moving party, and state grounds for grant of the motion.

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

There are no additional materials that are needed to be attached to motions to quash. However, depending on the particular circumstances, a reporter may want to submit an affidavit with the motion or other documents or materials relied upon in support of the motion.

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

#### **a. Necessity**

The trial judge can decide at her discretion whether to conduct an *in camera* inspection of any requested documents. *Rowe v. Rowe*, 74 N.C. App. 54, 327 S.E.2d 624, 627 (N.C. App.), *cert. denied* 314, N.C. 331, 333 S.E.2d 489 (N.C. 1985); *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E.2d 386 (N.C. App. 1982).

#### **b. Consequences of consent**

It is within the judge's discretion whether or not to conduct an *in camera* review. Consent of the parties to such review makes it more likely that a judge will review materials *in camera* but consent does not bind the judge in any way. The standard of review for an appeal of the judge's decision with regard to *in camera* review is abuse of discretion, a very difficult standard to meet. *Rowe v. Rowe*, 74 N.C. App. 54, 327 S.E.2d 624, 627 (N.C. App.) *cert. denied*, 333 S.E.2d 489 (N.C. 1985); *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E.2d 386 (N.C. App. 1982).

#### **c. Consequences of refusing**

A reporter refusing to comply with an order requiring *in camera* review can be (and almost certainly will be) held in contempt of court, even if the court's order was erroneously issued. *Massengill v. Lee*, 228 N.C. 35, 44 S.E.2d 356, 358 N.C. (1947); *Midgett v. Crystal Dawn Corp.*, 58, N.C. App. 734, 294 S.E.2d 386 N.C. App. (1982); *Godsey v. Poe*, 36 N.C. App. 682, 245 S.E.2d 522, 524 N.C. App. (1978). The only way to contest an order requiring *in camera* review, which is interlocutory in nature and not subject to direct appeal, is to seek a writ of certiorari, mandamus, or prohibition from the appellate courts under the applicable rules of appellate procedure. Otherwise, an appeal will lie from a finding of contempt.

### **5. Briefing schedule**

Pursuant to Rule 5(a1) of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 5(a1), in proceedings in superior court, briefs relating to motions "seeking a final determination of the rights of the parties as to one or more of the claims or parties in the action" must be served upon each of the parties at least two days before the hearing on the motion. Because motions to quash do not seek a "final determination" concerning claims or parties, this rule does not apply to such motions. Otherwise, there is typically no formal briefing schedule for motions to quash.

### **6. Amicus briefs**

Amicus briefs are sometimes submitted by interested parties and organizations at the trial court level. They are more typically filed at the appellate court level with the Court of Appeals or the Supreme Court. Organizations which have filed amicus briefs in actions involving media companies include:

North Carolina Association of Broadcasters  
150 Fayetteville Street, Suite 1610  
Post Office Box 627  
Raleigh, North Carolina 27602

Phone: (919) 821-7300  
Fax: (919) 839-0304  
Lisa Reynolds, Executive Manager

North Carolina Press Association  
5171 Glenwood Avenue, Suite 364  
Raleigh, N.C. 27612  
Phone: (919) 787-7443  
Fax: (919) 787-5302  
Beth Grace, Executive Director

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

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

The party seeking to overcome a reporter's qualified privilege bears the burden of proof and must establish entitlement to the testimony or materials by the greater weight of evidence. N.C. Gen. Stat. § 8-53.11(c).

### **B. Elements**

To overcome the privilege, the party seeking the information must prove that the material sought (1) is relevant and material, (2) cannot be obtained from alternate sources, and (3) is essential to the maintenance of a claim or defense. N.C. Gen. Stat. § 8-53.11(c). *See also State v. Rogers*, 9 Media L. Rep. 1254, 1255 (N.C. Superior Ct. 1983). If the party does not establish each of the elements of the test, then the subpoena must be quashed. N.C. Gen. Stat. § 8-53.11(c). *See also State v. Smith*, 13 Media L. Rep. 1942 (N.C. Superior Ct. 1987).

