

# REPORTER'S PRIVILEGE: NEW YORK

**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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This project was initially made possible by a generous grant from the Phillip L. Graham Fund.

Published by The Reporters Committee for Freedom of the Press.

Executive Director: Lucy A. Dalglish

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

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

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

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

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

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

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

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

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

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

### What is a subpoena?

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

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

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

NEW YORK

*Prepared by:*

Laura R. Handman, Esq.  
 Peter Karanjia, Esq.  
 Bryan M. Tallevi, Esq.  
 Elisa L. Krall  
 DAVIS WRIGHT TREMAINE LLP  
 1633 Broadway  
 New York, New York 10019  
 (212) 489-8230 (Telephone)  
 (212) 489-8340 (Facsimile)  
 laurahandman@dwt.com  
 peterkaranjia@dwt.com  
 bryantallevi@dwt.com

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## I. Introduction: History & Background

The New York reporters privilege, codified in Civil Rights Law § 79-h (the "Shield Law"), provides broad protection to reporters and publishers. As originally enacted, the statute only applied to materials or information given in confidence to the reporter. However, various amendments, some in response to judicial decisions, expanded the statute so that it now protects both confidential and nonconfidential information from disclosure.

The New York Shield Law is an outgrowth of the state's long history of protecting the freedom of the press and of providing "one of the most hospitable climates for the free exchange of ideas." *In re Beach v. Shanley*, 62 N.Y.2d 241, 255, 476 N.Y.S.2d 765,733 (1984) (Wachtler, J., concurring). According to one judge, the first New York case in which a reporter refused to reveal his sources dates back to 1735, when John Peter Zenger was prosecuted for publishing articles critical of the New York colonial governor. The case resulted in an acquittal. *Id.* Since that time, and particularly with the growth of the publishing industry in New York in the 19th century, the privilege has been expanded to the point that it provides "broadest possible protection" to the press.

Both Article I, § 8 of the New York State Constitution and New York Civil Rights Law § 79-h provide an absolute privilege from forced disclosure of materials obtained or received in confidence by a professional journalist or newscaster, including the identity of source. *Beach*, 62 N.Y.2d 241 (applying absolute privilege against disclosing a confidential source even though the disclosure of the materials to the reporter may itself have been a crime). The privilege applies in both criminal and civil contexts and to information passively received by a reporter.

As a result of a 1981 amendment to the Shield Law, the term "professional journalist" was expanded to include not only those working for traditional news media (newspapers, magazines, and broadcast media), but those working for any "professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public," as well. Civil Rights Law § 79-h (a) (6).

In 1988, the New York Court of Appeals, in *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 528 N.Y.S.2d 1 (1988), held that both the New York State Constitution and the First Amendment to the U.S. Constitution provide a qualified privilege from the forced disclosure of nonconfidential materials. This privilege may only be overcome by a clear and specific showing by the party seeking disclosure that the materials sought are: (a) highly material and relevant to the action; (b) critical or necessary to the maintenance of a party's claim or defense; and (c) not obtainable from any alternative source. In 1990, Civil Rights Law § 79-h was, in the wake of *O'Neill*, amended to incorporate this three-part test for nonconfidential news.

The Shield Law represents a formidable barrier to those who seek to compel the disclosure of information obtained by reporters in the course of their newsgathering activities. The *O'Neill* court, citing to the New York State Constitution and the State's early recognition of a constitutionally guaranteed free press, noted that this barrier is deliberately high:

The ability of the press freely to collect and edit news, unhampered by repeated demands for its resource materials, requires more protection than that afforded by the [CPLR]. The autonomy of the press would be jeopardized if resort to its resource materials by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes were routinely permitted. Moreover, because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a nonparty would be widespread if not restricted. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press.

*O'Neill*, 71 N.Y.2d at 526-27 (quashing subpoena seeking nonconfidential photographs) (citations omitted). New York courts thus afford the broadest possible protection to those engaged in "the sensitive role of gathering and disseminating news of public events," and they do not hesitate to quash subpoenas issued to reporters in both criminal and civil actions. *Id.* at 529 (quoting *In Re Beach v. Shanley*, 62 N.Y.2d at 256).

There are limits to the protection afforded by New York's Shield Law, however, and, as discussed below, recent decisions indicate that some courts may be more willing to order reporters' materials produced in cases where a criminal defendant's Sixth Amendment rights are at stake.

*Special thanks to Elisa Krall, who is a student at the New York University School of Law (class of '04) and a summer associate at Davis Wright Tremaine LLP, for her substantial and untiring assistance in researching and drafting the New York section of this compendium.*

## II. Authority for and source of the right

The source of the reporters privilege lies in the Shield Law itself (Civil Rights Law §79-h), Article I, § 8 of the New York State Constitution and, arguably, the First Amendment to the U.S. Constitution. *See O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 527-28, 528 N.Y.S.2d 1, 3 (1988) (recognizing qualified privilege for nonconfidential information under State Constitution and First Amendment); *In re Beach v. Shanley*, 62 N.Y.2d 241, 256, 476 N.Y.S.2d 765, 773 (1984) (Wachtler, J., concurring) (recognizing privilege against compelled disclosure of source as "a right guaranteed by the State Constitution"); *People v. Troiano*, 127 Misc.2d 738, 486 N.Y.S.2d 991 (Suffolk Co. Ct. 1985) (quashing subpoena on First Amendment grounds). *But see, Gonzales v. NBC*, 194 F.3d 29, 36 & n.6 (noting that prior decisions have expressed differing views as to whether the reporters privilege is constitutionally required or rooted in federal common law, but declining to decide the issue).

### A. Shield law statute

New York Civil Rights Law § 79-h. Special provisions relating to persons employed by, or connected with, news media.

(a) Definitions. As used in this section, the following definitions shall apply:

- (1) "Newspaper" shall mean a publication that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising or other matter regarded as of current interest, has a paid circulation and has been entered in the United States post office as second-class matter.
- (2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered in the United States post-office as second-class matter.
- (3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.
- (4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distributed news to its members.
- (5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.
- (6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.
- (7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.
- (8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(b) Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose news obtained or received in confidence or the identity of the source of such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.

(c) Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing. The provisions of this subdivision shall not affect the availability, under appropriate circumstances, of sanctions under section thirty-one hundred twenty-six of the civil practice law and rules.

(d) Any information obtained in violation of the provisions of this section shall be inadmissible in any action or proceeding or hearing before any agency.

(e) No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.

(f) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.

(g) Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subdivision (b) or (c) of this section waives such exemption if such person voluntarily discloses or consents to the disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section.

#### *Legislative History*

The bill (L. 1970, c. 615, § 2) containing what became Civil Rights Law § 79-h was signed into law, effective May 12, 1970, by Governor Rockefeller. Several news publishers, broadcasters and other media organizations expressed support for the bill, including the State Reporters Association, the Association of Managing Editors, the New York Society of Newspaper Editors, the American Newspaper Publishers Association, and the Magazine Publishers Association. Columbia Broadcasting System, Inc. (CBS) submitted perhaps the most detailed com-

ments in favor of the bill, which included its amicus brief in *In the Matter of Caldwell*, 311 F.Supp. 358 (N.D. Ca. 1970), a California case decided in April 1970. CBS's amicus brief included affidavits from such luminaries as Walter Cronkite, Mike Wallace, and Dan Rather. At the time, several of the bill's supporters expressed the concern that the bill was not broad enough and that reporters' resource materials, in addition to the identities of confidential sources, should be protected.

While the New York Attorney General, Louis J. Lefkowitz, had no objections to the bill, the New York Civil Liberties Union opposed it, citing its concern that a blanket privilege could "lead to instances in which the reporter, if for no other reason than his own convenience, can defeat a public or private right of access to due process." Governor's Bill Jacket, L 1970, ch. 615, p. 10.

In his memorandum approving the bill, Governor Rockefeller stated:

This "Freedom of Information Bill for Newsmen" will make New York State — the Nation's principal center of news gathering and dissemination — the only state that clearly protects the public's right to know and the First Amendment rights of all legitimate newspapermen, reporters and television and radio broadcasters."

The bill protects journalists and newscasters from charges of contempt in any proceeding brought under State law for refusing or failing to disclose information or sources of information obtained in the course of gathering news for publication.

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Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.

The threat to a newsmen of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information. That this real and imminent threat has been demonstrated by the statements of several prominent reporters that valuable sources of information have been cut off because of recent attempts by the Federal government to require the disclosure of information obtained by reporters in confidence.

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At the present time, fifteen states have enacted legislation extending the testimonial privilege to newsmen. This measure affords a stronger safeguard of the free channels of news communication than most existing legislation, by protecting newsmen from being compelled to disclose the information they gather, as well as the identity of their informants.

Memorandum of Governor Nelson A. Rockefeller, Governor's Bill Jacket, L 1970, ch. 615, p. 91-92.

As originally enacted in 1970, the Shield Law only protected from disclosure information obtained by a professional journalist "under the cloak of confidentiality," and it only applied to professional journalists employed by traditional media outlets, such as newspapers, magazines and broadcast media. In addition, the original statute made no mention whether grand juries were included among the "other bodies" precluded from using their contempt powers against journalists. In 1975, Civil Rights Law § 79-h was, with the support of the New York Attorney General, the New York Civil Liberties Union (reversing its former position) and others, amended to make clear that the statute prohibited grand juries from seeking to hold reporters in contempt for failing to disclose information obtained in confidence.

#### *The 1981 Amendment*

In 1981, the statute was again amended in response to judicial decisions that, in the words of one of the sponsors of the bill containing the amendments, failed "to follow the letter or even the spirit of the existing law." Memorandum of Assemblyman Steven Sanders, Governor's Bill Jacket, L 1981, ch. 468, p. 1 ("Sanders Memorandum"). This was an apparent reference to the decision in *People v. LeGrand*, 67 A.D.2d 446, 415 N.Y.S.2d 252 (2d Dep't 1979), in which a criminal defendant succeeded in obtaining the notes of an author who was writing an investigative book on a notorious crime family to be published by a subsidiary of Harper & Row, Inc. The *LeGrand* court

reasoned that the Shield Law did not extend to "authors," despite the fact that the writer in question previously worked for national and local broadcasters and had written, produced and directed numerous documentary films and news broadcasts. *Id.* at 448. *See Sanders Memorandum* at 2 ("But the highly absurd situation of Mr. Smith who writes news stories for the New York Times being covered while that same Mr. Smith six months later leaving the Times and beginning work on an investigative book of non-fiction intended for sale to a Harper & Row is *not* covered, is corrected in this bill. Thus the new bill will protect the journalistic process wherever that process is being professionally undertaken.")

The purpose of the amendment was to fill the "gaps and loopholes not perceived and not intended in the original legislation, such inadequacies that have allowed the courts to pierce the Shield Law time after time, leaving it in a state of legal impotency, with defense attorneys engaging in frequent and increasingly popular fishing expeditions for reporters' notes, and with judges becoming ever more creative in finding limitless reasons to violate the statute and ignore the intent of the Legislature in its 1970 adoption of 79-h." *Sanders Memorandum* at 1. This amendment to the Shield Law, however, was not without its detractors. Despite some opposition, the bill was passed and signed into law.

