

# REPORTER'S PRIVILEGE: NEVADA

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

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

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

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

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

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

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

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

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

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

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

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

### What is a subpoena?

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

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

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

NEVADA

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## I. Introduction: History & Background

Nevada is often recognized as having the strongest shield law in the country. The law protects unpublished and published materials and protects the confidential sources of libel defendants.

## II. Authority for and source of the right

### A. Shield law statute

Nevada's press shield law is provided for under NRS 49.275:

No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
2. Before the legislature or any committee thereof.
3. Before any department, agency or commission of the state.
4. Before any local governing body or committee thereof, or any officer of a local government.

The Legislative history of this statute was explained in *Las Vegas Sun v. Eighth Judicial District Court*, 104 Nev. 508, 511-12, 761 P.2d 849, 851-52 (1988), *overruled on other grounds*, *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 993 P.2d 50 (2000): "The legislative history behind the current shield law illustrates the legislators' concern with protecting confidentiality during and after the news gathering process. The legislature enacted the first shield law in 1969. It protected news media representatives from forced disclosure of their sources. Members of the press argued that confidential sources had to be protected from exposure to insure the free flow of information, particularly information about government corruption or mismanagement. The public, they claimed, had a right to know about such occurrences, but if sources were afraid to talk to reporters, the public's access to this valuable information would be severely restricted. Supporters of the legislation argued that if reporters could promise sources that their identities would not be revealed, sources would be more likely to give reporters information, and this would benefit the public. See Senate Jud. Comm. Minutes, D.B. 299, March 4, 1969 and March 27, 1969. The shield law was extended in 1975 to provide for former newsmen and for unpublished information. Several states expanded their shield statutes in similar fashion, because some courts had applied the shield privilege exclusively to published information. . . . Assemblyman Coulter told the Senate Judiciary Committee that the bill would extend protection to a newsman's 'tools,' i.e., notes, tape recordings and photographs. The underlying rationale was the same as in 1969: serve the public interest by protecting reporters in their news gathering efforts. See Senate Jud. Comm. Minutes, A.B. 381, May 1, 1975."

NRS 49.385 provides for a waiver of certain statutory privileges by voluntary disclosure of confidential matters:

1. A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter.
2. This section does not apply if the disclosure is:
  - (a) Itself a privileged communication; or
  - (b) Made to an interpreter employed merely to facilitate communications.

This statute does not apply, however, to the press shield law because the statute concerns confidential communications and the press shield law in NRS 49.275 protects both published and unpublished materials. *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 993 P.2d 50 (2000).

### **B. State constitutional provision**

Nevada's Constitution does not have an express shield law provision. Article I, Section 9 of the Nevada Constitution provides the following:

Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for libels, the truth may be given in evidence to the Jury; and if it shall appear to the Jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted or exonerated.

It does not appear that the Nevada Supreme Court has considered a press shield law question under the state constitution.

### **C. Federal constitutional provision**

It does not appear that the Nevada Supreme Court has considered the issue of whether there is a reporter's privilege based on the First Amendment to the U.S. Constitution. In fact, it seems unlikely that the court will do so in light of the statutory privilege. *See Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 n.7 (2000) ("We need not address Puit's first amendment argument. *See Director, Dep't Prisons v. Arndt*, 98 Nev. 84, 86, 640 P.2d 1318, 1320 (1982) (noting that 'it is well settled that this court will not address constitutional issues unless they are requisite to the disposition of a case.').").