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

The material sought must be "relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought." N.C. Gen. Stat. § 8-53.11(c)(1). *See also Higgins v. Young*, 29 Media L. Rep. 2528 (N.C. Superior Ct. 2001). In *State v. Peterson*, 31 Media L. Rep. 2501 (N.C. Superior Ct. 2003), the defendant's attorneys sought notes and other written material from journalists for the stated purpose of determining whether law enforcement officers had testified truthfully to the court about whether they had related information about the case to members of the news media. The defendant proposed that the notes be reviewed *in camera* by the court. In its decision, the court recognized that even *in camera* review constitutes a significant intrusion into the newsgathering and editorial process, and it quashed the defendant's subpoena, holding that "the mere possibility of finding evidence that the officers did not testify truthfully about their contacts with the news media" was insufficient to overcome the statutory privilege.

#### **2. Material unavailable from other sources**

The material sought must not be available from alternate sources. N.C. Gen. Stat. § 8-53.11(c)(1).

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

There are no reported appellate cases under the new shield law that attempt to define how exhaustive a search the requesting party must undertake to find the material through alternative sources. At a minimum, it is clear that the requesting party must make a showing of efforts to obtain the information. For example, in *State v. Wiggins*, 29 Media L. Rep. 1597 (N.C. Superior Ct. 2001), the trial court quashed a subpoena issued by the defendant in a highly-publicized capital murder trial (a local professional football player, Rae Curruth, was accused of killing his pregnant girlfriend) to a newspaper reporter seeking testimony and copies of correspondence with a witness in the trial where the defendant made no showing that the witness would not voluntarily testify and had not even attempted to subpoena the witness. One trial court applying the shield law has required a demonstration of exhaustion of all possible sources of information. *See Higgins v. Young*, 29 Media L. Rep. 2528 (N.C. Superior Ct. 2001). In *Higgins*, the trial court quashed a subpoena issued by the defendant in a civil case to a newspaper reporter seeking testimony concerning three articles published by the reporter where the defendant had not demon-

strated "that the information has not been unsuccessfully sought from all other available sources, and the Court is without knowledge whether this information could have been obtained from other sources."

An "exhaustion" requirement was applied by several trial courts prior to the adoption of the shield law. *See, e.g., Locklear v. Waccamaw Siouan Dev. Ass'n*, 12 Media L. Rep. 2391, 2392 (N.C. Superior Ct. 1986); *Johnson v. Skurow*, 10 Med. L. Rep. 2463 (N.C. Superior Ct. 1984). In *Locklear*, a reporter was subpoenaed by the plaintiff in a civil case to give testimony for the purpose of impeaching the chairman of the defendant's board of directors. In quashing the subpoena, the court held that the plaintiff had to demonstrate that it had sought the information from all alternate sources, such as other members of the board. The court stated that the requested information must not be available from any other source not protected by the First Amendment of the United States Constitution or Article I, Section 14 of the North Carolina Constitution, and "all other potential sources of such information, and all other means of obtaining information from such sources must be exhausted."

In a federal court case, a federal district court required a newspaper reporter to release both confidential and non-confidential information obtained as a result of the reporter's investigative efforts, but only after the plaintiff presented evidence that she had deposed all known potential witnesses, that independent investigations of the city police and FBI and state SBI had not uncovered the identity of the reporter's source, and that she herself had investigated all potential sources of the information. *Miller v. Mecklenburg County*, 602 F. Supp. 675 (W.D.N.C. 1985) and 606 F. Supp. 488 (W.D.N.C. 1985), *aff'd*, 813 F.2d 402 (4th Cir. 1986) (not addressing the reporter's privilege issue), *cert. denied*, 479 U.S. 1100 (1987).

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

There are no reported appellate cases under the new shield law that attempt to define the proof of search that the requesting party must make. *But see infra* Section VI(B)(2)(a), *Wiggins and Higgins*. In a pre-shield law case, *State v. Rogers*, 9 Media L. Rep. 1254, 1255 (N.C. Superior Ct. 1983), the trial court stated that there must be a serious attempt to exhaust all alternative sources of the information sought, and that by examining a sufficient number of witnesses and building a record, the moving party may surmount this threshold requirement. *But see Miller v. Mecklenburg County*, 602 F. Supp. 675 (W.D.N.C. 1985) and 606 F. Supp. 488 (W.D.N.C. 1985), *aff'd*, 813 F.2d 402 (4th Cir. 1986) (not addressing the reporter's privilege issue), *cert. denied*, 479 U.S. 1100 (1987) (plaintiff introducing depositions and other results of her investigative efforts into evidence to prove that she had exhausted all potential alternative sources of the information sought from the reporter).

