REPORTER'S PRIVILEGE: NEW MEXICO

The Reporters Committee for Freedom of the Press

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

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

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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 MEXICO

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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 3
C. Federal constitutional provision 3
D. Other sources 3
III. Scope of protection 3
A. Generally 3
B. Absolute or qualified privilege 4
C. Type of case 4
D. Information and/or identity of source 4
E. Confidential and/or non-confidential information 4
F. Published and/or non-published material 5
G. Reporter's personal observations 5
H. Media as a party 5
I. Defamation actions 5
IV. Who is covered 5
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 7
VI. Substantive law on contesting subpoenas 10
A. Burden, standard of proof 10
B. Elements 10
C. Waiver or limits to testimony 11
VII. What constitutes compliance? 12
A. Newspaper articles 12
B. Broadcast materials 12
C. Testimony vs. affidavits 12
D. Non-compliance remedies 12
VIII. Appealing 13
A. Timing 13
B. Procedure 14
IX. Other issues 15
A. Newsroom searches 15
B. Separation orders 15
C. Third-party subpoenas 15
D. The source's rights and interests 15

I. Introduction: History & Background

New Mexico has had a reporter's privilege on the books since 1967. In 1973, following the United States Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the statute was lengthened and strengthened. But in 1976, the New Mexico Supreme Court held the statute unconstitutional to the extent that it purported to regulate matters of procedure in the state courts by creating a rule of evidence.

The separation-of-powers problem was solved in 1982, when the state supreme court promulgated its own rule of evidence embodying a reporter's privilege. Rule 11-514 endows journalists with a privilege to refuse to disclose "confidential sources" and "confidential information." The privilege may yield, however, to a showing that "the confidential information or source is crucial to the case of the party seeking disclosure," that the requesting party's interest in disclosure "clearly outweighs the public interest" in continued confidentiality, and that the requesting party "has reasonably exhausted alternative means of discovering" the information. The rule also specifies the manner in which courts will adjudicate assertions of privilege. Meanwhile, the 1973 statute presumably continues to define the scope of the reporter's privilege, and the procedure for enforcing it, in legislative and administrative proceedings.

II. Authority for and source of the right

A. Shield law statute

The New Mexico legislature first enacted a reporter's privilege in 1967. *See* Act of Mar. 28, 1967, ch. 168, 1967 N.M. Laws 978. The original statute took the form of a declaration of "the public policy of New Mexico." *Id.* § 1(A), 1967 N.M. Laws at 978. It created a privilege limited to "source[s] of information." *Id.* It made the privilege subject to an exception for disclosures "essential to prevent injustice," and it instructed courts to "have due regard" for "the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove." *Id.* It provided that "[a]n order compelling disclosure shall be appealable, and subject to stay." *Id.*

In 1973, the legislature repealed the original statute and replaced it with a more elaborate enactment. *See* Act of Mar. 10, 1973, ch. 31, 1973 N.M. Laws 137. The new and improved statute offered explicit protection from disclosure, instead of merely articulating the state's "public policy." It continued to make the privilege subject to suspension when disclosure was "essential to prevent injustice," but it deleted the laundry list of factors for which the previous statute had directed courts to have "due regard." And it extended the protection beyond sources of information to the information itself, provided that the information was "unpublished." The 1973 statute also itemized additional media and additional categories of media representatives who could avail themselves of the privilege. Finally, the new statute required district courts ordering disclosure to "stat[e] the reasons why"; it provided for an "extraordinary" appeal to the supreme court, which would be "heard de novo and within twenty days from date of docketing"; and it made a stay of disclosure automatic upon the taking of an appeal.

Three years later, in *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), the New Mexico Supreme Court held the statute unconstitutional to the extent that it purported to create "a testimonial privile[]ge in a judicial proceeding." *Id.* at 310, 551 P.2d at 1357; *see id.* at 312, 551 P.2d at 1359. "[U]nder our Constitution," the court explained, "the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested exclusively in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding." *Id.* But the court left open the possibility that the statutory privilege might "properly be asserted in a[] proceeding or investigation before, or by[,] a[] legislative, executive or administrative body or person." *Id.*

The statute remains on the books today as NMSA 1978, § 38-6-7 (1973). Given the supreme court's decision in *Ammerman*, as well as its promulgation of a rule of evidence designed to codify the reporter's privilege in a con-

stitutional manner, *see infra* pt. II(D), the statute's current significance is largely historical. But the statute presumably retains most of its effectiveness when a journalist faces a request to divulge confidential sources or information "in a[] proceeding or investigation before, or by[,] a[] legislative, executive or administrative body or person." *Ammerman*, 89 N.M. at 312, 551 P.2d at 1359. In such situations, the only portion of the statute invalidated by *Ammerman* is the subsection providing that the supreme court will hear an appeal from an order of disclosure "de novo and within twenty days from date of docketing." NMSA 1978, § 38-6-7(C) (1973); *see Ammerman*, 89 N.M. at 312-13, 551 P.2d at 1359-60.

B. State constitutional provision

The New Mexico Constitution does not expressly set forth a reporter's privilege. On the other hand, New Mexico courts have ruled in other contexts that article II, § 17 of the state constitution — which provides that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right," and that "no law shall be passed to restrain or abridge the liberty of speech or of the press" — is more protective of speech than is the First Amendment to the federal Constitution. *City of Farmington v. Fawcett*, 114 N.M. 537, 546-47, 843 P.2d 839, 848-49 (Ct. App.), *cert. denied*, 114 N.M. 82, 835 P.2d 80 (1992).