The Ninth Circuit Court of Appeals has concluded that there is a qualified privilege under the First Amendment. *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). The federal district courts in Nevada have followed the Ninth Circuit's precedent by recognizing the existence of a qualified privilege under the First Amendment. *See Newton v. National Broadcasting Co.*, 109 F.R.D. 522, 526-27 (D.Nev. 1985). The constitutional privilege, however, is not as protective as the statutory privilege provided for by NRS 49.275. In *Newton*, the federal district court concluded that a television reporter would have been required to disclose information concerning his confidential sources under the qualified First Amendment privilege against disclosure of confidential sources. *Id.* at 527. The court applied a balancing test and found that disclosure was mandated under the constitutional privilege because the case was a libel action where the plaintiff was a public figure who had to meet the "actual malice" standard enunciated in *New York Times v. Sullivan*. The court found it significant that the journalist claiming the privilege was a party defendant and that the plaintiff had effectively exhausted alternative means of learning the identity of the confidential sources. *Id.* Nonetheless, the court found the information to be privileged under NRS 49.275 and recognized that "Nevada's press shield law provides the broadest protection to news media sources of any State shield law enacted in the United States." *Id.* at 529. In *re Stratosphere Corp. Securities Litigation*, 183 F.R.D. 684, 44 Fed.R.Serv.3d 1359 (D.Nev., 1999), in discussing *Shoen* at 686 the Magistrate noted: "Although this Court is not bound to follow Nevada law in determining whether a reporter should be compelled to disclose his or her sources, when dealing with purely federal issues of law, it should not ignore Nevada's public policy, as expressed in its statute, of providing reporters protection from divulging their sources. In writing his article for Nevada publication, clearly Mr. Di Rocco had a reasonable expectation that he would be protected by Nevada's media privilege law." *Cf. American Civil Liberties Union of Nevada v. City of Las Vegas*, 13 F.Supp.2d 1064 (D.Nev. 1998).

### **D. Other sources**

There appear to be no other sources of a reporter's privilege within the State of Nevada.

## **III. Scope of protection**

### **A. Generally**

Courts and commentators have generally recognized the fact that Nevada's shield law offers the broadest protection to news media sources of any state shield law enacted in the United States.

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

NRS 49.275 provides for an absolute privilege, for both published and unpublished information. The news shield statute is not limited to confidential sources, but includes any source. The statute protects both the information obtained and the source of the information. However, the Nevada Supreme Court has stated, in dicta, that "although the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations, e.g., when a defendant's countervailing constitutional rights are at issue, in which the news shield statute might have to yield so that justice may be served." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000).

## **C. Type of case**

### **1. Civil**

NRS 49.275 does not provide for a different standard for civil and criminal cases. The statute specifically refers to administrative matters, legislative hearings, and court proceedings. As noted above, in *Diaz v. Eighth Judicial District Court*, the Nevada Supreme Court stated that a different standard might be applied in a criminal case where a defendant's constitutional rights were at issue.

### **2. Criminal**

It does not appear that any written opinions have been published in criminal cases concerning application of the press shield law. As noted above, in *Diaz v. Eighth Judicial District Court*, the Nevada Supreme Court stated that a different standard might be applied in a criminal case where a defendant's constitutional rights were at issue. A subpoena issued by the prosecution, however, should be quashed under the statute because the State does not have any constitutional rights which would defeat application of the statute.

### **3. Grand jury**

NRS 49.275 specifies that the privilege is applicable to grand jury proceedings. It should not be more difficult to defend against issuance of a subpoena in this context.

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

NRS 49.275 specifically protects the identity of a source. It also protects information that implicitly identifies a source of information.

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

NRS 49.275 protects both confidential and non-confidential information.

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

NRS 49.275 protects both published and unpublished materials.

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

NRS 49.275 protects reporters who are eyewitnesses so long as they are acting as a reporter at the time of the observation. The statute "extends protection only to the journalist's newsgathering and dissemination activities within the journalist's professional capacity. Nevada's news shield statute provides no protection for information gathered in other capacities." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000).

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

NRS 49.275 does not make any distinction between cases where the media is a party and where it is not. The Nevada Supreme Court, however, has held that "once a media litigant has invoked the protection of the news shield statute to resist discovery, the defendant may not later rely on the privileged information as a defense." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000).

