# REPORTER'S PRIVILEGE: NEW JERSEY

**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

## Credits & Copyright

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

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

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

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

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 The lawyer may have to consider your news organization's policy for complying with subpoenas and for revealing unpublished information or source names.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 If the materials sought are unpublished, such as notes or outtakes, or concern confidential sources, it is unlikely that your employer has a policy to turn over these materials —at least without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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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I. Introduction: History & Background....2
II. Authority for and source of the right....2
A. Shield law statute....2
B. State constitutional provision....5
C. Federal constitutional provision....5
D. Other sources....5
III. Scope of protection....5
A. Generally....5
B. Absolute or qualified privilege....5
C. Type of case....5
D. Information and/or identity of source....6
E. Confidential and/or non-confidential information....6
F. Published and/or non-published material....6
G. Reporter's personal observations....6
H. Media as a party....6
I. Defamation actions....6
IV. Who is covered....6
A. Statutory and case law definitions....6
B. Whose privilege is it?....7
V. Procedures for issuing and contesting subpoenas....7
A. What subpoena server must do....7
B. How to Quash....8
VI. Substantive law on contesting subpoenas....9
A. Burden, standard of proof....9
B. Elements....9
C. Waiver or limits to testimony....10
VII. What constitutes compliance?....11
A. Newspaper articles....11
B. Broadcast materials....11
C. Testimony vs. affidavits....11
D. Non-compliance remedies....11
VIII. Appealing....12
A. Timing....12
B. Procedure....12
IX. Other issues....13
A. Newsroom searches....13
B. Separation orders....13
C. Third-party subpoenas....13
D. The source's rights and interests....13

## I. Introduction: History & Background

New Jersey originally adopted a reporter's privilege in 1933. Today New Jersey's newsperson's privilege is one of the strongest in the nation. Our Supreme Court has found "the legislative intent in adopting this statute ...as seeking to protect the confidential sources of the press as well as the information so obtained by reporters and other media representatives to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey" *In Re Myron Farber*, 78 N.J. 259 (1978). Indeed, the definition of "reporter" has been given a broad definition and court reading while the exceptions to the privilege are construed narrowly.

The privilege is statutorily based and protects both the source and the information. The privilege may only be pierced by a criminal defendant where the source or information sought is "relevant, material and necessary to the defense" and can not be obtained from any less intrusive source. Once the criminal defendant satisfies this criteria the court then is required to examine the materials in camera to determine the probable admissibility at trial. If the court determines the materials are admissible then an order to produce only those materials which satisfy both aspects of the test will be issued.

Civil defendants and prosecutors can not overcome the shield unless the reporter is an eyewitness to, or participant in any act involving physical violence or property damage. Even this "eyewitness" exception has been construed narrowly so that a reporter can not be compelled to testify if there are other witnesses.

Because of the strong privilege, reporters in New Jersey are rarely subpoenaed and if they are the subpoena is usually withdrawn after a letter from counsel invoking the privilege.

In addition to *Farber*, supra., three other New Jersey Supreme Court decisions, *State v. Boiardo*, 82 N.J. 446 (1980)(Boiardo I); *State v. Boiardo*, 83 N.J. 350 (1980)(Boiardo II); and *In re Schuman*, 114 N.J. 14 (1989) set forth the history and scope of the privilege.

## II. Authority for and source of the right

New Jersey's privilege is purely statutory. Although the state constitution also includes a strong free press provision the courts have never found a reporter's privilege originating in the state constitution.

### A. Shield law statute

(a) N.J.S.A. 2A:84A-21 provides:

> Subject to Rule 37 [Rule 530], a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasilegal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere:
>
> > a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
>
> b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.
>
> The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

(b) N.J.S.A. 2A:84A-21a provides:

Unless a different meaning clearly appears from the context of this act, as used in this act:

a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.

c. "Newspaper" means a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter.

d. "Magazine" means a publication containing news which is published and distributed periodically, has a paid circulation and has been entered at a United States post office as second class matter.

e. "News agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

f. "Press association" means an association of newspapers or magazines formed to gather and distribute news to its members.

g. "Wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

h. "In the course of pursuing his professional activities" means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage.