C. Federal constitutional provision

On remand from the New Mexico Supreme Court's invalidation of the statutory reporter's privilege in judicial proceedings, *see Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), the New Mexico Court of Appeals declared that "[t]he First Amendment does not grant a broadcaster any privilege, qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding." *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 257, 572 P.2d 1258, 1265 (Ct. App.), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied*, 436 U.S. 906 (1978). A subsequent supreme court decision concerning the discoverability of information relevant to the issue of "actual malice" was to the same effect. *See Marchiondo v. Brown*, 98 N.M. 394, 398-99, 649 P.2d 462, 466-67 (1982). Five months after its decision in *Marchiondo*, the supreme court crafted a rule of evidence creating a qualified reporter's privilege. *See infra* pt. II(D).

D. Other sources

Having declined to find a First Amendment basis for a reporter's privilege, and having rejected the legislature's attempt to mandate the recognition of such a privilege in judicial proceedings, the New Mexico Supreme Court promulgated Rule 11-514 of the Rules of Evidence in 1982. The rule — which remains in place today, essentially in its original form — affords journalists "a privilege to refuse to disclose ... confidential source[s] ... and ... confidential information," unless the proponent of disclosure shows by a preponderance of the evidence that the information or the identity of the source "is crucial to [her] case," that her need for the information "clearly outweighs the public interest in protecting the news media's confidential information and sources," and that she "has reasonably exhausted alternative means of discovering" the information. Rule 11-514(B) to (C) NMRA 2002.

Another supreme court rule — this one authorizing "[t]he broadcasting, televising, photographing and recording of court proceedings" under specified circumstances, Rule 23-107 NMRA 2002 — appears to create an absolute, rather than a qualified, privilege with respect to the fruits of such activities. It provides that "[n]one of the film, videotape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceeding." Rule 23-107(H) NMRA 2002.

III. Scope of protection

A. Generally

The principal source of a New Mexico reporter's privilege — Rule 11-514 — provides reasonably strong protection against judicially compelled disclosure of confidential sources and confidential information. But the protection vanishes whenever a litigant can persuade the court that the source or the information is "crucial" to his case, that he has "reasonably exhausted alternative means of discovering" the information, and that his need for the information "clearly outweighs" the public interest in enforcing the privilege.

B. Absolute or qualified privilege

The privilege embodied by Rule 11-514 is qualified in several ways. First, a radio station cannot take advantage of it unless the station "maintains and keeps open for inspection by a person affected by the broadcast, for a period of at least ... 180 ... days from the date of an actual broadcast, an exact recording, transcription, or certified written transcript of the actual broadcast." The same condition applies to television stations, except that the required period of retention is a full year, and the preservation of a "kinescope film" is an acceptable way of fulfilling the condition. Rule 11-514(B) NMRA 2002.

More generally, "[t]here is no privilege under th[e] rule in any action in which the party seeking the evidence shows by a preponderance of the evidence, including all reasonable inferences," that

> (1) a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;
>
> (2) the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;
>
> (3) the confidential information or source is crucial to the case of the party seeking disclosure; and
>
> (4) the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media's confidential information and sources.

Rule 11-514(C) NMRA 2002.

As for the statutory privilege that apparently continues to govern nonjudicial proceedings, *see supra* pt. II(A), it gives way whenever "disclosure is essential to prevent injustice." NMSA 1978, § 38-6-7(A), (C) (1973). In only one limited circumstance — requests for "film, videotape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding" — do the media appear to enjoy an absolute privilege against disclosure, or at least against admission of the materials into evidence. *See* Rule 23-107(H) NMRA 2002.

C. Type of case

1. Civil

Rule 11-514 does not distinguish between civil and criminal proceedings.

2. Criminal

Rule 11-514 does not distinguish between civil and criminal proceedings.

3. Grand jury

Rule 11-514 does not distinguish between grand-jury proceedings and other criminal proceedings.

D. Information and/or identity of source

The privilege codified in Rule 11-514 protects "(1) the confidential source from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing professional activities; and (2) any confidential information obtained in the course of pursuing professional activities." Rule 11-514(B) NMRA 2002. (Confidential information that a journalist obtains or sources that he consults while "participat[ing] in any act involving physical violence, property damage or criminal conduct" are not protected. Rule 11-514(A)(2) NMRA 2002.) Rule 23-107(H) specifically protects "film, videotape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding."

The statutory privilege applicable to nonjudicial proceedings protects "(1) the source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or (2) any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public." NMSA 1978, § 38-6-7(A) (1973).

E. Confidential and/or non-confidential information

Rule 11-514 protects only "confidential" information, defined as information "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional news media services or those reasonably necessary for the transmission of the [information]." Rule 11-514(A)(1), (B)(2) NMRA 2002. Rule 23-107(H) protects all "film, videotape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding." The statutory privilege applicable to nonjudicial proceedings protects only "unpublished" information, defined as "information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated, and includ[ing] but ... not limited to, all notes, news copy, outtakes, photographs, films, recording tapes or other data of whatever sort not disseminated to the public through a medium of communication." NMSA 1978, § 38-6-7(A)(2), (B)(5) (1973).

F. Published and/or non-published material

The statute protects only "unpublished" material. The rule of evidence protects only "confidential" information, which is apparently either the same thing as "unpublished" material or else a subset of it. Only Rule 23-107(H) seems to extend to images and sound recordings that are actually broadcast. *See supra* pt. III(E); *infra* pt. III(G).