## **I. Defamation actions**

NRS 49.275 does not distinguish between libel cases and other cases. The Nevada Supreme Court, however, has held that "once a media litigant has invoked the protection of the news shield statute to resist discovery, the defendant may not later rely on the privileged information as a defense." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000). It has also held that "to the extent that a plaintiff in a defamation action is required to prove that a media litigant either knew that the published information was false or acted in reckless disregard of the truth, an assertion of the shield statute may result in discovery sanctions." *Id.* at n.6.

In *Laxalt v. McClatchy*, 116 F.R.D. 438 (D.Nev. 1987), the court explained that there was no exception to the privilege for defamation cases. *Id.* at 452. It also explained the consequences of invocation of the statute: "This is not to say, however, that all is bitter for the plaintiff. For if the defendants are allowed to invoke the Nevada reporter's privilege regarding their confidential sources, they must do so absolutely. Therefore, if the defendants choose to prove their defense through witnesses whose identities are protected by this order, the defendants will be deemed to have waived the privilege. If the defendants choose to call the confidential sources as witnesses at trial, the plaintiff will be able to probe in depth as to their identity and credibility on cross-examination. In addition, if [a reporter] is questioned at trial regarding the sources for his articles, he may not respond that the information came from a 'reliable or confidential source.' Instead, if [the reporter] chooses to rely on the privilege at trial, he must do so absolutely. His responses to such a question would therefore have to be that he relies on his privilege as a reporter under Nevada law, and that he refuses to answer the question on that basis." *Id.* (citations omitted).

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

NRS 49.275 covers reporters, former reporters, and editorial employees of newspapers, periodicals and press associations. It all applies to employees of radio and television stations. The statute does not specifically define these terms.

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

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

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

NRS 49.275 does not define "reporter" and there appears to be no other statute defining this term.

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

NRS 49.275 does not define "editorial employee" and there appears to be no other statute defining this term.

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

NRS 49.275 does not define "news" and there appears to be no other statute defining this term.

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

NRS 49.275 does not specifically reference photojournalists.

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

NRS 49.275 specifies that the privilege is applicable to reporters, former reporters, and editorial employees of newspapers, periodicals and press associations, and employees of any radio or television station. It does not provide any definitions for these terms. The privilege has been found applicable to a newspaper (as opposed to a reporter from a newspaper) and its publisher. *Las Vegas Sun, Inc. v. Schwartz*, 104 Nev. 508, 515 n.7, 761 P.2d 849, 854 n.7 (1988), *overruled on other grounds*, *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000) ("We are satisfied that the legislature meant to include newspaper publishers in its definition of 'editorial employees.'").

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

The press shield law does not apply by statutory language to non-traditional news gatherers such as authors and academic researchers. The statute is not limited to professional or paid reporters.

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

The plain language of NRS 49.275 suggests that the privilege belongs to the reporter. It does not appear that there are any cases addressing whether the privilege may also be asserted by the source or the employer.

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

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

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

Issuance of subpoenas in criminal cases is governed by Chapter 174 of the Nevada Revised Statutes.

NRS 174.305 provides that a subpoena must be issued by the clerk under the seal of the court. It must state the name of the court and the title, if any, of the proceeding, and must command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party requesting it, who shall fill in the blanks before it is served.

NRS 174.315 provides that a prosecuting attorney may issue subpoenas subscribed by him for witnesses within the state, in support of the prosecution or whom the grand jury may direct to appear before it, upon any investigation pending before the grand jury. The prosecuting attorney or the attorney for the defendant may issue subpoenas subscribed by the issuer for: (a) Witnesses within the state to appear before the court at which an indictment, information or criminal complaint is to be tried; (b) Witnesses already subpoenaed who are required to reappear in any justice's court at any time the court is to reconvene in the same case within 60 days, and the time may be extended beyond 60 days upon good cause being shown for its extension. Witnesses, whether within or outside of the state, may accept delivery of a subpoena in lieu of service, by a written or oral promise to appear given by the witness. Any person who accepts an oral promise to appear shall: (a) Identify himself to the witness by name and occupation; (b) Make a written notation of the date when the oral promise to appear was given and the information given by the person making the oral promise to appear identifying him as the witness subpoenaed; and (c) Execute a certificate of service containing the information set forth in paragraphs (a) and (b). The prosecuting attorney shall orally inform any witness subpoenaed for a grand jury proceeding of the general nature of the grand jury's inquiry before the witness testifies. Such a statement must be included in the transcript of the proceedings.