(c) N.J.S.A. 2A:84A-21.1 provides:

Where a newsperson is required to disclose information pursuant to a subpoena issued by or on behalf of a defendant in a criminal proceeding, not including proceedings before administrative or investigative bodies, grand juries, or legislative committees or commissions, the provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege under Rule 27 (C. 2A:84A-21).

(d) N.J.S.A. 2A:84A-21.2 provides:

Proceedings pursuant to this act shall take place before the trial, except that the court may allow a motion to institute proceedings pursuant to this act to be made during trial if the court determines that the evidence sought is newly discovered and could not have been discovered earlier through the exercise of due diligence.

(e) N.J.S.A. 2A:84A-21.3 provides:

a. To sustain a claim of the newsperson's privilege under Rule 27 [Rule 508(a) ] the claimant shall make a prima facie showing that he is engaged in, connected with or employed by a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated, and that the subpoenaed materials were obtained in the course of pursuing his professional activities.

b. To overcome a finding by the court that the claimant has made a prima facie showing under a. above, the party seeking enforcement of the subpoena shall show by clear and convincing evidence that the privilege has been waived under Rule 37 [Rule 530] (C. 2A:84A-29) or by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the

information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. Publication shall constitute a waiver only as to the specific material published.

c. The determinations to be made by the court pursuant to this section shall be made only after a hearing in which the party claiming the privilege and the party seeking enforcement of the subpoena shall have a full opportunity to present evidence and argument with respect to each of the materials or items sought to be subpoenaed.

(f) N.J.S.A. 2A:84A-21.4 provides:

Upon a finding by the court that there has been a waiver as to any of the materials sought or that any of the materials sought meet the criteria set forth in subsection 3.b., the court shall order the production of such materials, and such materials only, for in camera inspection and determination as to its probable admissibility in the trial. The party claiming the privilege and the party seeking enforcement of the subpoena shall be entitled to a hearing in connection with the in camera inspection of such materials by the court, during which hearing each party shall have a full opportunity to be heard. If the court, after its in camera review of the materials, determines that such materials are admissible according to the standards set forth in subsection 3.b., the court shall direct production of such materials, and such materials only.

(g) N.J.S.A. 2A:84A-21.5 provides:

After any hearing conducted by the court pursuant to section 3 or 4 hereof, the court shall make specific findings of fact and conclusions of law with respect to its rulings, which findings shall be in writing or set forth on the record.

(h) N.J.S.A. 2A:84A-21.6 provides:

An interlocutory appeal taken from a decision to uphold or quash a subpoena shall act as a stay of all penalties which may have been imposed for failure to comply with the court's order. The record on appeal shall be kept under seal until such time as appeals are exhausted. In the event that all material or any part thereof is found to be privileged, the record as to that privileged material shall remain permanently sealed. Any subpoenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged, shall be returned to the party claiming the privilege.

(i) N.J.S.A. 2A:84A-21.7 provides:

Where proceedings are instituted hereunder by one of several co-defendants in a criminal trial, notice shall be provided to all of the co-defendants. Any co-defendant shall have the right to intervene if the co-defendant can demonstrate, pursuant to section 3, that the materials sought by the issuance of the subpoena bear upon his guilt or innocence. Where such intervention is sought by a co-defendant, that co-defendant shall be required, prior to being permitted to participate in any in camera proceeding, to make that showing required of a defendant in section 3.

(j) N.J.S.A. 2A:84A-21.8 provides:

If the court finds no reasonable basis for requesting the information has been shown, costs, including counsel fee, may be assessed against the party seeking enforcement of the subpoena. Where an application for costs or counsel fee is made, the judge shall set forth his reasons for awarding or denying same.

