

# REPORTER'S PRIVILEGE: NEW HAMPSHIRE

**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

# NEW HAMPSHIRE

*Prepared by:*

James P. Bassett  
 (jpb@orr-reno.com)  
 Jeffrey C. Spear  
 Orr & Reno  
 One Eagle Square  
 P.O. Box 3550  
 Concord, NH 03302-3550  
 603-224-2381

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## I. Introduction: History & Background

New Hampshire does not have a shield law statute, although the New Hampshire Supreme Court has recognized a qualified constitutional privilege to withhold the identity of confidential news sources. There have not been any recent efforts to enact a shield law statute. There has been very little litigation involving the reporter's privilege, and we are unaware of any reporters having been jailed or fined in New Hampshire. As the First Circuit Court of Appeals recently observed in *Gray v. St. Martin's Press*, 221 F.3d 243, 253, 28 Media L. Rptr. 2313 (2000), New Hampshire law on the qualified confidential source privilege for reporters "is not a model of clarity." 221 F.3d at 253.

## II. Authority for and source of the right

The press shield in New Hampshire is derived solely from case law — no statute addresses the topic.

### A. Shield law statute

New Hampshire does not have a shield law statute. The most recent effort to enact such a statute was in 1986 when the legislature considered a bill which would have, *inter alia*, created a statutory absolute privilege for unpublished information. After hearings and comment, the Judiciary Committee concluded that the existing case law, *see State v. Siel*, 122 N.H. 254, 444 A. 2d 499, 8 Media L. Rptr. 1265 (1982), provided adequate and sensible guidelines for criminal cases. Accordingly, the Committee recommended that the proposed legislation not be adopted, and the legislature accepted the recommendation of the Judiciary Committee.

### B. State constitutional provision

Although the New Hampshire constitution has no express shield provision, the New Hampshire Supreme Court has recognized a qualified privilege to withhold the identity of confidential news sources.

In *Opinion of the Justices*, 117 N.H. 386, 373 A.2d 644, 2 Media L. Rptr. 2083 (1977), the Court was asked whether the Senate, in a statutory proceeding to remove the sitting Director of Probation, could compel a reporter to disclose the sources of information that he used in preparing a series of articles criticizing the Department of Probation. The Court began by recognizing that "[w]hile some twenty-five states have some form of 'shield law' to prevent reporters from being compelled to disclose confidential information, New Hampshire is not one of them." *Id.* at 388 (internal citations omitted). The Court did find, however, that the New Hampshire Constitution gave rise to such a qualified privilege: "[p]art I, article 22 [of the New Hampshire Constitution] provides that 'liberty of the press' is 'essential to the security of freedom in a state' and ought, therefore, 'to be inviolably preserved.' Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process." *Id.* at 389. The Court concluded:

We hold only that in this civil proceeding involving the press as a nonparty, the balance is struck in favor of the press. *See* N.H. Const. pt. 1, art. 22. We need not decide the scope of the privilege, whether it is absolute, who is a reporter, what qualifies as 'press,' what the situation would be if criminal proceedings were at issue, or whether libel actions would require disclosure.

*Id.*

The Court subsequently has held that a qualified privilege does apply in criminal cases, *State v. Siel*, 122 N.H. 254, 444 A. 2d 499, 8 Media L. Rptr. 1265 (1982), but not in libel cases where the "sources are essential to a libel plaintiff's case." *Downing v. Monitor Publishing Co., Inc.*, 120 N.H. 383, 386, 415 A.2d 683, 6 Media L. Rptr. 1193 (1980). The remaining questions deferred by the Court in *Opinion of the Justices* have remained unanswered.

### C. Federal constitutional provision

No decision of the New Hampshire Supreme Court in this area has been based on the First Amendment to the U.S. Constitution. However, the Court has found the rationale of federal cases to provide useful guidance. *See, e.g., State v. Siel*, 122 N.H. at 259 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972) with approval).

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

No other sources of authority exist in New Hampshire.

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

#### **A. Generally**

Given the lack of a shield statute, and the paucity of cases decided by the New Hampshire Supreme Court, it is difficult to delineate the scope of protection that is afforded by the New Hampshire Constitution. However, the New Hampshire Constitution contains explicit and expansive statements of the rights of the press, which the Supreme Court has often held to be more protective than the United States Constitution of the rights of the press to gather and disseminate news. *See, e.g., Opinion of the Justices*, 117 N.H. 386, 389, 373 A.2d 644, 2 Media L.Rptr. 2083 (1977).