NRS 174.335 provides that a subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time before the trial or before the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

NRS 174.345 provides that a subpoena may be served by a peace officer or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena must be made by delivering a copy thereof to the person named. A subpoena to attend a misdemeanor trial may be served by mailing the subpoena to the person to be served by registered or certified mail, return receipt requested from that person, in a sealed postpaid envelope, addressed to the person's last known address, not less than 10 days before the trial which the subpoena commands him to attend. If a subpoena is served by mail, a certificate of the mailing must be filed with the court within 2 days after the subpoena is mailed.

NRS 174.365 provides that a subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Nevada.

NRS 174.375 provides that an order to take a deposition authorizes the issuance by the clerk of the court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein. A resident of this state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of this state may be required to attend only in the county where he is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.

NRS 174.385 provides that failure by any person without adequate excuse to obey a subpoena of a court or a prosecuting attorney served upon him or, in the case of a subpoena issued by a prosecuting attorney, delivered to him and accepted, shall be deemed a contempt of the court from which the subpoena issued or, in the case of a subpoena issued by a prosecuting attorney, of the court in which the investigation is pending or the indictment, information or complaint is to be tried.

Issuance of a subpoena in a civil case is governed by Nevada Rule of Civil Procedure 45:

Rule 45. (a) Form; Issuance.

(1) Every subpoena shall

- (A) state the name of the court from which it is issued; and
- (B) state the title of the action, the name of the court in which it is pending, and its civil case number; and
- (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
- (D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district in which the action is pending. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the action is pending. If the action is pending out of the state, a subpoena may be issued by the clerk of any district court, and the court in the district in which the deposition is being taken or in which the production or inspection is to take place shall, for the purposes of these rules, be considered the court in which the action is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of the court if the attorney is authorized to practice therein.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the State or an officer or agency thereof, fees and mileage need not be tendered. Prior notice, not less than 15 days, of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the state.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoena.

(1) 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 and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, 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, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

There appear to be no special rules concerning service of subpoenas to members of the news media.

## **2. Deposit of security**

NRS 50.225 provides that "for attending the courts of this state in any criminal case, or civil suit or proceeding before a court of record, master, commissioner, justice of the peace, or before the grand jury, in obedience to a subpoena, each witness is entitled: (a) to be paid a fee of \$25 for each day's attendance, including Sundays and holidays ... ; to be paid for attending a court of the county in which he resides at the rate of 19 cents a mile for each mile necessarily and actually traveled from and returning to the place of residence by the shortest and most practical route. Additional amounts may be provided for by a board of county commissioners. If a witness is from without the county, or, being a resident of another state, voluntarily appears as a witness at the request of the attorney general or the district attorney and the board of county commissioners of the county in which the court is held, he is entitled to reimbursement for the actual and necessary expenses for going to and returning from the

place where the court is held. He is also entitled to receive the same allowances for subsistence and lodging as are provided for state officers and employees generally. Any person in attendance at a trial who is sworn as a witness is entitled to the fees, the per diem allowance, if any, travel expenses and any other reimbursement set forth in this section, irrespective of the service of a subpoena. A person is not obligated to appear in a civil action or proceeding unless he has been paid an amount equal to 1 day's fees, the per diem allowance provided by the board pursuant to subsection 2, if any, and the travel expenses reimbursable pursuant to this section.