The 1933 statute protected only a source. In 1960 the original act was repealed and the new statute adopted that added an information privilege and retained the source privilege. The statute was again amended in 1977 to:

(1) add a provision that the information was privileged "whether or not disseminated". This was in direct response to an appellate court decision which held that a disclosure of the source and a partial disclosure of the information in a published newspaper article was a total waiver of the privilege, even as to unpublished materials *In re Bridge*, 120 N.J. Super. 460 (1972); and

(2) broaden the privilege to make it applicable to all media instead of merely print media.

In 1979 the statute was amended again to establish a procedure for a criminal defendant to pierce the privilege and to specifically prohibit the use of search warrants to obtain reporters' materials except in very limited circumstances.

A detailed discussion of the history of the privilege and the expansive shield provided by the privilege was set forth by the New Jersey Supreme Court in *In re Schuman*, 114 N.J. 14 (1989).

### B. State constitutional provision

Although the state constitution contains a strong freedom of the press section the courts have never found a newsperson's privilege originating in the state constitution.

### C. Federal constitutional provision

The New Jersey courts have not based any finding of privilege on the First Amendment.

### D. Other sources

There are no other sources for a newsperson's privilege in New Jersey.

## III. Scope of protection

### A. Generally

New Jersey has one of the strongest newsperson's privilege statutes in the nation. It offer a broad definition of "news" and "news media", even finding an annual rating of the financial condition of insurance companies to be "news" within the privilege. *In re Burnett*, 269 N.J. Super. 493 (1994). The exceptions to the privilege have been narrowly construed. Even where a reporter was present at the scene of physical violence the reporter's testimony will not be compelled if other witnesses are available. *State v. Santiago*, 250 N.J. Super. 30 (1991).

### B. Absolute or qualified privilege

The privilege is absolute in civil proceedings. Absent waiver a party to civil litigation may not obtain materials or testimony from a newsperson.

In criminal proceedings the privilege is not absolute, it may be overcome by a criminal defendant upon a showing of relevance, materiality, necessity, and unavailability from any other source.

### C. Type of case

#### 1. Civil

The privilege is absolute in civil proceeding. The privilege can not be pierced in defamation actions. *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982). The reporter may waive the privilege, but a partial waiver is not construed to be a total waiver and publication of the allegedly defamatory materials in a newspaper or news broadcast does not constitute a waiver.

#### 2. Criminal

In criminal proceedings the privilege is not absolute, it may be pierced by a criminal defendant upon a showing that "by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source." Even after the defendant makes such a showing the court is required to review the materials or potential testimony in camera to determine the admissibility. Only if the court also finds the materials and/or testimony will be admissible will it order the materials produced or the reporter to testify.

A prosecutor may not pierce the privilege, unless the reporter was an "eyewitness to, or participant in, any act involving physical violence or property damage" or the reporter concealed from the source the fact that he or she was a reporter. The New Jersey Supreme Court has held that a reporter who arrives at the scene of a fire while the fire is ongoing is not an eyewitness to property damage. *Matter of Woodhaven Lumber and Millwork*, 123 NJ 481 (1991).

#### 3. Grand jury

The privilege applies to Grand Jury subpoenas in the same manner as any other proceeding.

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

The New Jersey privilege by its specific terms protects both the source and the information held by a reporter. Because it protects both the source and the information any and all information that would identify the source, directly or indirectly, is privileged.

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

There is no requirement in the statute that the source request anonymity or that the reporter has promised confidentiality to invoke the privilege. The privilege belongs to the reporter and is his/hers to waive.

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

Publication in a newspaper or news broadcast is a waiver only as to the materials actually published, such publication can not be used to compel a reporter's testimony or to obtain materials not published. *In re Schuman*, 114 N.J. 14 (1989).