G. Reporter's personal observations

The 1973 statute — today applicable only to nonjudicial proceedings — protects all "data of whatever sort not disseminated to the public through a medium of communication." NMSA 1978, § 38-6-7(A)(2), (B)(5) (1973). This category of information would appear to include anything that the reporter observes but does not report. The point is less clear under the 1982 rule of evidence. That rule protects "confidential information," but its definitions speak only of confidential "communication[s]," which are communications "not intended to be disclosed to third persons." Rule 11-514(A)(1), (B)(2) NMRA 2002. The language was evidently borrowed from the rule on attorney-client privilege, *see* Rule 11-503(A)(4) NMRA 2002, which courts outside New Mexico have sometimes refused to apply to a lawyer's observations about her client's physical characteristics. Indeed, by limiting the privilege's protections to communications "not intended to be disclosed," the rule raises potentially vexing questions about whose intent is determinative and how such intent can be proved.

H. Media as a party

Neither Rule 11-514 nor the statutory privilege applicable to nonjudicial proceedings explicitly differentiates between cases to which the media are parties and those to which they are not.

I. Defamation actions

Rule 11-514 does not explicitly address the privilege's operation in libel cases. Cases predating the rule suggest that confidential sources and confidential information may well be deemed "crucial" to particular libel claims and undiscoverable from other sources. Rule 11-514(C) NMRA 2002; *see, e.g.*, *Marchiondo v. Brown*, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982) ("[S]ummary judgment for the [media] defendants was premature, in that it was rendered before the thoughts, editorial processes and other information in the exclusive control of the alleged defamer could be examined."); *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 258, 572 P.2d 1258, 1266 (court erred in ruling for libel defendant before permitting discovery concerning confidential sources, because "plaintiffs produced substantial evidence that there were strong reasons to doubt the veracity of the defense informants"), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied*, 436 U.S. 906 (1978). *But cf. Coronado Credit Union v. KOAT Television, Inc.*, 99 N.M. 233, 238-39 & n.2, 656 P.2d 896, 901-02 & n.2 (Ct. App. 1982) (libel defendant cannot simultaneously deny "actual malice" and refuse to identify confidential sources "[i]n the absence of a showing of privilege").

In any event, a claim of privilege generally "is not a proper subject of comment by the court or counsel," and "[n]o inference may be drawn therefrom." Rule 11-513(A) NMRA 2002. "Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." Rule 11-513(C) NMRA 2002.

IV. Who is covered

Both Rule 11-514 and the statutory privilege applicable to nonjudicial proceedings undertake to define the terms of the privilege in considerable detail. As a practical matter, however, these definitions are expansive enough to cover virtually any journalist or media organization.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Rule 11-514 confers the privilege on any "person engaged 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." Rule 11-514(B) NMRA 2002. The privilege survives termination of the journalist's employment. *See* Rule 11-514(A)(3) NMRA 2002. The statutory privilege applicable to nonjudicial proceedings protects any "journalist or newscaster, or working associates of a journalist or newscaster," NMSA 1978, § 38-6-7(A) (1973); it defines "journalists" and "newscasters" as "person[s] who, for gain [are, or at the relevant time were,] engaged in gathering, preparing, editing, analyzing, commenting on or broadcasting news," and it defines "working associates" as persons who are (and at the relevant time were) employees or co-workers of such journalists and newscasters, *id.* § 38-6-7(B)(7) to (9).

b. Editor

Persons engaged in editing the news are protected. *See supra* pt. IV(A)(1)(a).

c. News

The privilege does not turn on specialized definitions of, or value judgments about, what constitutes "news." Rule 11-514 confers the privilege on persons employed by news media to gather, procure, transmit, compile, edit, or disseminate "news," which the rule broadly defines to include "any written, oral or pictorial information." Rule 11-514(A)(3), (B) NMRA 2002. (But the privilege protects only confidential information that the journalist obtains and confidential sources that she consults "in the course of pursuing professional activities," which "does not include any situation in which a news media person participates in any act involving physical violence, property damage or criminal conduct." Rule 11-514(A)(2), (B) NMRA 2002.) The statutory privilege applicable to nonjudicial proceedings protects unpublished information "obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public," as well as the sources of such information. NMSA 1978, § 38-6-7(A) (1973).

d. Photo journalist

Neither the rule of evidence nor the statute mentions "photo journalists," but both are sufficiently broad and general to include them within the class of privilege-holders. *See supra* pt. IV(A)(1)(a).

e. News organization / medium

Originally promulgated in 1982 and never materially updated, Rule 11-514 confers the privilege on persons engaged by "news media," which it defines as "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." Rule 11-514(A)(6), (B) NMRA 2002. The terms "newspapers," "news agencies," "magazines," "press associations," and "wire services" are further defined. Of particular interest are the definitions of "newspaper" ("a news service that is printed or distributed electronically 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") and "magazine" ("a publication containing news which is published and distributed periodically," where "news" is "any written, oral or pictorial information"). *See* Rule 11-514(A)(3) to (5), (7) to (9) NMRA 2002.

The statutory privilege applicable to nonjudicial proceedings is nine years older still. It extends to persons who work on behalf of "a newspaper, magazine, news agency, news or feature syndicate, press association or wire service," or a "broadcast or television station or network, or cable television system." NMSA 1978, § 38-6-7(A), (B)(2), (7) to (8) (1973).

2. Others, including non-traditional news gatherers

Rule 11-514 reserves the privilege to persons involved in "gathering, procuring, transmitting, compiling, editing or disseminating news," as well as their employers. Rule 11-514(B) NMRA 2002. The statutory privilege applicable to nonjudicial proceedings extends to "working associates of a journalist or newscaster" — persons "who work[] for," or who are "employed by the same individual or entity" as, the journalist or newscaster. NMSA 1978, § 38-6-7(A), (B)(9) (1973).