The 1981 amendment broadened the definitions of the terms "news" and "professional journalist" in the statute, so that all persons "professionally engaged in a journalistic capacity" could claim its protection, including freelance journalists. *Sanders Memorandum* at 2. Accordingly, as of 1981, the Shield Law protects traditional, mainstream journalists and media entities, as well as those working for any "other professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public." Civil Rights Law § 79-h(a)(6), (b), (c).

#### *The 1990 Amendment*

In 1988, the New York Court of Appeals recognized a constitutional privilege, under both Article I, § 8 of the New York State Constitution and under the First Amendment, for nonconfidential information gathered by reporters. *See O'Neill*, 71 N.Y.2d 521 (privilege extends to nonconfidential photographs sought in a civil action). The decision in *O'Neill*, however, left open the question whether the qualified privilege would apply in the criminal context, and it came less than a year after the same court held that the Shield Law, as then written, did not protect from disclosure to a grand jury nonconfidential outtakes of an interview conducted of a suspect in a homicide investigation. *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 518 N.Y.S.2d 595 (1987). *See People v. Korkala*, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984) (nonconfidential outtakes ordered produced for *in camera* inspection).

In the wake of *O'Neill* and *Knight-Ridder*, the Legislature again amended Civil Rights Law § 79-h (effective November 1, 1990) to settle conflicting interpretations of the Shield Law. The 1990 amendment extended the qualified privilege to nonconfidential information obtained by reporters in the course of newsgathering and made clear that the privilege applies in both criminal and civil proceedings. The amendment codified the three-part test enunciated in *O'Neill*, which provides that the qualified privilege can only be overcome by a "clear and specific" showing by the party seeking to discover a reporter's resource materials that the materials sought are: (a) highly material and relevant; (b) critical or necessary to the maintenance of a party's claim or defense; and (c) not obtainable from any alternative source.

Other changes to Civil Rights Law § 79-h included provisions requiring that an order overcoming the qualified privilege could be no broader than necessary, and the order must be supported by clear and specific findings made after a hearing. Civil Rights Law §79-h (c). In addition, subsection (g) was also added to the statute, which provides that the privilege for both confidential and nonconfidential information may be waived by voluntary disclosure to a non-journalist of the specific information sought.

While the media supported the 1990 amendments, the New York Defenders Association, Inc. opposed extending the qualified privilege to nonconfidential news on the grounds that it conflicted with criminal defendants' Sixth Amendment rights and gave the press alone the power to decide whether and when to disclose information relevant to prosecutors and criminal defendants. Governor's Bill Jacket, L 1990, ch. 33 (pages not numbered). In order to address these concerns, the Defenders Association proposed that the privilege be limited to civil proceedings only, a position advocated by state Senator Gold and others in the floor debates over the bill. New York State

Senate Debates, 1990, ch. 33 at p. 1834-35, 1849-50. However, Governor Cuomo signed the bill into law on March 23, 1990, stating:

Significantly, this qualified privilege will apply in both civil and criminal cases. Indeed, the need for protection of nonconfidential information and sources is especially strong in criminal cases where journalists are all too often drawn into the criminal justice system merely because they have reported on a crime.

In applying this standard to criminal proceedings, the bill does not override the right to a fair trial guaranteed to defendants in criminal proceedings by the United States and New York State Constitution. To the contrary, the bill strikes an appropriate balance between the principle of a free press embodied in the First Amendment and a defendant's right to a fair trial.

Memorandum of Governor Mario Cuomo filed with Assembly Bill No. 3226-B, Governor's Bill Jacket, 1990 ch. 33.

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

The New York State Constitution does not contain an express Shield Law provision. However, New York courts have recognized that both the State Constitution's Article I, § 8 guarantee of a free press and the First Amendment provide at least a qualified privilege against compelled disclosure of both confidential and nonconfidential material by a reporter. In *O'Neill*, 71 N.Y.2d at 524, 527-28, the Court of Appeals held that both Article I, § 8 of the New York Constitution and the First Amendment "provide a reporter's privilege which extends to confidential and nonconfidential materials and which, albeit qualified, is triggered where the materials sought for disclosure — the photographs here — was prepared or collected in the course of newsgathering." The court further stated, "[W]e have no difficulty in concluding that the guarantee of a free press in article I, § 8 of the New York Constitution independently mandates the protection afforded by the qualified privilege to prevent undue diversion of journalistic effort and disruption of press functions." *Id.*

The Court of Appeals also noted that the protection afforded the press under the New York State Constitution is often broader than the minimum required by the First Amendment, stating that Article I, § 8 of the state constitution "assures, in affirmative terms, the right of our citizens to '*freely speak, write and publish,*' and prohibits the use of official authority which acts to '*restrain or abridge* the liberty of speech or of the press'." *Id.* at 529 n.3 (emphasis in original).

The State Constitutional protection was also recognized in *Beach*, 62 N.Y.2d at 251-52, where the Court of Appeals held that the Shield Law protects journalists from compelled disclosure of their sources, even when the revelation of the information to the reporter may itself be a crime. In his concurrence in that case, Judge Wachtler noted that the protection from compelled disclosure is not merely statutory, stating: "In my view, therefore, protection from contempt for refusal to disclose a source is not merely a privilege granted to the press by the Legislature, but is essential to the type of freedom of expression traditionally expected in this State and should be recognized as a right guaranteed by the State Constitution." *Id.* at 256 (Wachtler, J., concurring).

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

Even before the Shield Law was amended in 1990 to incorporate a qualified privilege for nonconfidential news, the Court of Appeals in *O'Neill* recognized a reporter's qualified privilege under the First Amendment and interpreted that privilege as consistent with the three-pronged balancing test articulated by the Second Circuit Court of Appeals in *United States v. Burke*, 700 F.2d 70 (2d Cir.1983), *cert denied*, 464 U.S. 816 (1983). *See O'Neill*, 71 N.Y.2d 521 at 527,528 (noting that "confidentiality or the lack thereof has little, if anything, to do with the burdens on the time and resources of the press that would inevitably result from discovery without special restrictions."). In *People v. Korkala*, a 1984 case which rejected the notion that the 1981 amendment to the Shield Law extended the statute to nonconfidential news, the court nevertheless recognized that "there is the qualified privilege accorded to the newsman which is founded directly upon the free speech, free press guarantees of the First Amendment," and cautioned that compelling disclosure even of a reporter's nonconfidential resource material can "have a chilling effect upon his functioning as a reporter and upon the flow of information to the general public." *Korkala*, 99 A.D.2d at 166-167 (1st Dep't 1984) (internal citations omitted).

More recently, however, in *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999), the Second Circuit indicated that the issue of whether the privilege is rooted in the First Amendment or federal common law is unresolved. The *Gonzales* court limited the holding of *Burke* and determined that when the materials are nonconfidential, federal law offers less protection to a journalist than the three-part test articulated in *Burke*, which should only be applied to confidential materials. Indeed, the *Gonzales* court held that the privilege for nonconfidential material is overcome if the litigant can show that the materials are of likely relevance to a significant issue in the case and are not reasonably obtainable from another reliable source. *Gonzales*, 194 F.3d at 36. Interestingly, while citing past second circuit authority suggesting a constitutional basis for the privilege, the *Gonzales* court declined to rule on whether this privilege derived from federal common law or the Constitution, indicating that the issue would have to be resolved in the event that the federal privilege were restricted or abrogated by Congressional action. *Id.* at n.6 (citing *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987)). In that event, if the privilege were constitutionally derived, the restrictions would be struck down; if derived from federal common law, Congress could modify the privilege.

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

In *Gonzales*, the Second Circuit indicated that the source of the journalists' privilege may be federal common law, instead of the First Amendment—a prospect that, should Congress choose to act, would affect the federal privilege:

Previous decisions of our court have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law. Compare *Baker*, 470 F.2d at 781 (reasoning that "absent a federal statute to provide specific instructions, courts which must attempt to divine the contours of nonstatutory federal law governing the compelled disclosure of confidential journalistic sources must rely on both judicial precedent and well-informed judgment as to the proper federal public policy to be followed in each case") with *Von Bulow*, 811 F.2d at 142 (reasoning that "the process of newsgathering is a protected right under the First Amendment, albeit a qualified one," and that "this qualified right...results in the journalist's privilege"). Until Congress legislates to modify the privilege or do away with it, however, we need not decide whether the privilege is founded in the Constitution.

*Id.* at n.6.

In *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006), the Second Circuit declined to offer further guidance on the source of the journalists' privilege, stating "we see no need to add a detailed analysis of our precedents." *Id.* at 173.

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

#### **A. Generally**

New York has "long provided one of the most hospitable climates for the free exchange of ideas.... It is consistent with that tradition for New York to provide broad protections, often broader than those provided elsewhere, to those engaged in publishing and particularly to those performing the sensitive role of gathering and disseminating news of public events." *In Re Beach v. Shanley*, 62 N.Y.2d 241 at 255, 476 N.Y.S.2d 765, 773 (1984) (Wachtler, J., concurring).

New York's Shield Law provides an absolute privilege with respect to confidential information, and a qualified privilege for nonconfidential information. The privileges apply equally in both the civil and criminal context, and in cases where the reporter is party to the litigation. However, in criminal cases, where the reporter's privilege frequently conflicts with a defendant's Sixth Amendment rights, courts appear more willing to find that the privilege as to non-confidential information has been overcome. Similarly, while the Shield Law protects journalists in defamation suits in which they (or their employers') are defendants, courts will often prevent the reporter from using information withheld on the basis of the privilege in his or her defense.

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

Subsection (b) of Civil Rights Law §79-h provides an absolute privilege with respect to any information, including the identity of a source, conveyed to a reporter in confidence. The privilege applies with equal force in criminal and civil actions and in responding to grand jury subpoenas. *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 518 N.Y.S.2d 595 (1987) (criminal investigation); *Beach*, 62 N.Y.2d 241 (grand jury subpoena). See *Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 652 N.Y.S.2d 833 (3d Dep't 1997) (reporters have unqualified protection from having to divulge confidential information and qualified privilege for nonconfidential information). A reporter may invoke the privilege regardless of whether he or she receives the information "passively" or receives it as a result of newsgathering efforts. See Civil Rights Law § 79-h(b), (c); *In re WBAI-FM*, 42 A.D.2d 5, 344 N.Y.S.2d 393 (3d Dep't 1973) (Cook, J., dissenting).

Subsection (c) of the statute provides a qualified privilege for nonconfidential news, which can only be overcome by a "clear and specific" showing by the party seeking disclosure that the material sought (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. See, e.g., *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 527 (1988). See also Section VI B, below. The privilege applies with equal force to journalists' testimony and the production of materials. See *Guice-Mills v. Forbes*, 12 Misc.3d 852, 819 N.Y.S.2d 432 (Sup. Ct. N.Y. Co. 2006).