### G. Reporter's personal observations

Where the reporter was an "eyewitness to, or participant in, any act involving physical violence or property damage" the privilege may be overcome. However the exception is narrowly construed. The New Jersey Supreme Court has held that a reporter who arrives at the scene of a fire while the fire is ongoing is not an eyewitness to property damage. *Matter of Woodhaven Lumber and Millwork*, 123 N.J. 481 (1991). Even where a reporter was present at the scene of physical violence the reporter's testimony will not be compelled if other witnesses are available. *State v. Santiago*, 250 N.J. Super. 30 (1991).

### H. Media as a party

Whether or not the media is a party to the litigation has no bearing on the invocation of the privilege.

### I. Defamation actions

The privilege can not be pierced in defamation actions. The media may invoke the privilege against testimony or production of materials in a defamation action as in any other action. *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982). The reporter may waive the privilege, but a partial waiver is not construed to be a total waiver and publication of the allegedly defamatory materials does not constitute a waiver.

Under the New Jersey rules of evidence an adverse inference may not be drawn from the invocation of a privilege against testifying. Evidence Rule 532, NJSA 2A:84A-31.

## IV. Who is covered

### A. Statutory and case law definitions

Traditional newsgathering terms are defined by the statute, only non-traditional news gatherers have been defined by case law.

#### 1. Traditional news gatherers

##### a. Reporter

The privilege is afforded to any "person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated". This definition includes all employees of the newspaper or media outlet, it is not limited to the reporter alone. The privilege is limited to information the reporter obtains "in the course of pursuing his professional activities," but that definition itself is broad. "In the course of pursuing his professional activities" means "any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage". The privilege is available regardless of whether the reporter is a full-time employee of a media outlet or a part-time stringer at a small weekly.

#### b. Editor

Because the statute states that the privilege extends to any "person engaged on, engaged in, or connected with, or employed by news media..." it includes editors.

#### c. News

Under the privilege "news" is defined as "any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect."

#### d. Photo journalist

Although "photojournalist" is not defined under the privilege because the statute states that privilege extends to any "person engaged on, engaged in, or connected with, or employed by news media..." it has been interpreted to include photojournalists. Further the definition of "news" includes "pictorial information."

#### e. News organization / medium

The New Jersey statute was amended in 1977 to extend the privilege to all media. The current definition of "news media" includes "newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public." Although web sites are not specifically mentioned in the statute the inclusion of "electronic means of disseminating news" is broad enough to include web sites; there has not yet been a court decision on this issue.

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

The publisher of an annual report rating various insurers was held to be a news medium, *Petition of Burnett*, 269 N.J. Super. 493 (Law Div 1993); a pubic relations firm hired to manage adverse publicity surrounding a chemical explosion was held not to be a news medium, *In re Napp Technologies, Inc. Litigation*, 338 N.J. Super. 176 (Law 2000).

## B. Whose privilege is it?

The privilege belongs to the news person and is his or hers to invoke. The privilege may be waived by the newsperson regardless of the wishes of the informant.

# V. Procedures for issuing and contesting subpoenas

## A. What subpoena server must do

### 1. Service of subpoena, time

Pursuant to the New Jersey Rules of Court a subpoena for testimony must be served on the newsperson, within the state of New Jersey, at least 5 days prior to trial. A subpoena for testimony during discovery must be served at least 10 days prior to the date for testimony.

### 2. Deposit of security

A witness fee must be paid at the time of service of the subpoena.

#### 3. Filing of affidavit

The party issuing the subpoena is not required to file any affidavit.

#### 4. Judicial approval

There is no judicial approval required to serve a subpoena. Only a criminal defendant may compel the testimony of a newsperson and then only if the information held by the newsperson is "relevant, material and necessary to the defense," can not be procured from any "less intrusive source," and that "the value of the material sought as it bears on the guilt or innocence outweighs the privilege." This balancing must be done by the court.

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

A subpoena issued by a prosecutor must be served at least 5 days prior to trial. Administrative agencies may set their own rules.

### B. How to Quash

#### 1. Contact other party first

There is no requirement that the other party be contacted prior to a motion to quash. However, because the privilege in New Jersey is almost absolute, a letter or telephone call requesting withdrawal of the subpoena will usually be effective.