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

Although in *Opinion of the Justices*, the New Hampshire Supreme Court expressly declined to decide whether the privilege was absolute or qualified, 117 N.H. at 389, subsequent cases have established that the privilege is a qualified one. *Siel*, 122 N.H. at 259 (the New Hampshire Constitution "provides a qualified privilege for reporters").

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

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

The qualified privilege applies generally in civil cases in New Hampshire. *Opinion of the Justices*, 117 N.H. 386, 373 A.2d 644, 2 Media L.Rptr. 2083 (1977).

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

The qualified privilege does apply in criminal cases, however, "because the individual citizen's civil rights must be also protected, 'a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case.'" *State v. Siel*, 122 N.H. 254, 259 (1982). In *Siel*, the Court held that

a defendant may overcome a press privilege to withhold a confidential source of news only when he shows: (1) that he has attempted unsuccessfully to obtain the information by all reasonable alternatives; (2) that the information would not be irrelevant to his defense; and (3) that, by a balance of the probabilities, there is a reasonable possibility that the information sought as evidence would affect the verdict in his case.

*Id.* at 259. The Court further stated that:

The third prong requires, first, that the information sought by the defendant must be material, in that it must go to the heart of the case. It must be helpful to the defendant's efforts to disprove an element of the crime, prove a defense, or reduce the classification or gradation of the crime charged. A matter not material, as here defined, is information sought solely to show a prior inconsistent statement by a witness.

Next, the defendant must show that there is a *reasonable possibility* that the information will affect the verdict. Requiring the defendant to demonstrate a *probability* that the information will affect the verdict would place too severe a burden on him, while allowing the privilege to be overcome by a demonstration of a *mere possibility* that the information will help the defendant would permit mere speculation to displace a constitutionally-grounded privilege.

*Id.* (citations omitted).

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

There is no statutory or case law establishing different standards for grand jury subpoenas.

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

There is no statutory provision addressing this issue. The cases establish that the privilege specifically protects the identity of a source. *See, e.g., Opinion of the Justices*, 117 N.H. 386, 373 A.2d 644, 2 Media L.Rptr. 2083 (1977).

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

The opinions of the New Hampshire Supreme Court do not expressly differentiate between the privilege protection afforded to confidential, as opposed to non-confidential, sources. In *State v. Siel*, 122 N.H. 254, 444 A. 2d 499, 8 Media L. Rptr. 1265 (1982), the Supreme Court's holding specifically addressed only confidential sources. At least one trial judge has ruled that the qualified privilege extends equally to confidential and non-confidential sources, while noting that "the distinction between confidential and non-confidential sources is one of several factors to be weighed, rather than [a] dispositive factor . . ." *Matson v. Downey*, No. 91-C-00105-WS (MCSC Aug. 24, 1994).

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

There is no statutory or case law that addresses or distinguishes between material that has been published and material, such as a reporter's notes, that has not been published. It should be noted, however, that *Matson v. Downey*, No. 91-C-00105-WS (MCSC Aug. 24, 1994), involved a subpoena seeking the production of a reporter's notes.

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

There is no statutory or case law addressing this issue.

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

As the First Circuit Court of Appeals observed in *Gray v. St. Martin's Press*, 221 F.3d 243, 253, 28 Media L. Rptr. 2313 (2000) in regard to a qualified privilege in cases where the media is a defendant, "New Hampshire law on the privilege in question . . . is not a model of clarity." In *Downing v. Monitor Publishing Co., Inc.*, 120 N.H. 383, 415 A.2d 683, 6 Media L. Rptr. 1193 (1980), the New Hampshire Supreme Court did not expressly decide whether the privilege exists in libel cases where the media is a party. However, in *Downing*, the Court ruled that where the *New York Times* rule applies and the press refuses to disclose a confidential source after being ordered to do so, "there shall arise a presumption that the defendant had no source" which may be removed by disclosure "a reasonable time before trial." *Downing v. Monitor Publishing Co., Inc.*, 120 N.H. 383, 387-88. Whether such a presumption could withstand a challenge on due process grounds remains to be determined.

#### **I. Defamation actions**

There is no statutory or case law addressing the issue of whether the privilege is different in libel cases where the media is *not* a party.

### **IV. Who is covered**

#### **A. Statutory and case law definitions**

There are no definitions in statutes or case law.

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

###### **a. Reporter**

There is no statute or case defining "reporter."

###### **b. Editor**

There is no statute or case defining "editor."

###### **c. News**

There is no statute or case defining "news," or requiring that the information be gathered in the pursuit of news. However, the privilege is consistently referred to as the "reporter's" privilege.

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

There is no statute or case defining "photojournalist."

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

There is no statute or case defining the media or employees of specific news media.