## C. Type of case

### 1. Civil

The absolute and qualified privileges provided by the Shield Law protect journalists in civil cases. See *Flynn*, 235 A.D.2d 907. The party seeking disclosure from a reporter in a civil action where the reporter is not a party faces a heavy burden in attempting to overcome the privilege. However, where a reporter is a party to the action (almost invariably a defamation suit), while courts will not compel disclosure of confidential sources, they will often preclude the reporter from relying on information validly withheld on the basis of the privilege in presenting his or her defense. See, e.g., *Sprewell v. NYP Holdings, Inc.*, 11 Misc.3d 1091(A), 819 N.Y.S.2d 851 (Sup. Ct. N.Y. Co. 2006) (precluding defendants, pursuant to CPLR 3126, from relying on undisclosed sources in defense of defamation action). (See Section III H, below.) In addition, a finding of contempt (which is specifically precluded by the Shield Law) or preclusion of evidence are not the only remedies available to a trial court to punish a party for failure to disclose relevant information. For instance, a court may strike a recalcitrant party's pleadings. However, there is some authority for the proposition that to the extent that remedies, including striking of pleadings, undermine the purpose of the Shield Law and seek to coerce journalists to reveal privileged information, they should not be available. See, e.g., *Oak Beach Inn, Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 464 N.E.2d 967, 476 N.Y.S.2d 269 (1984) (trial court could not impose sanctions through the CPLR where it could not do so under the Shield Law, but the court could limit the defendants' use of the confidential information), *cert denied*, 469 U.S. 1158 (1985).

### 2. Criminal

The New York Shield Law, on its face, applies to criminal cases. Civil Rights Law 79-h (b), (c). See *Beach*, 62 N.Y.2d at 245 ("as the statute is framed, the protection is afforded notwithstanding that the information concerns criminal activity"). In a case where the information is confidential, a criminal defendant or prosecutor cannot breach the absolute privilege of the Shield Law. See, e.g., *Id.* at 252 ("no matter how heinous the crime under investigation, the courts are not free to ignore the mandate of the Legislature and substitute the policy of their own" (internal citations omitted)); *People v Royster*, No. 5225/96 (Sup. Ct. N.Y. County, Dec. 8, 1997) (unpublished) (applying absolute privilege to quash subpoena by defendant seeking all notes on interviews with police and District Attorneys' offices; defendant failed to show overriding constitutional interest).

Where the qualified privilege for nonconfidential information is at issue, a criminal defendant or prosecutor must satisfy the same three-pronged test applied to civil litigants. For example, in *In re Ayala*, 162 Misc. 2d 108, 616 N.Y.S.2d 575 (Sup. Ct. Queens County 1994), the court granted the motion to quash a subpoena for outtakes of interview with arresting officer on grounds that defendant did not demonstrate that the outtakes were "critical" or "necessary" to the defense. The court further rejected the defendant's demand for disclosure on Sixth Amendment grounds as a "self-motivated, but understandable, grasp for favorable evidence." *Id.* at 116. In *Application of CBS*,

232 A.D.2d 291, 648 N.Y.S.2d 443 (1st Dep't 1996), the court rejected plaintiff's argument that it was entitled to nonconfidential outtakes of CBS's undercover investigation of a pharmacist because of the quasi-criminal nature of the investigation, and held that the Shield Law applies to both civil and criminal proceedings. *See, e.g., NBC v. People*, 238 A.D.2d 618, 657 N.Y.S.2d 970 (2d Dep't 1997) (ordering in camera inspection of outtakes of interview with murder defendant after three-part test satisfied); *People v. Griffin*, 1992 WL 474518, 21 Med. L. Rptr. 1030 (Sup. Ct. N.Y. County 1992); *People v. Cheche* 151 Misc.2d 15, 571 N.Y.S.2d 992 (1991) (compelling testimony from reporters concerning nonconfidential interviews with criminal defendant only after three-pronged test was satisfied); *New York ex rel Barnes v. Warden*, 47 A.D.2d 722, 365 N.Y.S.2d 17 (1st Dep't 1975).

Recent decisions, however, indicate that courts hearing criminal actions may be more willing to find that the qualified privilege has been overcome where it is a criminal defendant seeking the information and the privilege is in conflict with the defendant's Sixth Amendment right to a fair trial. For example, in *People v. Combest*, 4 N.Y.3d 341, 795 N.Y.S.2d 481 (N.Y. 2005), the Court of Appeals held that a criminal defendant satisfied the 3-part test necessary to compel the production of video recordings of his police interrogation and confession that had been recorded by a documentary film company. Indicted for murder and related charges, defendant alleged that his confession was the product of police coercion and sought from the film production company, by way of subpoena, the video footage of his confession, which he intended to introduce at trial. The court, reasoning that 79-h does not trump a criminal defendant's fair trial rights, found that the unbroadcast footage was "critical or necessary" to defendant's case and was not obtainable from another source. The Court also noted that it was concerned with the "troubling practice of the of police partnering with the media" — suggesting that 79-h may lose some of its protective force when the media becomes closely involved in law enforcement activities, such as pre-custodial interrogations. Similarly, in *Matter of Sullivan*, 167 Misc. 2d 534, 540, 635 N.Y.S.2d 437, 441 (Sup. Ct. Queens County 1995), the court denied a motion to quash a subpoena, finding that the defendant had made the clear and specific showing required by Civil Rights Law § 79-h (b). The court noted that the defendant's Sixth Amendment right to confront witnesses against him was at issue, and the reporter had chosen to be a participant in, rather than an observer of, the story (in this case by recording an interrogation). The reporter's participation, itself an "abuse of the criminal justice system [which] may encroach on the defendant's right to a fair trial," served to lessen the protection that might otherwise preclude disclosing the subpoenaed information. *Id.* Likewise, in *US v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992), a federal court, discussing the state Shield Law but applying federal law, found that newsgathering privilege was qualified by the defendant's constitutional right to fair trial and was weakened by the fact that the network trespassed on the defendant's property to film a lawful search and engaged in conduct contrary to Fourth Amendment principles. *See In re Grand Jury Subpoenas to NBC*, 178 Misc. 2d 1052, 683 N.Y.S.2d 708 (1998); *People v. Craver*, 150 Misc.2d 631, 633, 569 N.Y.S.2d 859, 860 (County Ct. Albany County 1990) (holding that testimony was "unavailable elsewhere," even though the defendant had made similar statements to police and in a letter to victims' families and stating that the "value of the testimony sought outweighs the constitutionally based privilege against disclosure.").

This apparent trend in allowing disclosure in cases where a criminal defendant's right to a fair trial is at stake can also be seen in New York federal court decisions. Previously, the Second Circuit Court of Appeals had held that there was "no legally principled reason for drawing a distinction between civil and criminal cases" with respect to the reporters privilege, and the three-part test for the qualified privilege applied regardless of whether the underlying case was civil or criminal in nature. *U.S. v. Burke*, 700 F.2d at 77. However, in *U.S. v. Cutler*, 6 F3d 67 (2d Cir. 1993), the court ordered the disclosure of nonconfidential materials where the subpoenaed reporter was witness to the crime (the interview itself violated a court order that the defendant not to speak with the press), the material were important to the defendant in making his case, and they were unavailable elsewhere. *Id.* at 73-74. In *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999), the Second Circuit explained its decision in *Cutler* and "clarified" the current standard for overcoming privilege in criminal cases where federal law is applied: "We understand *Cutler* to limit *Burke* only as to how much of a showing was needed to *overcome* the privilege when the materials at issue were sought by a criminal defendant. The limitation was meant to lower the bar of the showing required of such a defendant to obtain disclosure of reporter's materials; it resulted from our view in *Cutler* that *Burke* undervalued the needs of criminal defendants in putting on a defense." *Id.* at 34 & n3. (emphasis in original).

### 3. Grand jury

Civil Rights Law § 79-h applies, on its face, to grand jury subpoenas. *See* Civil Rights Law § 79-h (b), (c) ("nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court"). As the Court of Appeals has stated, the constitutional provision proscribing laws which suspend or impair a grand jury's investigative power was "not intended to prevent the Legislature from creating evidentiary privileges or their equivalent that have an incidental impact on investigations." *Beach*, 62 N.Y.2d at 252. Accordingly, although the Shield Law "may thwart a grand jury investigation, the statute permits a reporter to retain his or her information." *Id.*

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

With respect to confidential information, the Shield Law protects absolutely "news obtained in confidence or the identity of the source of such news." Civil Rights Law § 79-h (b). Similarly, the qualified privilege extends to "unpublished news obtained or prepared by journalist or newscaster...or the source of that news, where such news was not obtained or received in confidence." Civil Rights Law § 79-h (c).

If a confidential source's identity is disclosed (e.g., voluntarily by the source), the information received by the reporter from the source is treated as nonconfidential, and it is protected by the qualified privilege. *See People v. Lyons*, 574 N.Y.S.2d 126, 129, 151 Misc.2d 718, 722 (Buffalo County Ct. 1991) (to consider a waiver by a source as a waiver of the entire privilege would have the absurd result of granting less protection to news which was "originally confidential and entitled to an absolute privilege" than is granted to "news which from the outset was never confidential," a premise which would "result in a further intrusion upon the news media."). If a journalist discloses non-confidential information otherwise protected by 79-h to a third party, the qualified privilege is waived "with respect to the limited information shared." *Guice-Mills v. Forbes*, 12 Misc.3d 852, 819 N.Y.S.2d 432 (Sup. Ct. N.Y. Co. 2006).

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

The Shield Law grants an absolute privilege with respect to news "obtained or received in confidence or the identity of the source of such news." Civil Rights Law § 79-h (b). Notes and pre-production materials received from confidential sources are considered confidential and fall under the absolute privilege. *See Sands v. News America Pub. Inc.*, 161 A.D.2d 30, 560 N.Y.S.2d 416 (1st Dep't 1990) (pre-production, confidential notes of author of an allegedly libelous article absolutely privileged); *People v. Royster*, No. 5225/96 (Sup. Ct. N.Y. County Dec. 8, 1997) (unpublished). The reporter invoking the absolute privilege has the burden of showing that the information was gathered under an express or implied agreement of confidentiality in the course of gathering news for publication. *See In re WBAI-FM*, 42 A.D.2d 5, 344 N.Y.S.2d 393 (3d Dep't 1973); *Hennigan v. Buffalo Courier Express Co., Inc.*, 85 A.D.2d 924, 446 N.Y.S.2d 767 (4th Dep't 1981); *People v. Troiano*, 127 Misc.2d 738, 486 N.Y.S.2d 991(1985).

The qualified privilege applies to nonconfidential, unpublished news. Civil Rights Law § 79-h (c). Outtakes of interviews of nonconfidential sources are considered to be nonconfidential news and are protected by the qualified privilege. *See Ayala*, 162 Misc. 2d 108; *NBC v. People*, 657 N.Y.S.2d 970 (2d Dep't 1997); *In re CBS, Inc.*, 648 N.Y.S.2d 443 (1st Dep't 1996); *see also United Auto Group v. Ewing*, 34 Med. L. Rptr. 1801 (S.D.N.Y. 2006) (quashing subpoena seeking to compel production of a videotape containing unbroadcast outtakes of CBS news interviews, where plaintiff merely established that the videotape was "useful" as opposed to "critical or necessary"). Outtakes from a variety of other programs are also protected by the qualified privilege. *See People v. Combest*, 4 N.Y.3d 341, 795 N.Y.S.2d 481 (N.Y. 2005) (unbroadcast portions of television documentary are protected by qualified privilege, unless criminal defendant can satisfy the elements of 79-h); *People v. Hendrix*, 12 Misc.3d 447, 829 N.Y.S.2d 411 (N.Y. Sup. Kings Co. 2006) (quashing subpoena seeking outtakes from reality television show about police department where defendant conceded he could not establish the three prong test).