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

No reported case in North Carolina has specifically addressed the issue of when a source is also an eyewitness or a participant in a crime. Under the shield law, the reporter's privilege does not protect a reporter's eyewitness observation of criminal or tortious conduct, *see* N.C. Gen. Stat. § 8-53.11(d), but the shield law does not specifically speak to the situation where a source is an eyewitness or participant in a crime. The Court of Appeals has held that the state has a compelling interest in pursuing criminal investigations, *see In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592, 26 Media L. Rep. 1953 N.C. App. (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605, 27 Media L. Rep. 2340 N.C. (1999), but this compelling interest is qualified by the requirements of the shield law. Under this law, the moving party must show that the information cannot be obtained from alternate sources. *See* N.C. Gen. Stat. § 8-53.11(c)(2). Some trial courts have required the moving party to show that all other means of obtaining information from such sources have been exhausted. *See, e.g., Locklear v. Waccamaw Siouan Dev. Ass'n*, 12 Media L. Rep. 2391, 2392 (N.C. Superior Ct. 1986). Unless the eyewitness is unavailable and there are no other sources for information about the crime, it would be difficult for the prosecution or other requesting party to meet this high burden.

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

The North Carolina shield law does not incorporate an explicit balancing test or requirement. Rather, the law requires the court to evaluate (i) the relevance of the information, (ii) whether the information can be obtained from alternate sources, and (iii) whether the information is essential to the maintenance of a claim or defense of the person seeking the information.

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

Any person served a subpoena to produce documents may move to quash or modify the subpoena on the grounds that it is "unreasonable and oppressive." N.C. R. Civ. P. 45(c); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). A subpoena may not be used to conduct a "fishing or ransacking expedition," and it is possible to move to quash a subpoena because it is overly broad. *Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E.2d 37, 44 N.C. (1966).

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

Neither cases nor statutes in North Carolina examine whether courts are required to weigh whether the matter subpoenaed involves a threat to human life.

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

In *State v. Pallas* 144 N.C. App. 277, 282, 548 S.E.2d 773, 778 N.C. App. (2001) (a non-media case), the North Carolina Court of Appeals held that a subpoena could be quashed because the proposed testimony would have been cumulative or immaterial.

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

Rule 45 of the North Carolina Rules of Civil Procedure governs the procedure with respect to the issuance of subpoenas in both civil and criminal cases. *See* N.C. Gen. Stat. §§ 15A-801 (subpoena for witness in criminal cases) & 15A-802 (subpoena for production of documentary evidence in criminal cases). Rule 45(c) permits the filing of a motion to quash for an "unreasonable and oppressive" subpoena. While this rule applies on its face only to subpoenas *duces tecum* (i.e., subpoenas seeking the production of documents or things), the common practice is to file a motions to quash under Rule 45(c) with respect to witness subpoenas as well.

### **8. Other elements**

The state courts have not listed any other elements that must be met before the privilege can be overcome.

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

### **1. Is the privilege waivable at all?**

The North Carolina shield law does not discuss waiver of the privilege, and the issue of whether the reporter's privilege can be waived has not been raised in any reported decisions. While in *Industrotech Constructors, Inc. v. Duke University*, 67 N.C. App. 741, 743-44, 314 S.E.2d. 272, 274 N.C. App. (1984) (a non-media case), the Court of Appeals stated that "it is well established in this state that even absolutely privileged matter may be inquired into where the privilege has been waived by disclosure," the journalist's privilege is unique in that it belongs to the journalist and not the source. Moreover, because its goal is to enhance the flow of information, it may be argued that the reporter may choose when and how to disclose information without waiving the privilege for other purposes.

### **2. Elements of waiver**

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

No reported case in North Carolina has addressed whether disclosure of a confidential source's name is sufficient to find waiver of the privilege.

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

No reported case in North Carolina has addressed whether the disclosure of a non-confidential source's name is sufficient to find waiver of the privilege.

#### **c. Partial disclosure of information**

No reported case in North Carolina has addressed whether the journalist's disclosure of some information from the source waives the privilege.

#### **d. Other elements**

No North Carolina case has found other elements or circumstances where the journalist, through his own actions, has waived the privilege.

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

No North Carolina case has addressed whether when the reporter agrees to partially testify—such as to confirm that the story is accurate and true as published—the privilege is deemed waived. Such "partial testimony" is not inconsistent with the protections of the shield law, but the more a journalist says on the witness stand the greater the likelihood that a trial judge would conclude that a journalist has waived the privilege.