*N.B.* - AB No. 323 (May 30, 2007), effective June 1, 2008, revises the amount paid to a witness who attends a proceeding before a court or grand jury from 19 cents for each mile necessarily and actually traveled to and from his place of residence to the standard mileage reimbursement rate for which a deduction is allowed for the purposes of federal income tax for each mile so traveled. (NRS 50.225)

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

The privilege does not mandate that the subpoenaing party make a sworn statement in order to procure the reporter's testimony or materials. The discovery commissioner or district court judge may nonetheless require an affidavit or other evidence in support of a motion to compel compliance with a subpoena.

### **4. Judicial approval**

There is no requirement that a judge or magistrate approve a subpoena before a party may serve it.

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

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

## **B. How to Quash**

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

Most objections to subpoenas to the media can be resolved by a simple telephone call. It appears that most attorneys in Nevada are unfamiliar with the press shield law. Reference should be made to NRS 49.275 and *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000). If the attorney agrees to withdraw the subpoena, a letter confirming this fact should be sent. Most local court rules require that the parties attempt to resolve discovery matters by contacting the other party either in person or by telephone prior to filing a motion to quash or a motion to compel.

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

In criminal cases a motion to quash should be filed. In civil cases service of an objection is generally sufficient, although it is not uncommon for a motion to quash to be filed.

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

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

A motion to quash should be filed in the district court in criminal cases and with the discovery commissioner in civil cases. Objections to the discovery commissioner's report and recommendation should be filed in the district court.

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

A media representative should not wait for a motion to compel before filing a motion to quash in a criminal cases. In civil cases it is generally acceptable to wait for a motion to compel, although this is a matter of preference and it is acceptable to file a motion to quash prior to the filing of a motion to compel.

#### **c. Timing**

The time for filing a motion to quash may vary by local rule. Generally, the motion should be filed prior to the date and time listed on the subpoena. If the subpoena is for trial testimony, the motion to quash should be filed as

soon as possible to allow for time to file a petition for extraordinary relief with the Nevada Supreme Court in the event that the motion to quash is denied.

#### **d. Language**

Reference should be made to the First Amendment, NRS 49.275 and *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000).

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

A mere recitation of the statute alone is insufficient to claim the privilege. *Las Vegas Sun v. Schwartz*, 104 Nev. 508, 514, 761 P.2d 849, 854 (1988), overruled on other grounds, *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000). Any objection to a subpoena, motion to quash or other motion should be accompanied by a sworn affidavit, identifying the news gatherer and attesting that the information was obtained or produced during the news gathering process in that person's professional capacity." *Id.* at 515, 761 P.2d at 854.

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

#### **a. Necessity**

The law does not direct a court to conduct an *in camera* review of materials or interview the reporter prior to deciding a motion to quash.

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

There is no automatic stay pending appeal in the event of an adverse ruling in cases where a reporter or publisher consents to an *in camera* review.

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

There are no published decisions concerning the consequences to a reporter or publisher who refuses to consent to an *in camera* review.

### **5. Briefing schedule**

The briefing schedule varies by local rule, but a response is generally due 10 days after the filing of a motion. Motions may be heard on shortened time if ordered by the discovery commissioner or district court judge.

### **6. Amicus briefs**

Nevada courts routinely accept amicus briefs in the district courts and Nevada Supreme Court. Kent Lauer of the Nevada Press Association should be contacted at 702-885-0866. His fax number is 702-885-8233 and address is PO Box 1030, Carson City, NV 89702

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

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

NRS 49.275 provides for an absolute privilege, for both published and unpublished information. The news shield statute is not limited to confidential sources, but includes any source. The statute protects both the information obtained and the source of the information. However, the Nevada Supreme Court has stated, in dicta, that "although the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations, e.g., when a defendant's countervailing constitutional rights are at issue, in which the news shield statute might have to yield so that justice may be served." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000). It has not issued any opinions concerning a conflict between a criminal defendant's constitutional rights and the rights of the media under NRS 49.275. It is therefore unclear as to who would bear the burden and what the standard of proof would be in such a case.