Prior to the 1990 amendment to the Shield Law, outtakes and notes from interviews with nonconfidential sources were not considered privileged. *See People v. Korkala*, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984) (unpublished outtakes of conversations with criminal defendants held not confidential when defendants were paid for the interview and knew that all or part of interview would be broadcast). However, perhaps anticipating that the qualified privilege would ultimately be extended to nonconfidential news, courts were not always willing to compel production of such material, even in the absence of a privilege. In *People v. Bova*, 118 Misc.2d 14, 460 N.Y.S.2d 230 (Sup. Ct. Kings County 1983), the court quashed a subpoena for material obtained from a noncon-

confidential source on both relevance and First Amendment grounds. In another pre-1990 case, *Davis v. Davis*, an action for support payments, an estranged wife served a subpoena duces tecum on a newspaper, which had published letters to the editor from "Frank Davis," in an effort to obtain the address of her former husband, Frank Davis. The court determined that, absent proof that the letter writer and the ex-husband were the one and the same, "Frank Davis" would presumably consider his address to be confidential information and thus privileged. *Davis v. Davis*, 88 Misc.2d 1, 386 N.Y.S.2d 992 (Family Ct. Rensselaer County 1976).

Similarly, prior to the 1981 amendment to the Shield Law, information that was unsolicited by the reporter was not considered confidential and was thus not privileged. See *WBAI-FM*, 42 A.D.2d at 6. The Shield Law, however, was subsequently amended to make clear that the absolute privilege applies regardless of whether or not the information was solicited by the reporter. Civil Rights Law § 79-h (b) (privilege applies "notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person").

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

Once information has been published, the privilege is waived with respect only to the specific information that has been "exposed to view." See Civil Rights Law § 79-h (g); *Troiano*, 486 N.Y.S.2d 991, 994 ("The statute . . . cannot be used as a shield to protect that which has already been exposed to view"), quoting *People v. Wolf*, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1st Dep't 1972). Accordingly, courts have held that the privilege does not extend to mere authentication of what has already been published. See *People v. Smith*, 30 Med. L. Rptr. 1671 (N.Y. Sup. Ct. Oneida Co. 2002) (quashing subpoena seeking nonconfidential information, but permitting testimony of journalist for sole purpose of verifying certain published quotes); *In the matter of Grand Jury Subpoena Dated January 26, 2000*, 269 A.D.2d 475, 703 N.Y.S.2d 230 (2d Dep't 2000) (holding that there is no basis to invoke even the qualified privilege for nonconfidential material when the information sought was only an authentication that the broadcast or published reports were accurate); *In re Pennzoil Co.*, 108 A.D.2d 666, 485 N.Y.S.2d 533 (1st Dep't 1985).

The qualified privilege applies to all unpublished material from nonconfidential sources, but it may be overcome by a clear and specific showing that the materials are highly material and relevant, critical or necessary to the maintenance of a party's claim or defense, and not obtainable from alternative sources. Civil Rights Law § 79-h (b). See *People v. Combest*, 4 N.Y.3d 341, 795 N.Y.S.2d 481 (N.Y. 2005) (compelling production of video recording of defendant's confession and police interrogation, where defendant established that the tape was highly relevant, critical to his defense, and not obtainable from any other source); *United Auto Group v. Ewing*, 34 Med. L. Rptr. 1801 (S.D.N.Y. 2006) (outtakes must be "critical or necessary" to defense, not merely "useful"). Courts have held that such materials include: outtakes of nonconfidential broadcasts, research files used in compiling newspaper articles, corporate documents, materials and information given to a television journalist by a source, notes, records and videotapes taken at a criminal interrogations, and material relating to an investigative report that never aired. See, e.g., *Application to Quash Subpoenas to NBC*, 79 F.3d 346 (2d Cir. 1996) (outtakes of interview with plaintiff in wrongful death suit ordered produced after three-part test met); *People v. Hendrix*, 12 Misc.3d 447, 829 N.Y.S.2d 411 (N.Y. Sup. Kings Co. 2006) (quashing subpoena seeking outtakes from reality television show about police department where defendant conceded he could not establish the three prong test contained in 79-h); *Grand Jury Subpoenas Served on NBC*, 178 Misc.2d 1052 (outtakes of protest demonstration where police officers were assaulted ordered produced after three-part test met), *Flynn*, 235 A.D.2d 907 (research files used in compiling allegedly defamatory article); *Brown & Williamson Tobacco Corp v. Wigand*, 228 A.D.2d 187, 643 N.Y.S.2d 92 (1st Dep't 1996) (subpoena for documents and other materials given by defendant to a non-party television journalist quashed where plaintiff failed to meet "critical or necessary" element of test); *Sullivan*, 167 Misc.2d 534 (subpoena for notes, records and video concerning a criminal interrogation upheld where three-part test met); *Ayala*, 162 Misc.2d 108 (subpoena seeking videotaped interview with arresting officer quashed where "critical or necessary" element not met); *In re Grand Jury Subpoenas to Maguire*, 161 Misc.2d 960, 615 N.Y.S.2d 848 (Sup. Ct. Westchester County 1994) (subpoena seeking outtakes of television interview where interviewee confessed to murder quashed where "critical or necessary" element not met); *In re Armstrong*, 26 Med. L. Rptr. 1700 (Sup. Ct. NY County 1997) (subpoena seeking unpublished tapes of interviews and related notes for "60 Minutes" investigation on sports cars quashed where plaintiff failed to establish that materials were otherwise unavailable).

### G. Reporter's personal observations

The Shield Law may protect journalists who are themselves witnesses to criminal acts. In *Beach*, 62 N.Y.2d 241, the Court of Appeals held that the Shield Law affords journalists protection against compulsory disclosure of sources even where the disclosure of information to the journalist might itself be a criminal act. The court analyzed the legislative history of the act and found that the Law "provides a broad protection to journalists without any qualifying language." *Id* at 251. In *Application of CBS, Inc.*, 232 A.D.2d 291, the Appellate Division held that the Shield Law is not inapplicable where the journalist actually observes criminal activity. Journalists should, however, be wary of partnering with law enforcement officials investigating criminal activity. As the New York Court of Appeals suggested in *People v. Combest*, 4 N.Y.3d 341, 795 N.Y.S.2d 481 (N.Y. 2005), journalists who go beyond mere observation of law enforcement activity may be unable to avail themselves of the protections of the shield law.

Earlier precedent offered less protection to reporter-witnesses. In *People v. Dan*, 41 A.D.2d 687, 342 N.Y.S.2d 731 (4th Dep't 1973) a newscaster and cameraman were questioned about events that they had personally observed. The Appellate Division held that although they had the privilege of refusing to divulge the identity of any informant who had supplied them with information, the privilege did not permit them to refuse to testify before a grand jury about events that they had personally observed, including the identity of persons observed, notwithstanding the fact that such persons may also have been sources. *See People v. Dupree*, 88 Misc.2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. N.Y. County 1976) (privilege does not exempt reporters from being compelled to testify in a criminal trial as to what reporter personally observed).

In New York federal courts, reporters seeking the protection of the privilege for personal observations will likely run into the *Gonzales* test for non-confidential information: when the materials at issue are of likely relevance to a significant issue in the case and are not reasonably obtainable from other available sources, they likely can be compelled. 194 F.3d at 36. Similarly, in *Cutler*, the court compelled disclosure of non-confidential material when the reporter was witness to the crime, and the requested material was important to the defendant in making his case and was unavailable elsewhere. 6 F.3d at 74. However, when the requested material is merely cumulative, the three part test for qualified privilege established in *U.S. v. Burke* is still the rule. *See Gonzales*, 194 F.3d at n.6; *Cutler*, 6 F.3d at 73, *discussing Burke*, 700 F.2d at 78.

### H. Media as a party

Where the media is a defendant and its newsgathering is the issue, whether it be an intrusion claim or breach of contract claim brought by a source, the privilege will still apply but, to the extent that nonconfidential materials are sought, the three-part test is more likely to be met. See "Defamation Actions" below. In *People v. Doe*, the court found no evidence that the qualified privilege of O'Neill protects a news reporter from an obligation to appear and testify before a Grand Jury when the avowed purpose of the investigation concerns the newsgathering procedures of the reporter's employer, rather than news obtained from a third party source, confidential or otherwise. In that case, a reporter covering a Department of Environmental Conservation hearing tape recorded the proceeding contrary to an order by the Administrative Law Judge. After the reporters account ran in a newspaper, a grand jury subpoenaed him in an investigation into a possibility of violation of state law. The reporter moved to quash based on the Shield Law, but the court, citing the unusual fact setting, did not apply the Shield Law, instead, balanced the competing interests of the reporters privilege and the government's interest in an unimpeded Grand Jury investigation, and denied the motion to quash. 148 Misc.2d 286, 560 N.Y.S.2d 177 (Sup. Ct. St. Lawrence County 1990). In a federal case applying federal law, a court held that the reporter's privilege does not apply as a shield against prosecution for violation of laws of general applicability stemming from newsgathering activities. *US v. Sanders*, 17 F. Supp. 2d 141 (E.D.N.Y. 1998), *aff'd* 211 F.3d 711 (2d Cir 2000) (affirming conviction of journalists who had received a piece of fabric unlawfully removed by a federal official from TWA flight 800); *see also In re Zyprexa Injunction*, No. 07 Civ. 504, 2007 WL 460838, at \*8 (E.D.N.Y. Feb. 13, 2006) (castigating, but not holding liable, a New York Times reporter who, while not a party to the litigation, "conspired to obtain and publish documents in knowing violation of a court order not to do so," noting that "neither members of the media, nor any other branch of our government are authorized to violate court orders"); *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (compelling the disclosure of New York Times phone records does not

violate federal common law privilege or the First Amendment, where phone records may evidence certain journalists' criminal acts and there was a compelling interest in favor of disclosure).

### I. Defamation actions

Both the absolute and qualified reporters privileges apply in defamation actions where the reporter or newscaster is a defendant. *See, e.g., Miss American Petite, Inc. v. Fox Broadcasting Co.* 262 A.D.2d 33, 690 N.Y.S.2d 592 (1st Dep't 1999) (defamation action applying absolute privilege to the confidential source and holding that the three-part qualified privilege test was met with regard to the other seventeen sources); *Sands*, 161 A.D.2d 30; *Buffalo Courier Express Co.*, 85 A.D.2d 924 (pre-1990 case in which the court struck only those interrogatories pertaining to information obtained under promise of confidentiality and compelled reporter to answer single interrogatory concerning information obtained without a promise of confidentiality). The three-part test of the qualified privilege is more likely to be met in defamation actions and, more often than not, media defendants will want to rely on their newsgathering to support the truth (or lack of malice in publication) of the statements in issue.