## VII. What constitutes compliance?

### A. Newspaper articles

Newspapers and periodicals are self-authenticating under the North Carolina Rules of Evidence, and the journalist is not required to testify in court that a particular article appeared in a newspaper or magazine. N.C. R. Evid. 902(6). Accordingly, there should be no reason for a journalist to have to appear in court for a party to put a newspaper article in evidence. Nonetheless, there is no explicit mechanism under the rule governing subpoenas for a journalist, acting unilaterally, to submit an affidavit in lieu of testimony. *See* N.C. R. Civ. P. 45(c) (only permitting custodians of "public records" and hospital medical records to submit an affidavit in lieu of personal appearance).

### B. Broadcast materials

Motion pictures and videotapes, including broadcast materials, are not self-authenticating under Rule 902(6) of the North Carolina Rules of Evidence, but they are admissible into evidence under the same rules applicable to still photographs. *State v. Strickland*, 285 N.C. 253, 173 S.E.2d. 129 N.C. (1970); *State v. Lewis*, 58 N.C. App. 347, 351, 293 S.E.2d. 638, 640 N.C. App. (1982). A witness other than the photographer can testify that a photograph is authentic. *State v. Gardner*, 228 N.C. 567, 573, 46 S.E.2d. 824, 828 N.C. (1948); *White v. Hines*, 182 N.C. 275, 109 S.E. 31, 34 N.C. App. (1921). For example, in the *Lewis* case, a sheriff testified as to the authenticity of television videotape of a crime scene. 58 N.C. App. at 351.

### C. Testimony vs. affidavits

As discussed above, it is not necessary for journalists to authenticate articles or broadcast materials in North Carolina. However, there is no explicit mechanism under Rule 45 of the North Carolina Rules of Civil Procedure for a journalist to submit an affidavit in lieu of testimony. *See* Rule 45(c) (only permitting custodians of "public records" and hospital medical records to submit an affidavit in lieu of personal appearance). One federal district court allowed a newspaper reporter to comply with an order requiring release of the identity of his confidential source by submitting an affidavit to the court, which affidavit was subject to a protective order issued by the court. *See Miller v. Mecklenburg County*, 602 F. Supp. 675 (W.D.N.C. 1985) and 606 F. Supp. 488 (W.D.N.C. 1985), *aff'd*, 813 F.2d 402 (4th Cir. 1986) (not addressing the reporter's privilege issue), *cert. denied*, 479 U.S. 1100 (1987)

## D. Non-compliance remedies

### 1. Civil contempt

In general, contempt is "civil" if the contemnor may avoid the penalty by performing some act required by the court, such as complying with the original order. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106, 109 N.C. App. (1988) (citing *Hicks ex rel. Feliok v. Feliok*, 485 U.S. 624, 108 S. Ct. 1423, 99 L.Ed.2d 721).

If a subpoena is held to be valid, a reporter may be sanctioned for contempt of court. N.C. R. Civ. P. 45(f). To find someone in contempt, the court must make appropriate findings of fact to support the order. *Smith v. Smith*, 247 N.C. 223, 100 S.E.2d 370 N.C. (1957). However, a witness should not ignore a valid subpoena and risk a contempt sanction. Although there appear to be no reported decisions directly on point, the practice is that once a motion to quash has been filed in response to a subpoena a witness may refuse to comply with the subpoena until the motion has been ruled upon.

#### a. Fines

In civil actions, a witness who disregards a subpoena must pay forty dollars (\$40.00) to the party who issued the subpoena. N.C. Gen. Stat. § 8-63. In addition, the witness is liable "for the full damages which may be sustained for the want of such witness's testimony." *Id.*

### **b. Jail**

While journalists may be jailed for civil contempt until they comply with a subpoena since they "hold the keys to the jailhouse," there are no North Carolina state cases in which a journalist has been jailed for civil contempt. However, in a federal court case, a reporter for the Wilmington, North Carolina *Morning Star* newspaper was found in civil contempt by a federal district court for refusing to divulge the identities of certain confidential new sources and remanded to the custody of the United States Marshal "until such time as he purges himself of contempt by complying with the terms of the Orders of this Court." *See Ashcroft v. Conoco*, 218 F.3d 282, 286, 28 Media L. Rep. 2103 (4th Cir. 2000). This order, however, was stayed by the Fourth Circuit and, on the merits, the Fourth Circuit reversed the lower court's contempt order concluding that the basis of the court's order, the purported enforcement of a confidentiality order entered by the court, was invalid because of the court's failure to comply with the legal prerequisites for the entry of confidentiality orders. *Id.*