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

There is no requirement that notice of intent to quash be provided.

#### 3. File a motion to quash

##### a. Which court?

The motion should be filed in the court that is hearing the case.

##### b. Motion to compel

The rules of court require that the motion to quash come from the subpoenaed party. Although some attorneys will await the motion to compel, sanctions could still be imposed for failing to obey the subpoena.

##### c. Timing

The motion should be filed prior to the return date if possible. If that is not possible notice to the party issuing prior to the return date and filing as soon thereafter as possible is recommended.

##### d. Language

The motion must include a certification or affidavit from the reporter attesting to the fact that he or she is employed as a news person and that the information sought was obtaining while "in the course of pursuing his professional activities".

##### e. Additional material

Because the New Jersey privilege is so extensive only a brief outlining the relevant case decisions should accompany the motion; no treatise information is necessary.

#### 4. In camera review

##### a. Necessity

No *in camera* review occurs prior to deciding the motion. The newsperson is not required to make any disclosure, to the court or otherwise, to successfully assert the privilege. In fact the New Jersey Supreme Court has held that an *in camera* disclosure "represents precisely the same threat to the interests protected by the privilege as disclosure to counsel or to the world." *State v. Boirdo*, 82 N.J. 446 (1980).

#### b. Consequences of consent

Consent to an *in camera* review may be deemed a waiver of the privilege.

#### c. Consequences of refusing

None.

### 5. Briefing schedule

The brief in support of the motion to quash in a civil pre-trail proceeding must be submitted with the motion, at least 16 days prior to the return date of the motion. The opposition brief, if any, must be filed 8 days before the return date and any reply thereto must be filed 4 days before the return date.

For subpoenas issued for trial testimony the motion to quash should be filed directly with the Judge hearing the matter and the court will set a briefing schedule.

### 6. Amicus briefs

*Amicus* briefs are not generally submitted at the trial level although they are permitted. An *amicus* can ask to be heard at any level.

## VI. Substantive law on contesting subpoenas

### A. Burden, standard of proof

Once a reporter or editor has shown that he or she is a member of the news media only a criminal defendant can proceed to attempt to compel testimony. In criminal proceedings the privilege is not absolute; it may be pierced by a criminal defendant upon a showing that "by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source." Even after the defendant makes such a showing the court is required to review the materials or potential testimony *in camera* to determine the admissibility. Only if the court also finds the materials and/or testimony will be admissible will it order the materials produced or the reporter to testify.

### B. Elements

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

The information to be obtained by a criminal defendant from a news person must be "relevant, material and necessary" to the defense. In addition it must not be excludable under any other privilege or evidence rule.

#### 2. Material unavailable from other sources

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

The court has not set any standards for a search. The criminal defendant must show, by a preponderance of the evidence, that the information or testimony "could not be secured from any less intrusive source." If the substantially similar information can be obtained from another source the material is not unavailable.

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

Since the burden is on the criminal defendant he or she must prove all the elements necessary to overcome the privilege: necessary, material, relevant, and unobtainable from other less intrusive sources. The newsperson is, of course, entitled to produce evidence that other sources are available or to otherwise offer evidence to counter the defendant's proofs of relevance, materiality and necessity.

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

The fact that a source is an eyewitness does not automatically overcome the privilege. That fact is simply part of the proofs of the defendant.

#### 3. Balancing of interests

Only after the criminal defendant has proved by a preponderance of the evidence that information is relevant, necessary and material to his or her defense, and that the material is not available from any less intrusive source does the court enter into a balancing. The court must then determine "that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome."

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

The privilege specifically requires that after the criminal defendant has made the initial showing the court must then determine "that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome."

#### 5. Threat to human life

No decision of the court has addressed the issue of threat to human life, nor does the statute itself deal with this issue. The statute governing newsroom searches however, does permit a search where there is probable cause to believe "seizure is necessary to prevent the death of or serious bodily injury to a human being." NJSA 2A:84A-21.9. This provision might bear on the court's deliberations if the issue does arise.