Relying on the privilege in defamation actions may, however, subject a reporter to restrictions on his or her use of the privileged information, and, in some cases, may subject the reporter to sanctions other than contempt. While Civil Rights Law §79-h (b), (c), and (e) protect journalists from contempt, fine or imprisonment, the language of §79 (c), concerning nonconfidential news, explicitly states that the statute "shall not affect the availability, under appropriate circumstances, of sanctions under section [3126] of the civil practice law and rules." While this provision only applies with respect to the qualified privilege, the Court of Appeals has determined that some restrictions, while not technically sanctions under § 3126 of the CPLR, can be applied against a reporter who invokes the absolute privilege. *See Oak Beach Inn, Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 476 N.Y.S.2d 269 (1984) (holding that defendant newspaper could not rely on material withheld as absolutely privileged under the Shield Law to establish lack of malice), *cert denied*, 469 U.S. 1158 (1985). Defendants are thus precluded from "using as a sword the information which they are shielding from disclosure" by invoking the reporters privilege. *Collins v. Troy Publishing, Co., Inc.*, 213 A.D.2d 879, 881, 623 N.Y.S.2d 663, 665 (3d Dep't 1995) (precluding the media defendant from relying on the privileged information to establish lack of malice in defamation action). *See also, Sprewell v. NYP Holdings*, 11 Misc.3d 1091(A), 819 N.Y.S.2d 851 (Sup. Court. N.Y. Co. 2006) (defendant newspaper cannot rely upon the mere existence of confidential sources on summary judgment as a defense to defamation claims where the confidential source was the only basis for the allegedly defamatory statement); *Greenberg v. CBS*, 69 A.D.2d 693, 419 N.Y.S.2d 998 (2d Dep't 1979) (defendant, having invoked privilege, could not rely on the unnamed source to establish truth or lack of malice).

However, the relief granted to the party whose discovery is thwarted by the Shield Law should not exceed what is necessary to protect his or her legitimate interests. To the extent that remedies, including striking of pleadings, undermine the purpose of the Shield Law and seek to coerce journalists to reveal privileged information, those remedies should not be available. *See Babylon Beacon, Inc.*, 62 N.Y.2d 158 (striking of pleadings found improper); *Bemet v. N.Y.P. Holdings, Inc.*, No. 109793/99 (2001) (unpublished) (the Shield Law does not preclude sanctions, including a limited order of preclusion, as long as such sanctions do not undermine the policy underlying the Shield Law.). *See also Yellon v. Lambert*, 29 Med. L. Rptr. 1308, 1313 (N.Y. Sup. Ct. Suffolk County 2001), *affirmed* 289 A.D.2d 486, 735 N.Y.S.2d 592 (2d Dep't 2001) (refusing to limit media defendant's use of confidential information as long as plaintiff had not overcome privilege by demonstrating "that he ha[d] first endeavored to obtain this information by other means, and been unsuccessful."); *Sands*, 161 A.D.2d 30 (allowing magazine publisher to introduce evidence relating to the withheld information only if it was produced to the plaintiff at least ten days prior to trial). *Guice-Mills*, 12 Misc.3d at 857, 819 N.Y.S.2d at 436 (where defendant disclosed his source to a third party, the qualified privilege was waived "with respect to the limited information shared").

### IV. Who is covered

In 1981, in response to decisions such as that in *People v. LeGrand*, 67 A.D.2d. 446, 415 N.Y.S.2d 252 (2d Dep't 1979) (holding that a book author who had previously worked for numerous media organizations is not a journalist for the purposes of the Shield Law), Civil Rights Law § 79-h was amended to include not only journalists working for traditional news media, but also those working for "any professional medium or agency which has

one of its regular functions the processing and researching of news intended for dissemination to the public." Civil Rights Law §79-h (a) (6). Under the statute, "professional journalist" is defined as one who gathers news "for gain or livelihood" intended for dissemination to the public, and includes "gathering, preparing, collecting, writing, editing, filming, taping or photographing of news." Civil Rights Law §79-h (a) (6).

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

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

#### **a. Reporter**

The Shield Law explicitly protects not only full-time reporters, but also freelance reporters who perform news-gathering "as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication." Civil Rights Law §79-h(a)(6).

#### **b. Editor**

The statute explicitly protects journalists engaged in "editing," Civil Rights Law §79-h (a) (6), and applies to "supervisory or employer third person or organization having authority over the [professional journalist] described in the [Shield Law]." See Civil Rights Law §79-h (f); *In Re Beach v. Shanley*, 62 N.Y.2d 241, 476 N.Y.S.2d 765 (1984).

In at least one case, a federal court has found that while the privilege prevented disclosure from reporters at a newspaper, it had been overcome with respect to an editor at the same paper. In *Lipinski v. Skinner*, 781 F. Supp. 131 (N.D.N.Y. 1991), a criminal arrestee's HIV status was allegedly illegally disclosed by jail authorities to a newspaper editor, who then passed the information to a reporter assigned to write a story concerning the arrestee. The arrestee, who later brought suit against the jail authorities for breach of the state's confidentiality requirements for HIV testing, served a subpoena on the newspaper, seeking to discern the source of the leak. The court, discussing the New York Shield Law but applying federal law, found that while the privilege prevented the arrestee from deposing various reporters who had written follow-up stories concerning him, it had been overcome with respect to the editor who had first received the information. The district court found that the three-part *Burke* test had been met with respect to the editor, but with respect to the reporters, the information sought was otherwise available, i.e., from the editor. However, the court limited the subpoenas to require only testimony and notes directly relating to the initial disclosure of the arrestee's HIV status. *Id.* at 139-40.

#### **c. News**

"News" is defined as "written, oral, pictorial, photographic, or electronically recorded information concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." Civil Rights Law, §79-h(a)(8). While there is very little case law interpreting this provision of the statute, at least one New York court has addressed the issue with respect to letters to the editor. See *Oak Beach Inn v. Babylon Beacon*, 92 A.D.2d 102, 104 (1983) (holding that letter to the editor is "news" for the purpose of the statute and stating "many people read the letters to the editor column for the same reasons they read any other news column in the paper — to learn what is happening around them, and the reactions of other people to these events. The beneficial purposes served by the Shield Law would be unnecessarily restricted by removing the letters to the editor column from its aegis. It is in the public interest to hold that this column comes within the purview of 'news'."). Another court has held that a conviction for criminal mischief is a "matter of public concern or interest" and is therefore "news" protected by section 79-h. *Guice-Mills*, 12 Misc.3d at 856, 819 N.Y.S.2d at 435.

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

Journalists engaged in "filming" and "photographing" are explicitly included in Civil Rights Law §79-h(a)(6), which covers "pictorial" and "photographic" news. *Id.* at 79-h (a) (8). This protection was applied to a photojournalist in *O'Neill v. Oakgrove Construction, Inc.*, where the plaintiff in a civil action sought nonconfidential photographs of an accident scene. 71 N.Y.2d 521, 528 N.Y.S.2d 1 (1988).

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

While there are few cases in New York that specifically address what constitutes a protected news organization, the intent of the legislature in enacting the 1981 amendment to the Shield Law, which expanded the category of protected persons and entities, was to "provide broad and pervasive protection to all aspects of the process of newsgathering and dissemination." *Wilkins v. Kalla*, 118 Misc.2d 34, 37, 459 N.Y.S.2d 985, 987 (1983). The Shield Law has been continuously interpreted broadly with respect to the types of news organizations falling under the definition provided in Civil Rights Law §79-h(h)(a), which includes "any professional medium or agency which has one of its regular functions the processing and researching of news intended for dissemination to the public." However, where an organization does not "engage in newsgathering with the intent to do so," it will not qualify for the privilege. *Nat'l Med. Care, Inc. v. Home Medical of Am.*, No. 103030/02, 2002 WL 1461769 (Sup. Ct. N.Y. Co. May 20, 2002) (debt rating agency was not a news organization under section 79-h); *Am. Sav. Bank v. UBS Paine Webber*, No. M8-85, 2002 WL 31833223 (S.D.N.Y. Dec. 16, 2002) (credit rating agency not entitled to protection of shield law).

However, some federal courts in New York have applied the Shield Law more narrowly than state courts, holding in one instance, that the publisher of a newsletter was not protected when the newsletter was circulated to only a "limited" audience, and the publisher failed to establish that its "analysts" who compiled the newsletter were professional journalists. *PPM America, Inc. v. Marriot Corp.*, 152 F.R.D. 32 (S.D.N.Y. 1993). Compare with Justice Diamond's ruling in *Evans v. Schiff Publishing, Inc.*, No. 103562/02, (Sup. Ct. N.Y. Co. Sept. 9, 2002), holding that the publisher/editor of an established insurance industry newsletter was protected by the Shield Law.

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

Because of its broad definition of "journalist," (one who "for gain or livelihood" collects news intended for any professional medium which has "as one of its regular functions the processing and researching of news intended for dissemination to the public"), the Shield Law encompasses a broad array of newsgatherers. As noted, Civil Rights Law § 79-h was specifically amended in 1981 to broaden the definition of "journalist" to include, among others, freelance authors. Since the 1981 amendment, no New York state court has compelled disclosure on the grounds that the person seeking privilege was not a journalist. *See, e.g., In re Huddy*, 32 Med. L. Rptr. 1994 (Sup. Ct. N.Y. Co. 2004) (finding that a magazine product tester qualifies as a journalist protected by the shield law).

Some federal courts, however, have interpreted the Shield Law more narrowly. For instance, in *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987), a federal court held that under the New York Shield Law, a self-described author covering the infamous Von Bulow trial was not a journalist and therefore would not be protected by the privilege. The court determined that the author had no journalistic credentials, despite the fact that she claimed to have written an article concerning the trial for a German magazine (which listed her husband as the author) and produced a letter from a former editor of the *New York Post* indicating he had solicited her to cover the trial, though the newspaper had never printed anything she had written. *Id. See. PPM America, Inc.*, 152 F.R.D. 32 (1993) (publisher of newsletter with limited circulation not protected by the Shield Law where "analysts" who compiled the letter were found not to be professional journalists). While certain federal courts applying federal law have, on occasion, held that credit rating agencies are "journalists" protected by the reporter's privilege (*see, e.g., In re Pan Am Corp.*, 161 B.R. 577, 580-82 (S.D.N.Y. 1993)) the Second Circuit recently held in *In re Fitch, Inc.*, 330 F.3d 104, 111 (2d Cir. 2003) that a credit rating agency was not entitled to the protection of New York's shield law because the agency could not show "that the information it sought to protect was gathered pursuant to the newsgathering activities of a professional journalist." *Id.* at 109. The Second Circuit distinguished *Fitch* from prior precedent affording protection to publishers of similar information by stating that "subtle differences in the facts of this case mandate a different outcome." *Id.* Significantly, *Fitch* reported only on its own clients' transactions rather than any transactions it deemed newsworthy. Such practice, the court held, "weighs against treating *Fitch* like a journalist." *Id.* at 110.

In some instances, however, federal law may provide broader protection than the Shield Law. In *Blum v. Schlegel*, a reporter from a student newspaper was held not protected by the Shield Law since he did not fall within the statute's definition of "professional journalist," but he was entitled to assert privilege under federal law to avoid testifying about an interview with his school dean. *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993). Federal law has also been held to cover "scholars," and therefore by implication considers a dissertation to be "news." *In re*

*Grand Jury Subpoena Dated January 4, 1984*, 583 F.Supp. 991, 993 (E.D.N.Y. 1984) (criminal case holding that "serious scholars are entitled to no less protection than journalists" and quashing subpoena seeking notes that a student had taken in preparation for his dissertation; government did not show substantial need for the journal sufficient to overcome the student's qualified privilege); *See In re Pan Am Corp.*, 161 B.R. 577, 580-82 (S.D.N.Y. 1993) (holding that publisher of credit worthiness ratings of corporate and governmental debt instruments was protected by privilege).