## **2. Criminal contempt**

In general, contempt is "criminal" if the penalty is punitive in nature, such as a jail sentence limited to a definite period of time without possibility of avoidance by the contemnor's performance of an act required by the court or a fine payable to the court rather than to the complainant. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106, 109 (1988) (citing *Hicks ex rel. Feliok v. Feliok*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721).

In *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592, 26 Media L. Rep. 1953 N.C. App. (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605, 27 Media L. Rep. 2340 N.C. (1999), a journalist was sentenced to thirty days in jail for refusing to testify about non-confidential information obtained from non-confidential sources. The trial judge reduced her sentence to two hours and released her. There are no other reported cases in North Carolina of a journalist jailed as a result of a finding of criminal contempt.

## **3. Other remedies**

No reported cases.

# **VIII. Appealing**

## **A. Timing**

### **1. Interlocutory appeals**

Denial of a motion to quash or grant of a motion to compel discovery are interlocutory orders because they do not resolve or part of the claims in the underlying proceeding. Typically interlocutory orders are not immediately appealable, *see Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 N.C. (1979) and *Benfield v. Benfield*, 89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988), unless they affect a substantial right. *See* N.C. Gen. Stat. § 1-277(a); N.C. Gen. Stat. § 7A-27(d)(1). It is well-established that an interlocutory order is appealable under the "substantial right" exception where (i) the right itself is substantial, and (ii) the order deprives the appellant of a substantial right which will be lost if the order is not reviewed before final judgment. *See, e.g., J & B Slurry Seal Co. v. Mid South Aviation, Inc.*, 88 N.C. App. 1, 5-6, 362 S.E.2d, 812, 815 N.C. App. (1987).

There is no reported appellate decision holding that an order requiring a journalist to produce newsgathering information affects a substantial right, but there should be little doubt that it does. First, if journalists are forced to comply with an order requiring them to produce their privileged newsgathering information, their constitutional and statutory privilege protecting them from releasing such information will be lost if the disclosure order is not reviewed before final judgment in the underlying proceeding. Second, the North Carolina Supreme Court has held that when a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a "substantial right" for appellate purposes. *Sharpe v. Worland*, 351 N.C. 159 N.C. (1999),

522 S.E.2d 577, *on remand* 137 N.C. App. 82, 527 S.E.2d 75 (2000) (finding right to appeal where hospital asserted statutory privilege as basis for not producing documents). Journalists, of course, have a statutory privilege against being forced to produce information obtained in the court of newsgathering. N.C. Gen. Stat. § 8-53.11.

When a journalist is held in contempt for failing to comply with a discovery order, the order is immediately appealable for the purpose of testing the validity both of the original discovery order and the contempt order. *See, e.g., Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 N.C. (1976) (litigant held in contempt); *Wilson v. Wilson*, 124 N.C. App. 371, 374-75, 477 S.E.2d 254, 256 N.C. App. (1996) (litigant held in contempt); *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 N.C. App. (1988) (discovery order not immediately appealable due to lack of enforcement sanctions); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554-55, 353 S.E.2d 425, 426 (discovery order immediately appealable when enforced by sanctions under Rule 37(b)).

An appeal must be filed within 30 days after entry of the order being appealed. *See* N.C. App. R. 3(c). The announcement of an order in open court begins the time when the appeal can be filed, but the 30 day time limitation only begins after the written order has been entered. *See Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 738, (N.C. App.) *review denied*, 347 N.C. 263, 493 S.E.2d 450 N.C. (1997).

In the event that an order does not affect a "substantial right" and, therefore, is not immediately appealable, a party can seek review in the appellate courts by filing a petition for writ of certiorari. *See* N.C. App. R. 21; N.C. Gen. Stat. § 7A-32. There is no specific time in which such a petition must be filed, but it must be filed "without unreasonable delay." N.C. App. R. 21(c). In general, certiorari is appropriate "where a decision of the principal question presented would expedite the administration of justice, or where the case involves a legal issue of public importance." *Bardolph v. Arnold*, 112 N.C. App. 190, 435 S.E.2d 109 (1993), *quoting Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E.2d 426 (1986). *See also Industrotech Constructors, Inc. v. Duke Univ.*, 67 N.C. App. 741, 314 S.E.2d 272 (1984) (allowing certiorari with respect to discovery order requiring production of confidential arbitration transcripts).