#### 6. Material is not cumulative

Under the standards set forth in the statute cumulative material would be available from another source and therefore the defendant could not overcome the privilege.

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

If a newsperson is forced to move to quash a subpoena and the courts finds there was no reasonable basis for requesting the information, it may award costs, including counsel fees, against the party seeking to enforce the subpoena. As a practical matter fees and costs are almost never awarded.

#### 8. Other elements

Co-defendants are permitted to join in seeking information from a newsperson but the co-defendant must meet the same burden as the defendant issuing the subpoena: that it is relevant, necessary, and material to his or her [the co-defendant's] defense. Material provided to one defendant is not automatically provided to all defendants.

### C. Waiver or limits to testimony

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

The privilege belongs to the newsperson and may be waived, in whole or in part, by the newsperson.

#### 2. Elements of waiver

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

The name of the source may be disclosed to any other person who holds the privilege without a waiver occurring. A reporter may reveal the name to an editor, or another reporter. Such disclosure is not considered a waiver, nor is disclosure to an attorney in the course of defending against the subpoena. Disclosure to any other person in a non-privileged context would be a waiver. The statute creating the privilege specifically refers to a separate waiver statute:

> Rule 37. A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question."

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

The New Jersey newsperson's privilege makes no distinction between sources who requested and/or were promised confidentiality and other sources. Disclosure of the name to another person who is not also protected by the privilege is a waiver.

#### c. Partial disclosure of information

If a newsperson makes a partial disclosure it is a waiver only as to the materials disclosed. All other information is still protected by the privilege.

#### d. Other elements

None.

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

If a newsperson agrees to partially testify, for example that the article is accurate, such testimony acts as a waiver. The court has held that if the reporter testifies the right of cross examination could not be limited and an effective cross examination would necessarily inquire further into the information held by the newsperson. *In re Schuman*, 114 NJ 14 (1989).

## VII. What constitutes compliance?

### A. Newspaper articles

Newspersons can not be compelled to testify solely as to the authenticity of a newspaper article. The court can take judicial notice of the article and publication under the evidence rules, in particular Rule 201 of the Rules of Evidence.

### B. Broadcast materials

Newspersons can not be compelled to testify as to the authenticity of a broadcast, but may called upon to testify as to the broadcast when compelled to testify where the privilege has been overcome. The court may also take judicial notice of a broadcast tape under Evidence Rule 201.

### C. Testimony vs. affidavits

If the court has ordered testimony an affidavit may only be substituted with the court's permission.

### D. Non-compliance remedies

#### 1. Civil contempt

A reporter who fails to comply with an order to testify may be charged under the contempt statute. Contempt proceedings in New Jersey are no longer characterized as civil or criminal. Contempt may be prosecuted in a summary manner where the maximum jail time and fine is limited or may be prosecuted as a crime where the defendant is indicted and entitled to trial by jury.

#### a. Fines

The maximum fine for a summary contempt proceeding is $1,000.00.

#### b. Jail

The maximum jail time for a summary proceeding is 6 months.

#### 2. Criminal contempt

Contempt proceedings in New Jersey are no longer characterized as civil or criminal. If the matter is brought under an indictment pursuant to NJSA 2C:29-9, contempt is a crime of the fourth degree meaning that maximum fine is $7,500.00 and the maximum prison term is 9 months.

#### 3. Other remedies

None.

## VIII. Appealing

### A. Timing

#### 1. Interlocutory appeals

The appeal is interlocutory; however, the New Jersey Supreme Court has found that a decision ordering production "is immediately appealable as of right." *State v. Boiardo*, 82 N.J. 446, 471 (1980). It is made by motion and the court will grant leave to appeal "in the interest of justice." Generally appeal will be granted. The privilege specifically holds that the filing of an interlocutory appeal "shall act as a stay of all penalties which may have been imposed for failure to comply with the court's order." Once the appeal is filed the record is sealed until all appeals are exhausted and if the appeal is successful the record is permanently sealed.