### **B. Elements**

A mere recitation of the statute alone is insufficient to claim the privilege. *Las Vegas Sun v. Schwartz*, 104 Nev. 508, 514, 761 P.2d 849, 854 (1988), *overruled on other grounds*, *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000). Any objection to a subpoena, motion to quash or other motion should be accompanied by a sworn affidavit, identifying the news gatherer and attesting that the information was obtained or produced during the news gathering process in that person's professional capacity. *Id.* at 515, 761 P.2d at 854.

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

In most cases, the relevance of the material or testimony that has been subpoenaed should be irrelevant. The privilege is absolute and does not rest on materiality. As noted above, however, the Nevada Supreme Court has noted in dicta that there may be situations in which the privilege is defeated, such as in a case where a criminal defendant's constitutional rights would be violated if the privilege were recognized. In such a case, it is likely that the materiality of the testimony would be considered.

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

In most cases, the unavailability of the material from other sources should be irrelevant. The privilege is absolute and does not rest on unavailability from other sources. As noted above, however, the Nevada Supreme Court has noted in dicta that there may be situations in which the privilege is defeated, such as in a case where a criminal defendant's constitutional rights would be violated if the privilege were recognized. In such a case, it is likely that the unavailability of the of the testimony from other sources would be considered. It should also be noted that in *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000), a three-judge plurality of the Nevada Supreme Court gave extensive analysis of the fact that the information sought was available from other sources. Although it appears that such discussion was not necessary for resolution of that matter, it may be indicative of the Court's interest in related factual issues and its willingness to intervene.

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

In light of the absolute nature of the privilege, Nevada cases have not discussed any standards for exhaustion.

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

In light of the absolute nature of the privilege, Nevada cases have not discussed any standards for exhaustion.

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

There is no statutory exception to the privilege for a source that was a witness to a crime. However, the Nevada Supreme Court has stated, in dicta, that "although the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations, e.g., when a defendant's countervailing constitutional rights are at issue, in which the news shield statute might have to yield so that justice may be served." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000). It may be the case that if a source witnessed a crime or was a participant in a crime, and a criminal defendant required information about the source in order to defend himself against criminal charges, the Nevada courts might find an exception to the privilege. Such an argument should not prevail in cases where the prosecution seeks disclosure as the State has no constitutional rights that would prevail over the statutory privilege. There are no cases directly addressing this issue.

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

The terms of the statute do not provide for any judicial balancing of interests in determining whether to quash the subpoena. The Nevada Supreme Court has stated, in dicta, that "although the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations, e.g., when a defendant's countervailing constitutional rights are at issue, in which the news shield statute might have to yield so that justice may be served." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000). In such a case, there may be a judicial balancing of interests.

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

The discovery commissioner and district court judges are generally entitled to make a determination as to whether a subpoena is overly broad or unduly burdensome.

## 5. Threat to human life

There are no statutes or case authority addressing whether a judge is required to weigh whether the mattered subpoenaed involves a threat to human life.

## 6. Material is not cumulative

In light of the absolute nature of the privilege, Nevada cases have not discussed considerations of whether the material would be cumulative.

## 7. Civil/criminal rules of procedure

The rules of procedure provide that a motion to quash may be filed to contest frivolous or unduly burdensome subpoenas. Objections to a subpoena may be made to the issuing party in civil cases. Sanctions may also be sought, although they are granted far more often in civil cases than in criminal cases.

## 8. Other elements

There are no other elements that must be met before the privilege can be overcome.

### C. Waiver or limits to testimony

The privilege is not waived by publication of the information, but will be deemed waived if the journalist relies on confidential information in defending against a libel action. The statute must be invoked in its entirety and the journalist will generally not be permitted to claim that he relied upon confidential sources. The Nevada Supreme Court, however, has held that "once a media litigant has invoked the protection of the news shield statute to resist discovery, the defendant may not later rely on the privileged information as a defense." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000).

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

In *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000), the Nevada Supreme Court recognized that the privilege belongs to the reporter. The privilege covers both published and unpublished information, so it will not be waived based upon publication of otherwise confidential information.