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

The privilege belongs to the reporter and not to the source. Accordingly, if a confidential source later waives the privilege, the material becomes nonconfidential and thus subject to the reporter's qualified privilege for nonconfidential material. Prior to the statute's 1990 amendment granting qualified privilege for nonconfidential news, the privilege was deemed waived if the source later identified himself or testified at trial and thus disclosed his identity. *See Andrews v. Andreoli*, 92 Misc.2d 410, 400 N.Y.S.2d 442 (Sup. Ct. Onondaga County 1977); *People v. Zagarino*, 97 Misc.2d 181, 411 N.Y.S.2d 494 (Sup. Ct. Kings County 1978). In *People v. Lyons*, however, the court held that to consider a waiver by a source as applicable to the reporter as well would result in less protection being afforded to news which was "originally confidential and entitled to an absolute privilege" than is granted to "news which from the outset was never confidential" — a premise which would "result in a further intrusion upon the news media and would undermine the intent [of the 1990 amendment to the Shield Law]." 151 Misc. 2d 718, 722, 574 N.Y.S.2d 126, 129 (Buffalo County Ct. 1991). In *Lyons*, one of several undercover police officers involved in a filmed sting operation agreed to waive the confidentiality afforded him. The district attorney argued that the officer's actions served to waive the reporter's privilege entirely, and that outtakes of the report were therefore discoverable. The court held that while the absolute privilege for confidential information was waived, this merely served to make the materials nonconfidential and subject to the qualified reporters privilege contained in Civil Rights Law § 79-h (c).

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

New York Courts are bound by the New York Civil Practice Law and Rules ("CPLR"), which governs the procedures for both serving and opposing a subpoena of a party or non-party to an action. In addition, the Uniform Rules of the Court of the State New York ("Uniform Rules") and certain local rules may contain procedural and substantive requirements. This section focuses on the CPLR and, to a lesser extent, on the Uniform Rules. The local rules, as well as a particular Judge's individual rules (many of which are available online), should be reviewed prior to responding to a subpoena.

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

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

With only a very few exceptions (such as where the testimony of a prisoner is sought), there is no stated minimum or maximum time for the return of a subpoena. The return date is left to the individual determination of the one issuing it. *See Application of Mullen*, 177 Misc. 734, 31 N.Y.S.2d 710 (Queens County Ct. 1941) ("whoever issues it has the authority to determine in advance as to when and where the witness shall appear"). (For exceptions to this general rule see CPLR § 2303 (b); §§ 2306, 2307). If there are exigent circumstances, a subpoena may even be made returnable "forthwith." However, courts will take into account the abbreviated return date in determining whether the subpoena has been disobeyed. *See Siegel*, New York Practice at 618 (West Publishing, 3d Ed. 1999).

Under CPLR § 2303, a subpoena must be served "in the same manner as a summons." CPRL § 308, which governs service of a summons, provides for various forms of service.

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

No deposit or security is required in order to compel the attendance of a witness or the production of materials through a subpoena. However, a subpoenaed person must be paid a nominal witness fee (currently \$15 per day) and a mileage fee (23 cents per mile) in advance. *See* CPLR §§ 2302; 8001. These fees are usually tendered when

the subpoena is served, and additional fees must be paid, if the witness is required to appear on more than one day. *See* CPLR § 2305 (a).

### 3. Filing of affidavit

There is no statutory or case law addressing this issue.

### 4. Judicial approval

New York law allows for the issuance of a subpoena without prior judicial approval, except in certain limited circumstances. *See* CPLR § 2302. The subpoena may be issued by an array of people, including the clerk of the court, a judge, an arbitrator, a referee and by the attorney of record for a party to the action. *Id.*

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

There is no statutory or case law addressing this issue.

## B. How to Quash

Under § 2304 of the CPLR, the subject of a subpoena can move to quash, condition or modify the subpoena. Such a motion "shall be made promptly" in the court in which the subpoena is returnable. CPLR § 2304. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena "shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the Supreme Court." *Id.*

The CPLR does not specify the time within which a motion to quash or modify has to be made, but such a motion should be made at least "at or before the time specified in the subpoena for compliance therewith." CPLR § 2304, McKinney's Practice Commentary C2304:3. In addition, the target of a subpoena may also move for a protective order pursuant to CPLR § 3103. Motions typically ask for both forms of relief. If time is of the essence, the motion to quash can be made by order to show cause, which serves to abbreviate the notice time.

Frequently, litigants in foreign proceedings will petition the *ex parte* part of the New York Supreme Court for subpoenas seeking production from a New York resident or domiciliary. *See, e.g.*, CPLR § 3102. When this occurs, a motion to quash and/or for a protective order, which must be on notice and therefore is no longer *ex parte*, should be filed in the supreme court and not the *ex parte* part.

In addition, where New York subpoenas are issued to aid in discovery in an action pending in another jurisdiction, such as through commissions (*see, e.g.*, CPLR § 3102 (c)), it is advisable to review both the Shield Law (if one exists) and the procedural requirements for issuing commissions in the jurisdiction in which the action is pending. Courts frequently rubber stamp requests for commissions to take out-of-state discovery, and such commissions occasionally do not even comply with the issuing court's procedural requirements. For instance, the Shield Law in the jurisdiction in which the action is pending may require that the petition for commissions pertaining to a reporter's materials or testimony be on notice or that the commissions be reviewed and signed by a judge, rather than a clerk. Failure to comply with these requirements may provide alternative bases for a motion to quash. However, as New York's Shield Law frequently provides broader protection than those of other states, it may be desirable to move to quash a subpoena under New York's Shield Law, rather than under a potentially weaker statute of another state.

A reporter may have no other recourse but to move to quash under the law of a state other than New York, however, where a subpoena is issued pursuant to CPL 640.10 (2), the Uniform Act to Secure the Attendance of Witnesses from Without a State. When a foreign state issues a demand for the attendance of a New York witness under CPL 640.10 (2), the New York court will not evaluate the reporters privilege under the New York Shield Law, and instead will leave the issue of journalist privilege to the demanding state. In *Application of Codey*, 82 N.Y.2d 521, 626 N.E.2d 636, 605 N.Y.S.2d 661 (1993), New Jersey prosecutors subpoenaed ABC, seeking outtakes and notes of interviews its reporters had conducted of participants in an alleged college basketball point-shaving scheme. Despite CBS's opposition, the trial court granted the subpoena. The Appellate Division reversed, holding that the evidence would not be admissible under both New York and New Jersey's shield laws, and therefore the subpoena should not have issued. The Court of Appeals again reversed, holding that the subpoena was properly issued.

The Court of Appeals reasoned that the standard under CPL 640.10 (2) for determining if the subpoena is proper and should issue is whether the requested information is "material and necessary," neither term of which subsumes the concept of privilege. *Id.* at 529. The court further stated that the "purpose of the Uniform Act was to establish a simple and consistent method for compelling the attendance of out of state witnesses. This goal would be frustrated if the CPL 640.10 (2) hearings conducted by the sending state were to become a forum for the litigation of questions of admissibility and evidentiary privilege, most of which will inevitably have to be litigated again anyway during the course of the demanding state's criminal proceeding." *Id.* at 529-530. *See In re Application of Magrino*, 226 A.D.2d 218, 640 N.Y.S.2d 545 (1st Dep't 1996) (following the "material and necessary" standard of *Codey* and requiring producer of television program to produce two out-of-state witnesses to testify in Florida criminal trial where there was a logical relationship between the aired footage and the trial subject matter and the material was necessary for prosecution). Accordingly, in these circumstances it may be advisable to challenge the subpoena in the courts of the issuing state, rather than in a New York court.

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

Where a subpoena is not returnable in court, the subpoenaed party must contact the issuing party and request that the subpoena be withdrawn or modified prior to filing a motion. *See* CPLR § 2304. In addition, Rule 202.7 (a) of the Uniform Rules of Court requires that with respect to motions relating to disclosure, no motion may be served without an affidavit stating that counsel have conferred in a good faith effort to resolve the issues raised by the motion. The affirmation of good faith must state the "time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." Uniform Rule 202.7 (c).

The "mere recitation of a few phone calls to the other attorney without any discussion of the specific objections is insufficient to comply with Rule 202.7." *Yankee Trails, Inc. v. Jardine Insurance Brokers, Inc.* 145 Misc.2d 282, 283, 546 N.Y.S.2d 534, 535 (Sup. Ct. Rensselaer County 1989) (denying motion to vacate demand for bill of particulars due to failure to comply with rule). Rather, to satisfy the requirements of Rule 202.7, "[s]ignificant, intelligent and expansive contact and negotiations must be held between counsel to resolve any dispute and such efforts must be adequately detailed in an affirmation." *Eaton v. Chahal*, 146 Misc.2d 977, 983, 553 N.Y.S.2d 642, 645-46 (Sup. Ct. Rensselaer County 1990). Given that New York courts expect that "discovery disputes can and should be resolved by attorneys without the necessity of judicial intervention," the sound practice is to contact opposing counsel and make a complete record of all attempts to resolve the dispute for later inclusion in the affidavit of good faith. *Id.*

Above and beyond the legal requirement, such contact can result in, at a minimum, narrowing the scope of the subpoena, if not outright withdrawal. Often, the subpoenaing party is not aware of the Shield Law, and when he or she realizes what is involved, will drop the request or accept an affidavit from the reporter verifying the published information.

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

Aside from the request to withdraw or modify the subpoena required under CPLR § 2304 and the good faith effort to resolve any disputes concerning the subpoena required by Uniform Rule 202.7, no notice of intent to file a motion to quash or for a protective order is required under New York law. A motion to quash or vacate a subpoena is the proper and exclusive vehicle to challenge the validity of the subpoena or the jurisdiction of the issuing authority. *See Brunswick Hospital Center, Inc. v. Hynes*, 52 N.Y.2d 333, 438 N.Y.S.2d 253 (1981). A particular judge's Rules should, however, be consulted.

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

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

The motion to quash or for a protective order should be brought in the same court in which the subpoena is returnable, which is usually the court hearing the case. CPLR § 2304. If the subpoena has not issued out of a court, the motion to quash or modify is made to the Supreme Court. *See* CPLR § 2304, McKinney's Practice Commentary C2304:4. If the subpoena was issued from the *ex parte* part (e.g., in aid of disclosure in an out-of-state proceeding), the motion should be filed in the Supreme Court and not the *ex parte* part.

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

The target of a judicial subpoena should move to quash and/or for a protective order before the return date of the subpoena or risk a finding of contempt for failure to appear. *See* CPLR § 2308 (a). For non-judicial subpoenas, such as those issued in an out-of-court proceeding such as an arbitration or in an administrative hearing, the reporter "cannot be held in contempt for failure to comply unless and until a court has issued an order compelling compliance, which order has been disobeyed. *Reuters Ltd. V. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 662 N.Y.S.2d 450 (1st Dep't 1997).

### **c. Timing**

The CPLR specifies only that a motion to quash or modify a subpoena "shall be made promptly," without further explanation as to what is meant by "promptly." However, the practice commentaries to the statute advise that such a motion should be made at least "at or before the time specified in the subpoena for compliance therewith." CPLR § 2304, McKinney's Practice Commentary C2304:3. *See People v. Burnette*, 160 Misc.2d 1005, 612 N.Y.S.2d 774 (1994) (police department waived objection to subpoena where department failed to object prior to return date).

Where the requisite notice for a motion to quash or for a protective order cannot be given, such as where the subpoena calls for compliance "forthwith," the motion may be brought on an order to show cause, which will abbreviate the notice time. CPLR § 2214 (d) ("The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein.") If the subpoena seeks deposition testimony, it is probably safe to file the motion giving the eight day's notice required by CPLR § 2214 (b) and notifying opposing counsel in writing that in light of the motion, the subpoenaed reporter will not appear for the deposition. In addition, a motion for a protective order will also serve to "suspend disclosure of the particular matter in dispute." CPLR § 3103 (b).