B. Whose privilege is it?

Under both the rule of evidence and the statutory privilege applicable to nonjudicial proceedings, the privilege belongs to the reporter and her employer, but not to the source. *See* Rule 11-514(B) NMRA 2002; NMSA 1978, § 38-6-7(A), (B)(7) to (9) (1973); *compare id.* § 38-6-7(B)(7) to (8) ("journalists" and "newscasters" mean "persons") *with id.* § 12-2A-3(E) (1997) ("person" includes "any legal or commercial entity").

V. Procedures for issuing and contesting subpoenas

For the most part, neither Rule 11-514 nor the statutory privilege applicable to nonjudicial proceedings imposes any special procedural requirements on those who would subpoena — or resist subpoenas for — confidential information or the identities of confidential sources. Accordingly, much of the following discussion concerns the general New Mexico law relating to judicial subpoenas. Subpoenas issued by legislative, administrative, and executive bodies are beyond the scope of this outline, except to the extent that the statutory reporter's privilege applicable to nonjudicial proceedings specifically addresses them.

A. What subpoena server must do

1. Service of subpoena, time

A subpoena is subject to being quashed or modified if it "fails to allow reasonable time for compliance." Rule 1-045(C)(3)(a)(i) NMRA 2002 (civil cases); Rule 5-511(C)(3)(a)(i) NMRA 2002 (criminal cases); *see, e.g.*, *Attorney Gen. v. Montoya*, 1998-NMCA-149, ¶¶ 7-9, 126 N.M. 273, 968 P.2d 784 (holding that district court did not err in refusing to enforce subpoena issued to attorney one day before trial), *cert. denied*, 126 N.M. 532, 972 P.2d 351 (1998).

2. Deposit of security

There is no such requirement under New Mexico law. But every subpoena must be accompanied by "the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978," unless it is issued "on behalf of the state or an officer or agency thereof," Rule 1-045(B)(2)(b) NMRA 2002, "including the public defender department," Rule 5-511(B)(2)(b) NMRA 2002. Thus, the witness must be paid a $75 per diem, plus $.25 per mile for out-of-town travel. NMSA 1978, § 10-8-4(A), (D) (1989). A private litigant's "failure to tender required expense and mileage fees shall invalidate the subpoena and justify non-compliance with the subpoena's command." Rule 1-045 committee cmt. § 5 NMRA 2002.

3. Filing of affidavit

There is no such requirement under New Mexico law.

4. Judicial approval

Subpoenas can be served on anyone, including journalists, without prior judicial approval.

5. Service of police or other administrative subpoenas

Various administrative agencies, including the state fire marshal, enjoy the power to subpoena witnesses. State law supplies few, if any, special rules regarding the use and service of administrative subpoenas, though a person receiving such a subpoena should always consult the particular statutory authority cited in support of it.

B. How to Quash

1. Contact other party first

As an initial matter, contacting the subpoenaing party is almost always advisable, because some attorneys are both unfamiliar with the reporter's privilege and amenable to reason. But if the subpoena is defective on its face — because, for example, it was issued by a private party but is unaccompanied by a witness fee, *see supra* pt. V(A)(2) — tactical considerations may dictate silence until it is too late for the issuing party to remedy the problem.

2. Filing an objection or a notice of intent

With respect to subpoenas that call for the production of documents or other tangible objects, the person commanded to produce the items may either file a motion to quash, *see infra* pt. V(B)(3), or else simply "serve upon all parties written objection to [production of the items]. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials ... except pursuant to an order of the court by which the subpoena was issued [upon a motion to compel]." Rule 1-045(C)(2)(b) NMRA 2002; Rule 5-511(C)(2)(b) NMRA 2002. Any such written objections must be served "within [14] days after service of the subpoena or before the time specified for compliance if such time is less than [14] days after service." *Id.* The objections must claim the reporter's privilege "expressly" and must include "a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Rule 1-045(D)(2) NMRA 2002; Rule 5-511(D)(2) NMRA 2002.

Although the written-objections alternative is set forth in rules of judicial procedure, it ought to suffice for the purpose of contesting most legislative, administrative, and executive subpoenas as well. Many of the statutes authorizing such extrajudicial subpoenas incorporate court rules. *See, e.g.*, NMSA 1978, § 12-8-15(C) (1969) (Administrative Procedures Act). More importantly, the statutory reporter's privilege applicable to nonjudicial proceedings provides that "application shall be made to the district court of the county in which the proceeding is being held for an order of disclosure," NMSA 1978, § 38-6-7(C) (1973) — implying that a journalist can discharge her initial obligation merely by objecting to the subpoena instead of moving to quash it.

By placing the burden on the subpoenaing party to file a motion to compel, the service of written objections enables the subpoenaed party to postpone — and, occasionally, to avoid altogether — the effort and expense of preparing papers for submission to a court. The downside is that the moving party not only gets two briefs to the responding party's one, but also enjoys the final written word on the subject (the reply brief). But if the briefing sequence is perceived as a serious disadvantage, the journalist can always file a cross-motion to quash along with her response to the motion to compel; and in any event, the district court will almost certainly hold a hearing at which arguments made in reply briefs can be addressed.

If the subpoena commands its recipient not only to produce documents, but also to appear in person to give testimony at a deposition, a hearing, or a trial, written objections will be insufficient, and a motion to quash will be necessary. The rules of procedure do not require a notice of intent or any other filing in advance of such a motion.

3. File a motion to quash

a. Which court?