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

There is no statutory or case law addressing this issue.

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

There is no statute on point. The case law in New Hampshire has arisen in cases where the privilege was asserted by the reporter, as well as where the privilege was asserted by the media employer. In *Gray v. St. Martin's Press*, the First Circuit Court of Appeals assumed that the privilege could be asserted by the author of a book, as well as by the publisher. *Gray v. St. Martin's Press*, 221 F.3d 243, 28 Media L. Rptr. 2313 (2000).

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

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

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

No cases or statute establishes specific requirements for service of subpoenas on a member of the news media.

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

There is no case law or statute that requires that the subpoenaing party deposit any security.

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

There is no statutory or case law that requires the subpoenaing party to file an affidavit.

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

Judicial approval is not required.

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

There are no special rules regarding the use or service of police or other administrative subpoenas.

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

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

The rules governing proceedings in the trial courts of New Hampshire require that an effort be made to contact the other party or his or her counsel prior to the filing of any motion, subject to limited exceptions. It is recommended, and often required by the clerks of court, that any motion filed, including a motion to quash, be discussed with the opposing party prior to filing.

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

No notice of intent to quash needs to be filed.

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

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

While there is no requirement that the motion to quash be filed in the same court as that which is hearing the case at issue, it is not only the most logical forum, but also the forum which the presiding judge and the clerks of court would likely prefer.

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

The media party should not wait for the subpoenaing party to file a motion to compel because failure to appear as summoned is a violation which may be punished by contempt or an order of costs.

### **c. Timing**

There is no specific deadline; however, it is recommended that the motion to quash be filed as soon as possible.

### **d. Language**

There is no preferred text or mandatory language that should be included in such a motion.

### **e. Additional material**

There are so few New Hampshire cases in which this issue has arisen that there is no reliable indicator as to which attachments or additional materials would be particularly well-received by the courts. It should be noted, however, that over twenty-five years ago, in *Opinion of the Justices*, 117 N.H. 386, 373 A.2d 644, 2 Media L. Rptr. 2083 (1977), the Supreme Court referenced several surveys and studies before it held that a reporter's privilege did exist.

## **4. In camera review**

### **a. Necessity**

There is no requirement that a court conduct an *in camera* review. However, in *State v. Siel*, 122 N.H. 254, 444 A.2d 499, 8 Media L. Rptr. 1265 (1982), the New Hampshire Supreme Court held that, after the trial judge "is satisfied on the facts then before him that the privilege should fall, the trial judge may also hold an *in camera* hearing with the reporters and, if necessary, with the source before releasing the information to the defendant." *In camera* review of documents by the trial courts often occurs in connection with right-to-know requests, *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 478 (1996), and requests for documents sealed in legal proceedings. *Petition of Keene Sentinel*, 136 N.H. 121 (1992).

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

Consent to an *in camera* review is immaterial and irrelevant to the issue of whether a stay will issue. There is no automatic stay entered by the trial court pending appeal in the event of an adverse ruling.

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

There is no statutory or case law addressing this issue. However, it is recommended that, in the event that the trial judge requests an *in camera* review, the invitation not be refused. There is broad discretion vested in the trial judge, and the practical consequences of refusal would likely be significant and adverse.

## **5. Briefing schedule**

There is no regular briefing schedule procedure.

## **6. Amicus briefs**

The New Hampshire Supreme Court regularly accepts *amicus* briefs and has often done so in cases involving the media. In the few Supreme Court cases addressing the reporter's privilege, no *amicus* briefs have been filed. There is limited experience with *amicus* briefs filed in the trial courts; however, there is no reason to believe that leave to file *amicus* briefs would be refused.

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

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

Once a member of the news media demonstrates that he or she is covered under the privilege, the New Hampshire Supreme Court has ruled that, at least in a criminal case, a defendant may overcome a press privilege to withhold a confidential source of news only when it is shown: (1) that he has attempted unsuccessfully to obtain the infor-

mation by all reasonable alternatives; (2) that the information would not be irrelevant to his defense; and (3) that by a balance of the probabilities, there is a reasonable possibility that the information sought as evidence would affect the verdict in his case. See *State v. Siel*, 122 N.H. 254, 259-60. Recently, the First Circuit Court of Appeals endorsed the same test in a libel action with the media defendant. See *Gray v. St. Martin's Press*, 221 F.3d 243, 253. In *Matson v. Downey*, No. 91-C-00105-WS (MCSC Aug. 24, 1994), a superior court judge interpreted the existing case law, including *State v. Siel*, 122 N.H. 254, 444 A. 2d 499, 8 Media L. Rptr. 1265 (1982), and *Opinion of the Justices*, 117 N.H. 386, 373 A.2d 644, 2 Media L. Rptr. 2083 (1977), so as to establish a qualified reporter's privilege in a civil case where a party seeks to compel the reporter to disclose information obtained from non-confidential, as well as confidential, sources. The burden of proof is discussed at length in the opinion issued in *New Hampshire v. Siel*, 7 Med. L. Rptr. 1904 (1981), authored by Justice David Souter, then a trial judge in the New Hampshire Superior Court.