## **2. Expedited appeals**

There are no explicit rules or statutes setting forth procedures for requesting expedited appeals. Likewise, there is no statute or reported case establishing a right to expedited appeal in a reporter's privilege case. Nonetheless, the appellate courts do entertain motions for expedited briefing and oral argument schedules, and, where a showing of need is made, the courts do grant such motions. In particular, where constitutional rights are at stake, the appellate courts have shown sensitivity to the need for expedited proceedings.

### **B. Procedure**

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

Any party who is entitled by law to appeal a judgment or order of a superior or district court in North Carolina may appeal that order by filing notice with the clerk of superior court and serving notice on the other parties. N.C. App. R. 3(a) & (c). Appeal from an order of superior or district court lies with the Court of Appeals. An appellant may seek to bypass the Court of Appeals and go straight to the Supreme Court by filing a Petition for Discretionary Review with the Supreme Court. *See* N.C. App. R. 15; N.C. Gen. Stat. § 7A-31. Such a petition must be filed within 15 dockets of the appeal being docketed in the Court of Appeals. N.C. App. R. 15(b).

#### **2. Stays pending appeal**

A request for a stay of a trial court order pending appeal should be made first to the trial court. N.C. App. R. 8(a). If denied, application for a stay pending appeal may be made to the appellate court by filing a petition for a writ of supersedeas. N.C. App. R. 23.

Application to the appellate court to stay a trial court order is properly considered only when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the order. *Craver v. Craver*, 298 N.C. 231, 258 S.E.2d 357 (1979); N.C. App. R. 23(a)(1). In other words, the writ of supersedeas may issue only in the exercise of, and as ancillary to, the underlying jurisdiction of the appellate court, and its purpose is to preserve the status quo pending the exercise of appellate jurisdiction. *New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961).

An appeal operates as a stay of all proceedings in the lower court relating to the issues included in the appeal. *See, e.g., Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981); *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962). However, an appeal by itself does not stay enforcement of the order under review.

### **3. Nature of appeal**

As discussed *supra* at Section VII(A)(2), a right of appeal lies from an interlocutory order that affects a substantial right. Where an interlocutory order does not affect a substantial right, a party may seek review by filing a petition for writ of certiorari with the appellate court.

### **4. Standard of review**

The North Carolina shield law does not address the standard of review on appeal, and no reported appellate decision has addressed the appropriate standard review in a reporter's privilege case.

However, the shield law does contain specific requirements that must be met by the trial court in compelling production or testimony. Specifically, (i) the party requesting disclosure must establish by the greater weight of evidence that the statutory factors overcoming the reporter's privilege are met; (ii) any order compelling testimony or production can be issued only after notice to the journalist and a hearing; and (iii) any order compelling testimony must include clear and specific findings as to the showing made by the person seeking the testimony or production. N.C. Gen. Stat. § 8-53.11(c). Presumably an appellate court would conduct a *de novo* review as to whether these statutory requirements had been met.

In general, motions to quash are "addressed to the sound discretion of the court in which the action is pending." *Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E.2d 37, 42 (1966). Therefore, an appeal from the denial of a motion to quash will be reviewed under an abuse of discretion standard.

The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Sharpe v. Nobles*, 127 N.C. App. 705, 493 S.E.2d 288, (1997); *Koufman v. Koufman*, 97 N.C. App. 227, 230, 388 S.E.2d 207, 209 (1990), *rev'd on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991).

The North Carolina appellate courts have not addressed whether or not the constitutional basis of the reporter's privilege affects the standard of review on appeal.

### **5. Addressing mootness questions**

There are no North Carolina cases which address the issue of mootness in the context of a subpoenaed reporter.

### **6. Relief**

An appellate court can either reverse, vacate, or remand for further proceedings a finding of contempt or denial of a motion to quash. The precise relief that a reporter should seek depends on the facts of each case, but, in general, a reporter will seek to have the appellate court reverse and vacate a finding of contempt or denial of a motion to quash to avoid having to relitigate the same issue before the same trial judge.