A motion to quash, like a motion to compel, is addressed to the court that issued the subpoena. *See* Rule 1-045(C)(2)(b), (3)(a) NMRA 2002; Rule 5-511(C)(2)(b), (3)(a) NMRA 2002. If the subpoena is issued in a nonjudicial proceeding, "the district court of the county in which the proceeding is being held" will ultimately be the proper forum, NMSA 1978, § 38-6-7(C) (1973), though in some cases it may be desirable to file an initial motion to quash with the issuing body itself.

b. Motion to compel

The relationship between motions to compel and motions to quash is discussed above. *See supra* pt. V(B)(2).

c. Timing

A motion to quash must be "timely." Rule 1-045(C)(3)(a) NMRA 2002; Rule 5-511(C)(3)(a) NMRA 2002. The subpoenaed party cannot go wrong by conforming to the deadline for written objections — "[14] days after ser-

vice of the subpoena or before the time specified for compliance if such time is less than [14] days after service." Rule 1-045(C)(2)(b) NMRA 2002; Rule 5-511(C)(2)(b) NMRA 2002.

d. Language

There is no stock language or preferred text for motions to quash. But the reporter's privilege must be claimed "expressly," and the motion must be "supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Rule 1-045(D)(2) NMRA 2002; Rule 5-511(D)(2) NMRA 2002.

e. Additional material

Receptiveness to attachments varies from judge to judge. In any event, the subpoenaed party should take care to research and obey any local rules that may limit the number of attached pages. *See, e.g.*, N.M. 2d Judicial Dist. R. 119(B) (25 pages, except by leave of court).

4. In camera review

a. Necessity

Rule 11-514 provides that "[i]f possible," the court will determine whether the subpoenaing party has successfully overcome the qualified reporter's privilege "without requiring disclosure of the confidential source or information sought to be protected by the privilege." But "[i]f it is not possible for the court to make [that] determination ... without the court knowing the confidential source or information sought to be protected, the court may issue an order requiring disclosure to the court alone, in camera." Rule 11-514(D) NMRA 2002.

b. Consequences of consent

Rule 11-514 provides:

> Following the in camera hearing the court shall enter written findings of fact and conclusions of law, without disclosing any of the matters for which the privilege is asserted, and a written order ....
>
> Evidence submitted to the court in camera, and any record of the in camera proceedings, shall be sealed and preserved to be made available to an appellate court, in the event of an appeal, and the contents shall not otherwise be revealed without the consent of the person asserting the privilege.
>
> . . . .
>
> Any order ... ordering ... disclosure may be appealed ... in the procedural manner provided by the Rules of Appellate Procedure.

Rule 11-514(D) NMRA 2002. A fair reading of these passages is that any confidential information or sources revealed to the court in camera will remain under seal as long as the privilege-holder wants them to. A separate question, however, is whether the reporter's obligation to obey an order of disclosure is stayed pending appeal. *See infra* pt. VIII(B)(2).

c. Consequences of refusing

"Any order requiring an in camera disclosure ... may be appealed ... in the procedural manner provided by the Rules of Appellate Procedure." Rule 11-514(D) NMRA 2002. The "procedural manner provided by the Rules of Appellate Procedure" is presumably the "writ of error," which codifies the collateral-order doctrine. Allowance of an appeal under this doctrine is purely discretionary with the appellate court. *See* Rule 12-503(I) NMRA 2002.

5. Briefing schedule

The motion to quash must be "timely." Rule 1-045(C)(3)(a) NMRA 2002; Rule 5-511(C)(3)(a) NMRA 2002. Like any opposed motion, it may be accompanied by "a brief or supporting points with citations or authorities." Rule 1-007.1(C) NMRA 2002 (civil cases); Rule 5-120(D) NMRA 2002 (criminal cases). Written responses must be filed within 15 days after the motion is served, and a reply brief in support of the motion can be filed within 15 days after service of the response. Rule 1-007.1(D) to (E) NMRA 2002; Rule 5-120(E) to (F) NMRA 2002.

6. Amicus briefs

New Mexico appellate courts routinely accept amicus briefs, but the practice is far less common at the district-court level. In the past, the New Mexico Press Association (2531 Wyoming Blvd. NE, Albuquerque, N.M. 87112; 505-275-1377) and the New Mexico Broadcasters Association (8014 Menaul Blvd. NE, Albuquerque, N.M. 87110; 505-881-4444) have occasionally weighed in with amicus briefs on issues of concern to the press.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The party seeking disclosure of confidential information or sources must demonstrate an exception to the reporter's privilege "by a preponderance of evidence, including all reasonable inferences." Rule 11-514(C) NMRA 2002.

B. Elements

To overcome the reporter's privilege in judicial proceedings, the subpoenaing party must show that:

> (1) a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;
>
> (2) the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;
>
> (3) the confidential information or source is crucial to the case of the party seeking disclosure; and
>
> (4) the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media's confidential information and sources.

Rule 11-514(C) NMRA 2002. To overcome the statutory privilege applicable to nonjudicial proceedings, the subpoenaing party must show that disclosure is "essential to prevent injustice." NMSA 1978, § 38-6-7(A), (C) (1973).

1. Relevance of material to case at bar

Under Rule 11-514, the threshold question is whether the information or the source is "material and relevant to the action." But relevance is not enough; the information or source must be "crucial." Rule 11-514(C)(1), (3) NMRA 2002. "Essential" is the standard under the statutory privilege applicable to nonjudicial proceedings. NMSA 1978, § 38-6-7(A), (C) (1973).