#### 2. Elements of waiver

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

Disclosure of a confidential source's name within the context of a published article will not be sufficient to waive the privilege. Disclosure of a confidential source's name to an editor or lawyer will not be sufficient to waive the privilege.

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

Disclosure of a non-confidential source's name will not be sufficient for waiver of the privilege.

##### c. Partial disclosure of information

If the journalist discloses some information from the source, the privilege will not be deemed waived. A journalist would likely not be permitted to provide partial information in defending a defamation or libel action and then claim the privilege for other information about the source. The statute must be invoked in its entirety.

##### d. Other elements

Waiver may be found if the journalist attempts to defend a defamation or libel action by revealing partial information about a source. The statute must be invoked in its entirety.

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

There are no published Nevada cases addressing whether a waiver of the privilege will be found if a reporter agrees to partially testify, such as to confirm that the story is accurate and true as published.

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

### **A. Newspaper articles**

There appear to be no Nevada cases addressing whether newspaper articles are self-authenticating or who can authenticate the material. NRS 52.145 provides that "printed materials purporting to be newspapers or periodicals are presumed to be authentic."

### **B. Broadcast materials**

There appear to be no Nevada cases addressing whether tapes of broadcast materials are self-authenticating or what steps must be taken to authenticate a broadcast tape.

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

There appear to be no Nevada cases addressing whether affidavits make take the place of in-court testimony to confirm that an article was true and accurate as published.

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

Although there is no case law directly addressing the issue of non-compliance remedies, it appears that a reporter who refuses to comply with a court order to testify or produce documents could be held in civil contempt or criminal contempt. If a reporter is a party to a civil action, the court may impose discovery sanctions.

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

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

NRS 50.195 provides that "refusal to be sworn or to answer as a witness may be punished as a contempt by the court. In a civil action, if the person so refusing is a party, the court may strike any pleading on his behalf, and may enter judgment against him. A witness disobeying a subpoena in a civil action shall also forfeit to the party aggrieved the sum of \$100 and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action. A witness disobeying a subpoena issued on the part of a defendant in a criminal action shall also forfeit to the defendant the sum of \$100, which may be recovered in a civil action, unless good cause can be shown for his nonattendance."

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

There appear to be no limits for jail sentences in cases of civil contempt. It does not appear that there are any recent cases of reporters who went to jail rather than disclose the names of confidential sources or information. Likewise, it does not appear that there are any recent cases in which reporters have been threatened with jail sentences.

NRS 22.110 provides that "(1) except as otherwise provided in subsection 2, when the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. The required act must be specified in the warrant of commitment; (2) A person so imprisoned as a result of his failure or refusal to testify before a grand jury may be imprisoned in the county jail for a period not to exceed 6 months or until that grand jury is discharged, whichever is less."

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

NRS 50.205 provides that "in case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required."

NRS 22.100 provides: "Penalty for contempt 1. Upon the answer and evidence taken, the court or judge or jury, as the case may be, shall determine whether the person proceeded against is guilty of the contempt charged. 2. Except as otherwise provided in NRS 22.110 a person is found guilty of contempt, a fine may be imposed on him not exceeding \$500 or he may be imprisoned not exceeding 25 days, or both. 3. In addition to the penalties provided in subsection 2, if a person is found guilty of contempt pursuant to subsection 3 of NRS 22.010 the court may re-

quire the person to pay to the party seeking to enforce the writ, order, rule or process the reasonable expenses, including, without limitation, attorney's fees, incurred by the party as a result of the contempt."

There appear to be no recent cases in Nevada involving criminal contempt of a reporter.

### **3. Other remedies**

The Nevada Supreme Court, however, has held that "once a media litigant has invoked the protection of the news shield statute to resist discovery, the defendant may not later rely on the privileged information as a defense." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000). It has also held that "to the extent that a plaintiff in a defamation action is required to prove that a media litigant either knew that the published information was false or acted in reckless disregard of the truth, an assertion of the shield statute may result in discovery sanctions." *Id.* at n.6.