### **d. Language**

While there is no "stock language" or preferred text to be included in a motion to quash or for a protective order, a uniform notice of motion can be found within the text of Rule 202.7 of the Uniform Rules of Court.

### **e. Additional material**

A motion to quash or for a protective order should include a notice of motion, supporting affidavits, a memorandum of law and an affirmation of good faith effort to resolve the issues raised by the motion. *See* Uniform Rule 202.7(a). No notice of motion is required for an order to show cause, though the affirmation of good faith must still be included. *See* Uniform Rule 202.7(d). In addition, New York State courts require that a "blue back," a blue form containing the case caption, index number and other pertinent information, be attached to the back of the papers filed with the court. Although not required, it may also be advisable to append a draft order for the court to sign, which states that the relief the reporter is seeking has been granted. This not only saves the court the trouble of drafting an order, but it also allows the reporter to control (at least initially) the language of the order.

## **4. In camera review**

### **a. Necessity**

No statute mandates that the court conduct an in camera review of the requested materials in order to determine whether or not they should be produced. However, courts have on occasion conducted in camera reviews to determine if the materials were provided to the reporter in confidence or if the materials are necessary to the defense or prosecution of an action. *See, e.g., Hybrid Films v. Combest*, 281 A.D.2d 500, 721 N.Y.S.2d 795 (2d Dep't 2001) (ordering in camera review of outtakes for purposes of redacting irrelevant material, provided criminal defendant first met three-part test for producing nonconfidential information); *People v. Combest*, 4 N.Y.3d at 349 n.4, 795 N.Y.S.2d at 486 n.4 (noting that while a court is not always required to review subpoenaed material in camera in order to determine in the first instance whether the requisite showing under 79-h has been made, "it would have been the better practice to do so"); *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 119 A.D.2d 68, 505 N.Y.S.2d 368 (3d Dep't 1986) (ordering trial court to conduct in camera review of outtakes of interview of murder suspect); *modified on other grounds*, 70 N.Y.2d 151, 518 N.Y.S.2d 595 (1987); *People v. Korkala*, 121

Misc.2d 291, 467 N.Y.S.2d 517 (ordering in camera inspection to determine "whether there exists any necessity for [the materials] being made available to the People in respect to any defense proffered" by a criminal defendant). *But see Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 652 N.Y.S.2d 833 (3d Dep't 1997) (trial court properly denied request for in camera review where party seeking disclosure failed to overcome qualified privilege); *Doe v. Cummings*, 1994 WL 315640, 22 Media L. Rep. 1510 (Sup. Ct. St. Lawrence County 1994) (refusing request for in camera review and noting that *People v. Korkala*, *supra*, was decided prior to the 1990 amendment to the Shield Law, which brought nonconfidential information under the protection of the statute).

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

Although there is no New York case law directly addressing the issue, the consent to an in camera review of the materials does not appear to act as a waiver of the privilege. *See People v. Lyons*, 151 Misc.2d 718, 574 N.Y.S.2d 126 (City Ct. Buffalo 1991).

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

No New York statute or case law specifically addresses the consequences of refusing to allow an in camera review of subpoenaed material. However, refusal to abide by a court's order to produce materials for such a review would probably result in the entry of a contempt finding. The better practice is to file an appeal of the order to produce and request that enforcement of the order be stayed pursuant to CPLR § 5519 (c).

## **5. Briefing schedule**

Pursuant to CPLR § 2214 (b), a notice of motion (whether to quash, for a protective order or both) and supporting affidavits must be served at least eight days before the time at which the motion is to be heard, and answering affidavits must be served at least two days prior to the return date. However, if the notice of motion is served at least twelve days prior to the return date, answering papers are due at least seven days before that date. *Id.* If the motion to quash is served the requisite twelve or more days prior to the return date, it is advisable for the moving party to refer to CPLR § 2214 (b) in the notice of motion, and to request specifically that the answering papers be served *by hand* at least seven days prior to the return date (e.g., "PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 2214 (b), demand is made that opposition papers, if any, be served by hand upon the undersigned counsel at least seven days before the return date of this motion."). Failure to request service by hand may result in the answering papers — though timely served — arriving by mail on the eve of the return date. The extra time afforded by CPLR § 2214 (b) can be used to draft any reply papers, which are due one day before the return date. CPLR § 2214 (b).

Should an appeal become necessary, it is advisable to review Articles 55-57 of the CPLR and the applicable rules for the appellate department (or other appellate court) in which the appeal will be taken, as the schedule for an appeal will vary substantially from the briefing schedule for the initial motion.

## **6. Amicus briefs**

Amicus briefs are not typically filed at the trial court level, but they are accepted in matters pending before the appellate division courts and the New York Court of Appeals. Amicus curiae status may be sought by motion at the discretion of the appellate court. The New York Court of Appeals is the only appellate court to promulgate a rule specifying the criteria for granting a motion for leave to file an amicus brief. See 22 NYCRR § 500.11(e). In addition, only the second department has a court rule concerning how to seek leave to file an amicus brief. See 22 NYCRR § 670.11.

Organizations which have served as amici on reporters privilege issues arising in New York include:

ABC INC.

John W. Zucker, Esq.

77 West 66th Street

New York, NY 10023

(212) 456-7387

ADVANCE PUBLICATIONS, INC.

Ralph Huber, Esq.

Patricia Clark, Esq.  
Sabin, Bermant & Grould LLP  
Four Times Square  
23rd Floor  
New York, NY 10036  
(212) 381-7000

AOL TIME WARNER INC.  
Robin Bierstedt, Esq.  
75 Rockefeller Plaza  
New York, NY 10019  
(212) 484-8000

THE ASSOCIATED PRESS  
David A. Schulz, Esq.  
Levine Sullivan Koch & Schulz LLP  
230 Park Avenue Suite 1160  
New York, NY 10169  
(212) 850-6103

BLOOMBERG L.P.  
Richard L. Klein, Esq.  
Wilkie Farr & Gallagher  
787 Seventh Avenue  
New York, NY 10019  
(212) 728-8000

CABLE NEWS NETWORK, INC.  
Jennifer Falk Weiss, Esq.  
Turner Broadcasting System, Inc.  
75 Rockefeller Plaza  
New York, NY 10019  
(212) 484-8000

CBS CORP.  
Susanna M. Lowy, Esq.  
51 West 52nd Street  
New York, NY 10019  
(212) 975-8758

DOW JONES & COMPANY, INC.  
200 Liberty Street  
New York, NY 10281  
(212) 416-2000

GANNETT CO., INC.  
Barbara Wartelle Wall, Esq.  
1100 Wilson Blvd., 29th Fl.  
Arlington, VA 22234

THE MCGRAW-HILL COMPANIES, INC.  
Kenneth M. Vittor, Esq.  
1221 Avenue of the Americas  
New York, NY 10020  
(212) 512-2564

**THE NEW YORK PRESS CLUB, INC.**

Vincent D. Farrell, Esq.  
Farrell, Farrell & Burke  
212 Station Plaza North  
Mineola, New York 11501  
(516) 741-6611

**THE NEW YORK TIMES COMPANY**

229 West 43rd Street  
New York, NY 10036  
(212) 556-1234

**NYP HOLDINGS, INC.**

1211 Avenue of the Americas  
New York, NY 10036  
(212) 852-7000

**THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS**

Lucy A. Dalglish, Esq.  
1101 Wilson Blvd., Suite 1100  
Arlington, VA 22209  
(703) 807-2100

**REUTERS AMERICA, INC.**

1700 Broadway  
New York, NY 10019  
(212) 603-3525

**VI. Substantive law on contesting subpoenas****A. Burden, standard of proof**

The reporter or publisher has the burden of proving the essential elements of the privileged relationship: "the intent [of the reporter] to use material — sought, gathered, or received — to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *In the Matter of Application of Waldholz*, 1996 WL 389261, \*2 (S.D.N.Y. 1996), citing *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987). "To invoke the [absolute] privilege, the journalist carries the burden of proffering at least preponderant evidence of mutuality of the understanding, or agreement, of confidentiality. He may do so by direct or indirect evidence, by presenting proof of an express, i.e., a verbalized, understanding or agreement, or by offering preponderant proof of circumstances from which a mutual agreement of confidentiality may be implied." *Andrews v. Andreoli*, 92 Misc.2d 410, 418, 400 N.Y.S.2d 442, 447 (Sup. Ct. Onondaga County 1977). See *PPM America, Inc. v. Marriott Corp.*, 152 F.R.D. 32, 36 (S.D.N.Y. 1996) (applying federal law).

If the information is not confidential and thus protected by the qualified privilege, the party seeking disclosure has the burden of making a "clear and specific showing" that the information or sources are highly relevant and material, critical or necessary, and not obtainable from any alternative source. *In re Application of CBS*, 232 A.D.2d 291,292, 648 N.Y.S.2d 443 (1st Dep't 1996). See *Matter of Subpoena to ABC, Inc.*, 189 Misc.2d 805, 735 N.Y.S.2d 919 (Sup. Ct. N.Y. County 2001); *Greenfield v. Schultz*, 173 Misc.2d 31, 660 N.Y.S.2d 624 (Sup. Ct. N.Y. County 1997), *aff'd in part, modified in part on other grounds, vacated in part on other grounds*, 251 A.D.2d 67, 673 N.Y.S.2d 684 (1st Dep't 1998)

The three-part test which must be met to overcome a qualified privilege for nonconfidential information is not satisfied absent clear and specific proof that the claim for which the information is requested "virtually rises or falls with admission or exclusion of the proffered evidence." *In Re. Application to quash Subpoena to NBC*, 79 F.3d 346, 351 (2d Cir 1996) (applying New York Shield Law). The test is not merely whether the material may be

helpful or probative, but whether "the action may be presented without it." *Id.* See *Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 652 N.Y.S.2d 833 (3d Dep't 1997); *In Re Grand Jury Subpoena to Maguire*, 161 Misc.2d 960, 965, 615 N.Y.S.2d 848, 851 (1994); *In re Grand Jury Subpoenas Served on NBC*, 178 Misc.2d 1052, 683 N.Y.S.2d 708 (1998); *United Auto Group v. Ewing*, 34 Med. L. Rptr. 1801 (S.D.N.Y. 2006). The privilege may only yield when the "party seeking the material can define the specific issue, other than general credibility, as to which the sought after interview provides truly necessary proof." *Matter of Subpoena to ABC*, 189 Misc.2d at 808.

## B. Elements

As discussed above, the Shield Law provides absolute privilege for confidential material. Therefore the elements below are relevant only when the subpoena seeks nonconfidential information. To overcome the qualified privilege, the party seeking such news must make "a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." Civil Rights Law §79-h (c).

A federal court sitting in diversity will apply the New York Shield Law. *United Auto Group v. Ewing*, 34 Med. L. Rptr. 1801 (S.D.N.Y. 2006); *Don King Productions Inc. v. Douglas*, 131 F.R.D. 421, 422 (1990). However, when federal law is applied in federal criminal cases or in civil cases where jurisdiction in federal court arises under federal law, the privilege will be overcome for nonconfidential materials on a showing that the materials are of "likely relevance to a significant issue in the case," and are "not reasonably obtainable from other available sources." *Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1999) (applying federal law). When the material is confidential, the three part test of *Burke* (identical to the Shield Law's provision for nonconfidential information) applies. See also *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (federal common law privilege overcome where there was a compelling interest in favor of disclosure of newspaper's telephone records).