2. Material unavailable from other sources

Under Rule 11-514, the subpoenaing party must show that he "has reasonably exhausted alternative means of discovering the confidential information or sources." Rule 11-514(C)(2) NMRA 2002. The statutory privilege applicable to nonjudicial proceedings does not specifically address the point, but a requirement that the material be unavailable elsewhere is implicit in the "essential to prevent injustice" standard. NMSA 1978, § 38-6-7(A), (C) (1973).

a. How exhaustive must search be?

Rule 11-514 demands that the subpoenaing party conduct a "reasonably" exhaustive search for alternatives, *see* Rule 11-514(C)(2) NMRA 2002, but no case law exists to illustrate what this means in practice.

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

Under Rule 11-514, the subpoenaing party must "show[] by a preponderance of the evidence, including all reasonable inferences," that he has already "reasonably exhausted alternative means of discovering the confidential information or sources." Rule 11-514(C)(2) NMRA 2002.

c. Source is an eyewitness to a crime

No New Mexico law specifically addresses this situation. *See supra* pt. III(G).

3. Balancing of interests

Under Rule 11-514, the privilege prevails unless "the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media's confidential information and sources." Rule 11-514(C)(4) NMRA 2002.

4. Subpoena not overbroad or unduly burdensome

The vices of overbreadth and undue burden are not specifically addressed by Rule 11-514 or the statutory privilege applicable to nonjudicial proceedings. But the rules of civil and criminal procedure generally applicable to subpoenas declare that "[a] party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty ...." Rule 1-045(C)(1) NMRA 2002; Rule 5-511(C)(1) NMRA 2002; *see also* Rule 1-045(C)(3)(a)(iv) NMRA 2002 (subpoena can be quashed or modified if it "subjects a person to undue burden"); Rule 5-511(C)(3)(a)(iv) NMRA 2002 (same).

5. Threat to human life

No New Mexico law specifically addresses this issue.

6. Material is not cumulative

The reporter's privilege should protect cumulative material — which, by definition, is not "crucial to the case of the party seeking disclosure," Rule 11-514(C)(3) NMRA 2002, or "essential to prevent injustice," NMSA 1978, § 38-6-7(A), (C) (1973).

7. Civil/criminal rules of procedure

Not addressed.

8. Other elements

New Mexico courts have not formulated any additional elements of the exception to the reporter's privilege.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

The original codification of the reporter's privilege in New Mexico — which has since been superseded — declared that "[a]ny reporter may waive the privilege granted in this section." Act of Mar. 28, 1967, ch. 168, § 1(C), 1967 N.M. Laws 978, 979 (superseded 1973). The present-day version of the statute, applicable only to nonjudicial proceedings, does not specifically mention the possibility of waiver. *See* NMSA 1978, § 38-6-7 (1973). Regarding the reporter's privilege that obtains in judicial proceedings, general waiver principles govern the larger body of privilege law within which it falls. *See* Rule 11-511 NMRA 2002 ("A person upon whom these rules confer a privilege ... waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the [privileged] matter or communication. This rule does not apply if the disclosure is itself a privileged communication.").

2. Elements of waiver

a. Disclosure of confidential source's name

No New Mexico law specifically addresses this issue.

b. Disclosure of non-confidential source's name

No New Mexico law specifically addresses this issue. Presumably, however, because Rule 11-514 protects only confidential sources, *see* Rule 11-514(B)(1) NMRA 2002, identification of non-confidential sources would not implicate the privilege, let alone waive it.

c. Partial disclosure of information

No New Mexico law specifically addresses this issue. But according to general evidentiary principles, "disclosure of any significant part of [a privileged] matter or communication" waives the privilege. Rule 11-511 NMRA 2002.

d. Other elements

No published New Mexico appellate opinions have discussed the ways in which a reporter might waive the privilege.

3. Agreement to partially testify act as waiver?

No New Mexico law specifically addresses this issue. But it seems unlikely that a reporter's testimony to the effect that her story was true and accurate as published would work a waiver of her privilege not to identify her confidential sources or to disclose the confidential information that remained unpublished. *Cf., e.g., Pub. Serv. Co. v. Lyons*, 2000-NMCA-077, ¶¶ 1, 22, 129 N.M. 487, 10 P.3d 166 (holding that under Rule 11-511, party cannot "implicitly" waive attorney-client privilege by pleading claims to which privileged communications might be relevant, but instead must make "offensive or direct use of [the] privileged materials").

VII. What constitutes compliance?

A. Newspaper articles

The reporter's privilege would not protect a journalist from having to testify that a particular article actually appeared in the newspaper. *See* Rule 11-514(A)(1), (B) NMRA 2002; NMSA 1978, § 38-6-7(A), (B)(5) (1973). On the other hand, a librarian or a records custodian could as easily give such testimony if it were up to the newspaper to designate an appropriate witness; and in any event, "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating. Rule 11-902(F) NMRA 2002.

B. Broadcast materials

No New Mexico law specifically addresses this issue.

C. Testimony vs. affidavits

Generally speaking, affidavits do not constitute admissible evidence at trial. But litigants frequently stipulate to the authenticity of exhibits in lieu of presenting the testimony of records custodians. And newspapers and other periodicals are self-authenticating. *See* Rule 11-902(F) NMRA 2002.