## **B. Elements**

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

There are no Supreme Court cases that further amplify upon the standard as set forth in *State v. Siel*, 122 N.H. 254, 444 A. 2d 499, 8 Media L. Rptr. 1265 (1982), which requires that in a criminal case "the information sought by the defendant must be material, in that it must go to the heart of the case." *Id.* at 260. The trial court opinion in *Siel*, authored by then Superior Court Justice David Souter, has a lengthy discussion of relevance and "materiality." *New Hampshire v. Siel*, 6 Media L. Rptr. 1904, 1911-14 (1981).

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

As stated in *State v. Siel*, 122 N.H. 254, 444 A. 2d 499, 8 Media L. Rptr. 1265 (1982), the privilege to withhold a confidential source may be overcome only upon a showing, *inter alia*, that a defendant "has attempted unsuccessfully to obtain the information by all reasonable alternatives." There is very little case law interpreting or applying this prong of the *Siel* test. See, e.g., *Matson v. Downey*, No. 91-C-00105-WS (MCSC Aug. 24, 1994). In *Gray v. St. Martin's Press*, 221 F.3d 243, 253, the First Circuit characterized the first prong of the *Siel* test as "the requirement of exhausting other means," and observed that "if Gray were found to have exhausted all reasonable means of identifying the source and [the author] still refused to reveal her source, Gray would have been entitled to a presumption that no source existed."

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

Other than as discussed above, there has been no discussion in the case law as to what constitutes "exhaustion" for purposes of satisfying the first prong of the *Siel* test.

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

There are very few cases that have addressed this issue. In *Matson v. Downey*, No. 91-C-00105-WS (MCSC Aug. 24, 1994), the superior court quashed the subpoena because "the defendant has not shown why his need for information could not be addressed by depositions of both the plaintiff and her attorney and her request for document production of any notes either participant wrote during the interview with [the reporter]." Slip Op. at 8.

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

There is no statutory or case law addressing this issue.

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

There is no statutory or case law that requires a judicial balancing of interests in determining whether to quash the subpoena.

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

There is no statutory or case law that exempts subpoenas issued to the media from General Guidelines for Discovery set forth in Superior Court Rule 35(b), and the case law governing discovery. Discovery may be limited by the court if the discovery requests have the purpose or effect of harassing, embarrassing, annoying or invading the privacy of, or to impose an undue burden or expense or an oppressive hardship on, a party.

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

There is no case law or statute addressing this issue.

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

There is no case law or statute that expressly addresses the significance of whether the material or information subpoenaed would be cumulative. However, if the information sought is cumulative, it is unlikely that the subpoenaing party could successfully satisfy the first prong of the *Siel* test, *i.e.*, that he or she has been unable to obtain the information through alternative means.

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

Superior Court Rule 35 states the general guidelines governing discovery. Rule 35(c) articulates the standards and procedures to be followed in seeking a protective order in discovery matters.

## **8. Other elements**

There are no cases, other than the cases discussed above, that enumerate additional elements that must be satisfied before the privilege can be overcome.

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

There is no statutory or case law addressing this general issue.

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

There is no statutory or case law addressing this issue.

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

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

There is no statutory or case law addressing this issue.

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

There is no statutory or case law addressing this issue.

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

There is no statutory or case law addressing this issue.

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

There is no statutory or case law addressing this issue.

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

There is no statutory or case law addressing this issue.

## **VII. What constitutes compliance?**

### **A. Newspaper articles**

There is no statutory or case law addressing this issue, however, it is unlikely that a reporter or editor would be required to testify in order to authenticate a newspaper article. Ordinarily, it would be expected that before the trial or hearing, the parties would stipulate as to the admissibility of certain exhibits, which would likely include the article or the newspaper.

### **B. Broadcast materials**

There is no statutory or case law addressing this issue.

### **C. Testimony vs. affidavits**

Although there is no statutory or case law addressing this issue, it would be highly unusual for a sworn affidavit to replace in-court testimony in the absence of a stipulation between the parties.