## **IX. Other issues**

### **A. Newsroom searches**

There are no reported cases in which the federal Privacy Protection Act, 42 U.S.C. § 2000-AA, which drastically limits searches of newsrooms, has been construed in North Carolina. There are no similar provisions under state law.

### **B. Separation orders**

There are no reported cases or state statutes involving journalists who are both on the witness list and covering the trial.

### **C. Third-party subpoenas**

There are no reported cases applying state law in which subpoenas have been issued to third parties such as telephone companies or Internet service providers in an attempt to locate a journalist's source or other protected newsgathering information.

However, in a highly publicized case brought in federal court in North Carolina, a federal court issued a protective order denying access to such information. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 24 Med. L. Rep. 2431 (M.D.N.C. 1996). *Food Lion* arose out of the broadcast of a *Prime Time Live* program in which journalists used hidden cameras and "undercover" employees to suggest that Food Lion's corporate goals of promoting efficiency and reducing waste result in the sale of unsanitary food to consumers. In discovery, Food Lion issued a large number of third party subpoenas to hotels, letter carrier services, and telecommunications companies seeking documentation of communications to and from ABC journalists during an eighteen-month period. The district court issued a protective order prohibiting these third party subpoenas on the grounds that the subpoenas (i) were overbroad and (ii) intruded upon ABC's First Amendment interest in protecting confidential sources. With regard to the constitutional basis of its decision, the court relied on a Fourth Circuit case arising out of North Carolina that recognized the reporter's privilege under the federal constitution, *Miller v. Mecklenburg County*, 602 F. Supp. 675, 11 Med. L. Rep. 1566 (W.D.N.C. 1985), *aff'd*, 813 F.2d 402 (4th Cir. 1986), *cert. denied*, 479 U.S. 1100 (1987), but neither the *Food Lion* nor the *Miller* court specified whether they were applying North Carolina law.

Under North Carolina's shield law, the definition of "journalist" includes "employees, independent contractors and agents" of the journalist. See N.C. Gen. Stat. § 8-53.11(a)(1). Therefore, third party subpoenas that are intended to circumvent the reporter's privilege are prohibited to the extent they are directed at third parties who may be characterized as "agents" of the journalist. In addition, journalists may still raise objections to such third party subpoenas based on the protections of the federal and state constitutions.

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

In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991), the United States Supreme Court held that the First Amendment did not prohibit confidential sources from recovering damages for a newspaper publisher's breach of the promise of confidentiality in exchange for information. The underlying claim in *Cohen*, however, was based on a theory of promissory estoppel under Minnesota law.

There are no reported North Carolina decisions involving claims against the media for breach of contract or promissory estoppel for the disclosure of the identity of a confidential source. In general, North Carolina law regarding breach of contract is consistent with standard "hornbook" principles. In order for a valid contract to exist, there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite. See, e.g., *Horton v. Humble Oil & Refining Co.*, 255 N.C. 675, 122 S.E.2d 716 (1961). In addition, there must be an offer, acceptance, and consideration. See, e.g., *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972). North Carolina law also recognizes promissory estoppel as a valid defense in cases where there has been an intended abandonment of an existing right by the promisee. See, e.g., *Clement v. Clement*, 230 N.C. 636, 55 S.E.2d 459 (1949) (applying promissory estoppel where plaintiff had previously agreed not to charge interest); *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991) (applying estoppel where seller sought to void a real estate contract). The elements of promissory estoppel are (1) proof of express or implied promise and (2) detrimental reliance on that promise. See *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 293 S.E.2d 749 (1982). However, the North Carolina Supreme Court has yet to approve the use of the doctrine of promissory estoppel as a cause of action for affirmative relief. See *Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co.*, 86 N.C. App. 540, 358 S.E.2d 539 (1987), *aff'd*, 322 N.C. 107, 366 S.E.2d 441 (1988) (per curiam). In addition, North Carolina law has not recognized the doctrine as a substitute for consideration. See *id.*

If North Carolina courts were willing to recognize a *Cohen* claim under state law, a journalist could still argue for greater protection from such a claim under the state constitution than that recognized by the United States Supreme Court in *Cohen* with respect to the federal constitution. The merits of such a defense have not been addressed by North Carolina courts.

There are no reported cases involving a source's right to intervene anonymously in a proceeding to prevent disclosure of his or her identity.