D. Non-compliance remedies

1. Civil contempt

No New Mexico law specifically addresses this issue with respect to an unsuccessful assertion of the reporter's privilege. In general, however, "[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Rule 1-045(E) NMRA 2002; Rule 5-511(E) NMRA 2002; *see also* Rule 1-037(B)(1) NMRA 2002 ("If a deponent fails ... to answer a question after being directed to do so by a court with jurisdiction, the failure may be considered a contempt of that court."); Rule 5-503.2(B)(1) NMRA 2002 (same).

a. Fines

No New Mexico law specifically addresses this issue with respect to an unsuccessful assertion of the reporter's privilege. In general, however, courts can levy compensatory or coercive fines in cases of civil contempt. No law caps such fines.

b. Jail

No New Mexico law specifically addresses this issue with respect to an unsuccessful assertion of the reporter's privilege. In general, however, courts can impose coercive jail sentences in cases of civil contempt. No law limits such sentences.

2. Criminal contempt

No New Mexico law specifically addresses this issue with respect to an unsuccessful assertion of the reporter's privilege. In general, however, disobedience of a court order can be punished as a criminal contempt, and a fine or a jail sentence can be imposed.

3. Other remedies

No New Mexico law specifically addresses the consequences of refusal to obey an order to disclose confidential information or sources. Regarding discovery sanctions generally, see Rule 1-037(B) NMRA 2002.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Rule 11-514 provides that "[a]ny order requiring ... disclosure may be appealed by any party or by the person asserting the privilege, if not a party, in the procedural manner provided by the Rules of Appellate Procedure." Rule 11-514(D) NMRA 2002. But the reporter's-privilege statute enacted by the legislature in 1973 calls for appellate procedures quite alien to the Rules of Appellate Procedure: it provides that "an order [of disclosure] is appealable to the supreme court if the appeal is docketed in that court within ten days after its entry." NMSA 1978, § 38-6-7(C) (1973). Although the supreme court in *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), found much of this statute to be an unconstitutional arrogation of judicial power by the legislature, the court acknowledged that the legislature "[u]nquestionably ... has the power to determine in what district court cases, civil and criminal, this court shall exercise appellate jurisdiction," *id.* at 312, 551 P.2d at 1359. Arguably, then, the supreme court has a duty to hear an interlocutory appeal taken within ten days from any disclosure order. To play it safe, however, a journalist seeking appellate review of such an order may wish to file provisional notices of appeal "in the procedural manner provided by the Rules of Appellate Procedure." Rule 11-514(D) NMRA 2002. The remainder of this section discusses appellate procedures of general application.

If an order recites that it "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal ... may materially advance the ultimate termination of the litigation," NMSA 1978, § 39-3-4(A) (1999), an aggrieved party can apply for an interlocutory appeal within 15 days after entry of the order, *see* Rule 12-203(A) NMRA 2002. The appellate court has discretion to accept the appeal or decline it. *See* Rule 12-203(B) NMRA 2002.

If the order does not contain the certification necessary for interlocutory appeal, the aggrieved party can seek a "writ of error" — the vehicle for review under the collateral-order doctrine — within 30 days after the order is filed. Rule 12-503(C) NMRA 2002. The application for a writ of error must demonstrate that the order "(a) conclusively determines the disputed question; (b) resolves an important issue completely separate from the merits of the action; and (c) would be effectively unreviewable on appeal from a final judgment because the remedy by way of appeal would be inadequate." Rule 12-503(E)(2) NMRA 2002. "The appellate court in its discretion may issue the writ." Rule 12-503(I) NMRA 2002.

A journalist might also seek an "extraordinary writ" of prohibition from the supreme court, *see* Rule 12-504 NMRA 2002, though this remedy is highly discretionary and rarely granted. It is particularly disfavored when review appears at least theoretically available by another means or in another court. *See* Rule 12-504(B)(1)(b) NMRA 2002.

Alternatively, the journalist may choose to disobey the order and incur a finding of contempt. A state statute provides that "[a]ny person aggrieved by the judgment of the district court in any proceeding for civil contempt, and any person convicted of criminal contempt except criminal contempt committed in the presence of the court, may appeal within thirty days from the judgment of conviction." NMSA 1978, § 39-3-15(A) (1966). Despite the exception carved out by this statute for "criminal contempt committed in the presence of the court," New Mexico courts apparently consider convictions on such charges no less appealable than other categories of contempt. *See,*

e.g., *State v. Ngo*, 2001-NMCA-041, ¶ 7, 130 N.M. 515, 27 P.3d 1002 (order of direct criminal contempt is "final and appealable when entered").

Rules governing procedures in courts of limited jurisdiction — i.e., the metropolitan court (which currently exists only in Bernalillo County) and the magistrate courts — do not appear to contemplate interlocutory appeals. *See* Rule 1-072(A) NMRA 2002 (permitting appeal from "judgment or final order"); Rule 1-073(A) NMRA 2002 (same); Rule 2-705(A) NMRA 2002 (same); 3-706(A) NMRA 2002 (same). But Rule 11-514 expressly empowers a reporter to appeal from an order of disclosure "in the procedural manner provided by the Rules of Appellate Procedure" — rules that do allow for interlocutory appeals. *See supra*. In any event, a notice of appeal from a court of limited jurisdiction must be filed within 15 days after the filing of the judgment or order at issue. *See* Rule 1-072(A) NMRA 2002; Rule 1-073(A) NMRA 2002; Rule 2-705(A) NMRA 2002; Rule 3-706(A) NMRA 2002.