#### 2. Expedited appeals

The privilege does not specifically provide for an expedited appeal but the newsperson can move to expedite the appeal, such requests are usually granted.

### B. Procedure

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

Appeal from the municipal court are made to the Assignment Judge of the Superior Court, appeals from the Superior Court to the Appellate Division and then to the New Jersey Supreme Court. A notice of appeal is forwarded to the court or if an expedited appeal from the Superior Court or Appellate Division is necessary, to the Appellate Judge or Supreme Court Justice assigned to hear emergent matter at that time, from that court.

#### 2. Stays pending appeal

The filing of an appeal works an automatic stay under the express terms of the privilege.

#### 3. Nature of appeal

The appeal is interlocutory; however, the New Jersey Supreme Court has found that a decision ordering production "is immediately appealable as of right." *State v. Boiardo*, 82 N.J. 446, 471 (1980). It is made by motion and the court will grant leave to appeal "in the interest of justice." Generally appeal will be granted.

#### 4. Standard of review

The appellate court will review the entire record in the exercise of its original jurisdiction under the Rules of Court, Rule 2:10-5.

#### 5. Addressing mootness questions

The privilege commands that proceedings to determine the applicability of the privilege "shall take place before the trial" and appeal is granted as of right. The mootness issue does not ordinarily arise in New Jersey. In other cases related to the news media the courts have generally been willing to hear cases under the "capable of repetition" theory.

#### 6. Relief

Depending upon the issue before the appellate court the court may quash the subpoena or order further proceedings before the trial court. Because of the emergent nature of most applications related to the privilege the court will usually issue a final determination rather than remand.

## IX. Other issues

### A. Newsroom searches

A separate statute governs newsroom searches. Essentially searches are prohibited except where the person or corporation has or is committing a crime; where immediate seizure is necessary to prevent "bodily injury or death"; where advance notice would result in the destruction of the materials; or where a motion to quash and all appeals therefrom have been unsuccessful.

*2A:84A-21.9. News media person or entity; freedom from searches and seizures of documentary materials; exceptions*

Any person, corporation, partnership, proprietorship or other entity engaged on, engaged in, connected with, or otherwise employed in gathering, procuring, transmitting, compiling, editing, publishing, or disseminating news for the public, or on whose behalf news is so gathered, procured, transmitted, compiled, edited, published or disseminated shall be free from searches and seizures, by State, county and local law enforcement officers with respect to any documentary materials obtained in the course of pursuing the aforesaid activities whether or not such material has been or will be disseminated or published.

This section shall not restrict or impair the ability of any law enforcement officer, pursuant to otherwise applicable law, to search for or seize such materials, if there is probable cause to believe that:

a. The person, corporation, partnership, proprietorship or other entity possessing the materials has committed or is committing the criminal offense for which the materials are sought; or

b. The immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

c. The giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration or deliberate concealment of the documentary materials other than work product; or

d. The documentary materials, other than work product, have not been produced in response to a court order directing compliance with a subpoena duces tecum, and

(1) All appellate remedies have been exhausted by the party seeking to quash the subpoena duces tecum; or

(2) There is a probability that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice. In the event a search warrant is sought pursuant to this subparagraph, the person, corporation, partnership, proprietorship or other entity possessing the materials shall be afforded adequate opportunity to submit an affidavit to the court setting forth the basis for any contention that the materials sought are not subject to seizure.

### B. Separation orders

The privilege commands that subpoenas for the testimony of newsperson "shall take place before the trial" and therefore the issue should be adjudicated prior to the trial and a separation order is unnecessary.

### C. Third-party subpoenas

There are no cases of third party subpoenas to circumvent the privilege in New Jersey.

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

The source has no rights relevant to the privilege. The privilege belongs to the newsperson; the purpose of the privilege is to protect news gathering activities "to the greatest extent permitted by the constitutions of the United States and New Jersey."