## **VIII. Appealing**

### **A. Timing**

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

An appeal may be taken only if the person appealing the order is a party to the action and the order is either final or has been certified as final pursuant to Nevada Rule of Civil Procedure 54(b). A reporter who is not a party to an action may attempt to challenge an order compelling compliance with a subpoena through a petition for a writ of prohibition or a petition for a writ of mandamus. A notice of appeal must be filed within 30 days of notice of entry of judgment in a civil case and within 30 days of a judgment of conviction in a criminal case. There appears to be no difference between appealing a discovery subpoena versus a trial subpoena.

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

A party may file a motion to expedite an appeal with the Nevada Supreme Court. There is no statute or rule which provides for an expedited appeal in cases involving news media subpoenas. A motion to stay a district court order must be made in the district court prior to the filing of a motion to stay a district court order that is filed in the Nevada Supreme Court.

### **B. Procedure**

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

Appeals from municipal court or justice court are made to district court. Objections to an order from the discovery commissioner may be made to the district court. Appeals from district court are made to the Nevada Supreme Court. Nevada does not have an intermediate appellate court.

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

A motion for stay pending appeal, or stay pending petition for extraordinary relief, will not be entertained by the Nevada Supreme Court unless a motion for stay is first made in the district court. The motion in the district court may be made orally or in writing. The motion for stay pending appeal in the Nevada Supreme Court must be made in writing. Permission to file via facsimile may be sought from the Clerk's office of the Nevada Supreme Court. A motion for stay pending appeal should be premised upon violation of the constitutional right, the statutory privilege, and a claim of irreparable harm.

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

An appeal may be taken only if the person appealing the order is a party to the action and the order is either final or has been certified as final pursuant to Nevada Rule of Civil Procedure 54(b). A reporter who is not a party to an action may attempt to challenge an order compelling compliance with a subpoena through a petition for a writ of prohibition or a petition for a writ of mandamus. A notice of appeal must be filed within 30 days of notice of entry of judgment in a civil case and within 30 days of a judgment of conviction in a criminal case. In *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 54 (2000), the court entertained a petition for a writ of man-

damus from a party to the action who challenged a district court's order quashing a subpoena to a reporter, despite the availability of an appeal, because there was "an important issue of law [which] needs clarification and public policy is served by this court's invocation of its original jurisdiction[.]"

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

Questions of statutory interpretation are subject to the Nevada Supreme Court's independent review. *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 54 (2000).

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

It does not appear that the Nevada Supreme Court has addressed any mootness issues within the context of appeals or writ proceedings concerning the press shield law.

#### **6. Relief**

A reporter's attorney should file a petition for a writ of mandamus, or in the alternative, a writ of prohibition in cases where the reporter is not a party to the action, or in cases where confidential information will be disclosed in compliance with a district court order compelling production or testimony. A motion for stay pending appeal, or stay pending petition for extraordinary relief, should be made in the district court, and if denied, should be made in the Nevada Supreme Court. The Nevada Supreme Court may dissolve a contempt citation, order the issuance of a writ, or provide any other relief which it deems appropriate under the circumstances.

### **IX. Other issues**

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

It appears that there are no published court decisions or statutes addressing newsroom searches.

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

It appears that there are no published court decisions or statutes limiting the scope of separation orders issued against reporters who are both trying to cover the trial and are on a witness list. In practice before the trial courts, a few attorneys have listed reporters on witness lists and have attempted to have the reporter excluded from the courtroom. In each case known to this author, motions to quash the subpoenas have been successful, and the reporters have not been called to testify.

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

It does not appear that the Nevada Supreme Court has addressed the issue of whether subpoenas can be issued to third parties in an attempt to discover a reporter's source.

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

It does not appear that the Nevada Supreme Court has addressed the issue of whether sources may intervene anonymously to halt disclosure of their identities. There do not appear to be any Nevada cases addressing suits by sources concerning disclosure of their identities.