2. Expedited appeals

The New Mexico Court of Appeals — the forum to which nearly all appeals of right from the district court are taken, *see infra* pt. VIII(B)(1) — maintains an "expedited bench decision program" under which briefing times are shortened, cases are submitted to a panel of judges at the court's earliest opportunity, and decisions are ordinarily rendered on the day of oral argument. Any appellate litigant can move for expedited case-handling on this basis. *See Rosen v. Lantis*, 123 N.M. 231, 236-37, 938 P.2d 729, 734-35 (Ct. App. 1997) (describing procedures). But the reporter's-privilege statute specifies an appeal to the supreme court, *see* NMSA 1978, § 38-6-7(C) (1973), where no such expedited option is routinely available. While the constitutionality of this appeal provision in the context of judicial proceedings isn't entirely clear, *see supra* pt. VIII(A)(1), the portion of the statute declaring that an appeal from a disclosure order "shall be considered as an extraordinary proceeding and shall be heard de novo and within twenty days from date of docketing," NMSA 1978, § 38-6-7(C) (1973), is plainly invalid, *see Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 312-13, 551 P.2d 1354, 1359-60 (1976).

B. Procedure

1. To whom is the appeal made?

Most appeals from the district court — not including those involving "a sentence of death or life imprisonment" or the grant of a writ of habeas corpus — are taken to the court of appeals. *See* Rule 12-102 NMRA 2002. But the reporter's-privilege statute specifies an appeal to the supreme court "if the appeal is docketed in that court within ten days after its entry." NMSA 1978, § 38-6-7(C) (1973). Lingering questions about the statute's constitutionality probably necessitate alternative appeals to both courts. *See supra* pt. VIII(A)(1).

Appeals from the metropolitan court or the magistrate court are taken to the district court. *See* Rule 1-072(A) NMRA 2002; Rule 1-073(A) NMRA 2002.

2. Stays pending appeal

The reporter's-privilege statute provides that "[t]he taking of an appeal shall operate to stay proceedings ... in the district court." NMSA 1978, § 38-6-7(C) (1973). Conceivably, a court could deem this provision an unconstitutional attempt by the legislature "to regulate practice and procedure in the courts." *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 312, 551 P.2d 1354, 1359 (1976); *see supra* pt. VIII(A)(1). But it is presumably valid at least to the extent that the district court's order pertains to an order of disclosure in proceedings before a legislative, administrative, or executive body. *See Ammerman*, 89 N.M. at 312, 551 P.2d at 1359. In case the stay provision is unconstitutional with respect to disclosure orders arising out of judicial proceedings, the remainder of this section discusses appellate procedures of general application. *See supra* pt. VIII(A)(1).

"The granting of an application [for interlocutory appeal] shall automatically stay the proceedings in the district court unless otherwise ordered by the appellate court." Rule 12-203(E) NMRA 2002. "[A] party seeking a stay of [an] order which is the subject of [a] writ of error or a stay of proceedings pending appeal shall first seek such an order from the district court, and any party may thereafter seek appellate review of the district court's ruling pursuant to Rule 12-205, 12-206 or 12-207." Rule 12-503(J) NMRA 2002. Rules 12-205, 12-206, and 12-207 concern "Release pending appeal in criminal matters," "Stay pending appeal in children's court matters," and "Supersedeas and stay in civil matters," respectively, and should be consulted as appropriate. Stays are also available in

connection with the issuance of extraordinary writs of prohibition. *See* Rule 12-504(D) NMRA 2002. Regarding stays of orders and judgments of the magistrate and metropolitan courts, see Rule 2-705(G) to (H) NMRA 2002 and Rule 3-706(G) to (H) NMRA 2002.

3. Nature of appeal

See supra pt. VIII(A)(1).

4. Standard of review

The 1973 legislature considered the reporter's privilege so important that it undertook to require the supreme court to hear appeals from disclosure orders "de novo." NMSA 1978, § 38-6-7(C) (1973). But in *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), the supreme court rejected that provision as an unconstitutional legislative encroachment on judicial prerogative. The court held that appeals from disclosure orders would be treated no differently from other cases:

> The fact-finding process has always been left to the district courts. That is, factual issues are determined either by the trial jury or the trial court sitting without a jury. The weight and credibility of the evidence and of witnesses are left for the trier of the facts and are not subjects of review by this court.
>
> Our review of the evidence is only for the purpose of determining whether there was substantial evidence to support the trier of the facts.

Id. at 313, 551 P.2d at 1360 (citations omitted).

In other contexts, the New Mexico appellate courts have stated that they "review discovery orders for abuses of discretion." *Pub. Serv. Co. v. Lyons*, 2000-NMCA-077, ¶ 10, 129 N.M. 487, 10 P.3d 166. But to the extent that an appeal concerns a "trial court's construction of law regarding privileges ..., it presents a legal question that [the court] review[s] de novo." *Id.*

Appeals from the magistrate court to the district court — at least appeals from "final judgments and decisions" — are de novo in all respects. N.M. Const. art. VI, § 27.

5. Addressing mootness questions

No New Mexico law specifically addresses this issue in relation to the reporter's privilege. *But see, e.g., State ex rel. N.M. Press Ass'n v. Kaufman*, 98 N.M. 261, 265-66, 648 P.2d 300, 304-05 (1982) (reviewing trial court's restrictions on press coverage of murder trial after trial's conclusion, because "the issues involved are of substantial public interest and are capable of repetition yet evading appellate review").

6. Relief

Journalists should not hesitate to ask the appellate court to dissolve a contempt citation or to direct that a subpoena be quashed — recognizing, of course, that the appellate court, in deference to the lower court, may prefer to remand the matter so that the lower court has an opportunity to do the right thing on its own.

IX. Other issues

A. Newsroom searches

No New Mexico law specifically addresses this issue.

B. Separation orders

No New Mexico law specifically addresses this issue.

C. Third-party subpoenas

No New Mexico law specifically addresses this issue.

D. The source's rights and interests

No New Mexico law specifically addresses this issue.