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

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

The New Hampshire Supreme Court has specifically stated that "the trial court is free to exercise its contempt power to enforce its [order to disclose]," *Downey v. Monitor*, 120 N.H. at 387, which would include the power to levy fines or to jail the reporter. There are no instances of a trial court finding a reporter in contempt, levying a fine, or ordering a reporter to jail.

##### **a. Fines**

There is no statutory or case law capping the amount of fines.

##### **b. Jail**

There is no statutory or case law limiting jail sentences.

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

There is no statutory or case law addressing this issue.

##### **3. Other remedies**

Where the *New York Times* rule applies in a case against the media and the reporter refuses to disclose a confidential source after being ordered to do so, "there shall arise a presumption that the defendant has no source," which may be removed by disclosure "a reasonable time before trial." *Downing v. Monitor Publishing Co., Inc.*, 120 N.H. 383, 415 A.2d 683, 6 Media L. Rptr. 1193 (1980).

### **VIII. Appealing**

#### **A. Timing**

##### **1. Interlocutory appeals**

There are no specific rules or procedures related to the timing of an appeal from a denial of a motion to quash. Interlocutory appeals from a trial court ruling are governed by Supreme Court Rule 8, which requires that the trial court transfer the question to the Supreme Court. The Supreme Court may, in its discretion, decline to accept the interlocutory appeal. There is no case law, statutory provision or court rule that requires that an appeal be filed only after the reporter is held in contempt for failing to comply with a subpoena.

##### **2. Expedited appeals**

While there are no specific court rules, statutory provisions or cases setting forth the procedure for an expedited appeal, the Supreme Court will entertain a motion to expedite. While there have not been expedited appeals involving the denial of a reporter's motion to quash, on several occasions the Supreme Court has entertained expedited appeals of court access cases.

#### **B. Procedure**

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

In New Hampshire, all appeals from the trial court are made to the New Hampshire Supreme Court.

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

Absent a court order, the order of the trial court is not stayed pending appeal. There is no case law or statute setting forth a different presumption or process for cases involving the reporter's privilege.

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

The primary vehicle for obtaining a review of a final order by the New Hampshire Supreme Court is Supreme Court Rule 7, Appeal from Lower Court Decision on the Merits. It is also possible to obtain review under Supreme Court Rule 11, Petition for Original Jurisdiction. Appeals to the New Hampshire Supreme Court from a trial court's decision on the merits are mandatory in all but a few (and irrelevant) categories. Interlocutory appeals and petitions for original jurisdiction remain discretionary and, therefore, the Supreme Court may refuse to accept them.

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

Although there is no statutory provision or case law specifically setting forth the standard of review, in *State v. Siel*, 122 N.H. 254, 444 A. 2d 499, 8 Media L. Rptr. 1265 (1982), a criminal case involving a defendant seeking to overcome a press privilege to withhold a confidential source, the New Hampshire Supreme Court utilized a deferential standard in reviewing the findings of the trial court. In upholding the order of the trial court judge (Souter, J.), the Supreme Court ruled that, in regard to the third prong of the *Siel* test, "[w]e cannot say that no reasonable person could find as did the trial judge." *State v. Siel*, 122 N.H. at 260. Decisions vested within the discretion of the trial court are reviewed by the Supreme Court using the "unsustainable exercise of discretion" standard where the appellant has the burden of demonstrating that the trial court's ruling was "clearly untenable or unreasonable to the prejudice of [the] case." *State v. Lambert*, 147 N.H. 295, 296 (2001). In contrast, questions of law are reviewed by the Supreme Court *de novo*. *State v. Paulson*, 143 N.H. 447, 449 (1999).

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

There are no cases addressing the mootness issue arising when the trial or grand jury session for which a reporter was subpoenaed has concluded. It should be noted, however, that the New Hampshire Supreme Court recently accepted, over the State's mootness objection, a petition by the electronic media for courtroom access in a criminal case that had already concluded. *Petition of WMUR Channel 9*, 148 N.H. 644 (2002).

#### **6. Relief**

There is no statutory or case law addressing the specific relief available to a media party seeking relief from a court order to disclose. Nonetheless, there can be little doubt that it is within the power of the Supreme Court to order a contempt citation dissolved, as it is likewise within the Court's power to order the trial judge to reconsider the issue below in light of the appellate court decision.

### **IX. Other issues**

#### **A. Newsroom searches**

The federal Privacy Protection Act has not been used in New Hampshire, and there is no similar state statute.

#### **B. Separation orders**

There is no statutory or case law in New Hampshire regarding separation orders issued against reporters who are both trying to cover the trial and are on a witness list.

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

There is no statutory or case law addressing this issue.

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

There is no statutory or case law addressing this issue.