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

The first and second prongs of the test applied to nonconfidential news, that the materials sought must be "highly material and relevant" and "critical or necessary" to the action, are really two sides of the same coin in that materials that are "critical or necessary" to the action will, in all likelihood, also be "highly material or relevant." However, satisfying the first prong of the test (which appears to be the easiest of the three to meet) will not necessarily satisfy the second. To satisfy the "critical or necessary" requirement, the materials sought must be more than merely useful to the party seeking them. Rather, the party seeking production must convince the court that a claim virtually rises or falls with the admission or exclusion of the proffered evidence and that the defense or prosecution of the action may not be presented without it. See *Flynn.*, 235 A.D.2d 907; *Application to Quash Subpoena to NBC*, 79 F.3d 346; *U.S. v. Marcos*, 1990 WL 74521, 17 Media Law Rep. 2005 (S.D.N.Y. 1990); *Doe v. Cummings*, 1994 WL 315640 \*1, 22 Med. L. Rep. 1510 (1994) (holding that material's usefulness for cross-examination does not satisfy burden); *In re Investigation into Death of John Doe*, 34 Med. L. Rptr. 1057, 1059 (Sup. Ct. Suffolk Co. 2004) ("It has been said that the test is not merely that the material may be helpful or probative, but whether or not the case may be presented without it"). Even where certain testimony is highly material and relevant to an issue in the case, it is not "critical" if it is merely cumulative or if the party seeking the testimony alleges only a vague need for impeachment material. *People v. Troiano*, 127 Misc.2d 738, 486 N.Y.S.2d 991 (City Ct. Suffolk County 1985). Merely invoking the "critical or necessary" language without any support or analysis is insufficient to overcome the privilege. *Flynn*, 235 A.D. 2d 907. Some cases illustrating the difficulty in overcoming the "critical or necessary" element of the test are discussed below.

In *In re Brown & Williamson v. Wigand*, plaintiff sought outtakes and unpublished information concerning a "60 Minutes" interview of Jeffrey Wigand in a Kentucky action against him for breach of confidentiality agreements he entered into with B&W. The court held that while the requested materials were "highly material and relevant," B&W had not established that the materials were "critical or necessary" to its case, since it already had "ample proof" of Wigand's breach of the confidentiality agreements in the publicly available tapes of the interview broadcast by CBS. Allegations that the documents were needed to establish the full measure of damages incurred by the breach were deemed too vague to satisfy the statute's requirements. *In re Brown & Williamson v. Wigand*, 228 A.D.2d 187, 643 N.Y.S.2d 92 (1st Dep't 1996).

Similarly, mere speculation that the requested information is critical and necessary, without factual corroboration, is insufficient to establish criticality. *In re Subpoena to Ayala*, 162 Misc.2d 108, 616 N.Y.S.2d 575 (1994). In *Ayala*, a criminal defendant overheard part of an interview between a reporter and the arresting officer, a portion of which was broadcast. The defendant sought outtakes from the interview, which he believed would go to the issue of probable cause in his defense. The court held that while the outtakes were highly relevant and material, and unavailable elsewhere, the defendant's speculation that the tape may be the most reliable version of events and may prove inconsistencies in the officer's testimony did not satisfy the stringent requirement that the material must be critical or necessary. *Id.* at 114. Likewise, in *United Auto Group v. Ewing*, 34 Med. L. Rptr. 1801, 1803 (S.D.N.Y. 2006) the court quashed a subpoena seeking video out-takes from a CBS news interview where plaintiff professed that the out-takes "may" strengthen its claims and "may" provide an independent basis for one of its claims. The "highly material" and "critical or necessary" prongs of the test were not satisfied, the court held, because plaintiff's statements essentially conceded that it can prove its case without the outtakes.

In *People v. Griffin*, 21 Med. L. Rep 1030 (Sup. Ct. N.Y. County 1992), the defendant sought a videotape and testimony from a reporter who had accompanied police on an operation in a Times Square subway station, arguing that the video would show "confusion in the subway" at the time of the defendant's arrest and would likely bolster his claim that the wrong person was arrested. The court quashed the subpoenas, holding that the defendant could not make a "clear and specific showing" that the material was highly material and relevant and critical and necessary to the maintenance of the defense, given that the video would not prove or disprove who committed the crime and given that there was no claim that the incident itself was caught on tape or witnessed by the reporter.

## 2. Material unavailable from other sources

The final prong of the test for nonprivileged news requires that the party seeking disclosure make a clear and specific showing that the requested materials are "not obtainable from any alternative source." Civil Rights Law § 79-h (c). This provision of the statute frequently is the most difficult hurdle for a party seeking disclosure to overcome, and courts have held that disclosure from a reporter may only be permitted as a "last resort." See *In re Grand Jury Subpoenas Served on National Broadcasting Co., Inc.*, 178 Misc.2d 1052, 1055, 683 N.Y.S.2d 708, 711 (Supreme Ct. N.Y. County 1998).

Where alternative sources for the information exist, disclosure may not be had. Witnesses, and in some circumstances the opposing party, are alternative sources whose testimony must be sought before a journalist's testimony or resource materials will be compelled. See *Application of CBS Inc.*, 232 A.D.2d 291, 292, 648 N.Y.S.2d 443, 444 (1st Dep't 1996) ("Plainly, [plaintiff] made no efforts to identify the potential witnesses who were in the pharmacy on the date in question, nor made any other investigative efforts to obtain evidence to substantiate the anticipated professional misconduct charges against the pharmacist."). Similarly, the trial court in *Brown & Williamson v. Wigand* held that Mr. Wigand was himself an alternative source for the information sought by his former employer and rejected Brown & Williamson's allegations that Wigand was untrustworthy and therefore not a reliable source as "yet untried and unproven." 24 Med. L. Rep. 1720, 1724, 1996 WL 350827, \*5 (Sup. Ct. N.Y. County 1996). There, the court held that to disqualify the defendant as an unqualified alternative available source would "vitiating the three-prong test of 79-h (c) since all that would be required to defeat the journalist's protection would be to allege, without more, that the alternative non-journalistic source is dishonest." *Id.*

In a class action seeking relief for alleged sales of residential property to African-American plaintiffs at higher prices and under more burdensome terms than would have been charged to white purchasers, the court refused to compel a non-party journalist to reveal sources for an article on the subject where the article itself and the pictures therein provided leads to obtaining discovery and where information concerning potential witnesses could also be obtained from title and mortgage records. *Baker v. F and F Investment*, 470 F.2d 778 (2d Cir. 1972), (applying Federal law as informed by the New York and Illinois Shield Laws), *cert denied*, 411 U.S. 966 (1973).

However, courts have found that certain sources do not count as "available" for the purposes of meeting the requirements of the three-part test for nonconfidential news. See *Grand Jury Subpoenas to NBC*, 178 Misc.2d 1052 (holding that outtakes were critical to an assault case and that it was not reasonable that prosecutors first interview numerous police officers present at the time of the assault to attempt to locate eyewitnesses); *People v. Combest*, 4 N.Y.3d 341, 795 N.Y.Y.2d 481 (N.Y. 2005) (finding that each of the three prongs were satisfied where video

outtake was only recording of criminal defendant's interrogation and confession); *Matter of Sullivan*, 167 Misc. 2d 534, 635 N.Y.S.2d 437 (Sup. Ct. Queens County 1995) (the fact that all other witnesses to the interrogation gave conflicting testimony satisfied the "no alternative source" element necessary to deny motion to quash subpoena *duces tecum*); *In re Ayala*, 162 Misc.2d 108 (neither arrestee nor arresting officer were alternative sources preventing disclosure of the contents of a journalist's videotaped interview with the arresting officer even though the arrestee overheard part of the interview, since videotape was inherently superior to the memories of the arrestee and arresting officer; subpoena quashed for failure meet "critical or necessary" element); *People v. Craver*, 150 Misc.2d 631, 569 N.Y.S.2d 859 (1990) (reporter's testimony could be compelled in murder case even though the defendant had also given statements to the police and made admissions by letter to the victim's parents).

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

While courts have not delineated a clear standard for proving "exhaustion," merely asserting that a search has been done will not suffice. The party seeking disclosure "has an obligation to demonstrate that it has first endeavored to obtain this information by other means instead of directly intruding upon the self-imposed confidentiality of those who gather news." *Greenleigh Associates, Inc. v. New York Post Corp.*, 79 A.D.2d 588, 434 N.Y.S.2d 388, 389 (1st Dep't 1980) (citing *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433 (10th Cir 1977); see also, *Yellon v. Lambert*, 29 Med. L. Rptr. 1308, 1313, affirmed, 289 A.D.2d 486, 735 N.Y.S.2d 594 (2d Dep't 2001) (plaintiff "has an obligation to demonstrate that he has first endeavored to obtain this information by other means, and has been unsuccessful"); *Application of CBS*, 232 A.D.2d 291; *Flynn*, 652 N.Y.S.2d at 835 (quashing subpoena in part because plaintiff "has not detailed any efforts made to obtain the requested documents or the information contained therein," and had thus not satisfied the third prong of the test).

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

See "How Exhaustive must search be?" above.

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

There is no statutory or case law addressing this issue.

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

The qualified privilege allows disclosure only "as a last resort." See *In re Grand Jury Subpoenas Served on National Broadcasting Co., Inc.*, 178 Misc.2d 1052, 1055, 683 N.Y.S.2d 708, 711. The Shield Law strikes a balance "between the *urgent* requirements of litigants in both civil and criminal courts, and the countervailing need to prevent the undue diversion of journalistic effort and disruption of press functions, to maintain the tradition in this state of providing the broadest possible protection to secure the sensitive role of gathering and disseminating news of public events and to assure particular vigilance by the courts if this state in safeguarding the free press against *undue* interference." *Matter of Subpoena to ABC*, 735 N.Y.S.2d 919, 921-22 (emphasis in original) (internal citations omitted).

In some cases, a court will, usually in dicta, discuss the defendant's Sixth Amendment rights as a counterweight to the Shield Law or the First Amendment. However, the subpoena must satisfy the three-pronged test of the Shield Law — requiring that the information be highly material and relevant, necessary or critical to maintenance of the claim, and not obtainable from other available sources. If the Sixth Amendment right is a factor, it is incorporated into that test. See *People v. Troiano*, 486 N.Y.S.2d 991; *Sullivan*, 167 Misc.2d at 539 (finding that "under appropriate circumstances, a reporter's privilege may yield to the defendant's Sixth Amendment rights" and applying three-part test to determine if the circumstances were met); *People v. Combest*, 4 N.Y.3d at 347, 795 N.Y.S.2d at 485 ("Because in this case we conclude that defendant met his burden under the Shield Law, we need not decide what standard is constitutionally required in order to overcome a criminal defendant's substantial right to obtain relevant evidence."). See also *Gonzales*, 194 F.3d at 34 & n.3 (noting that the Second Circuit's decision in *Cutler*, *supra* limited the holding of *Burke*, *supra*, and stating "We understand *Cutler* to limit *Burke* only as to how much of a showing was needed to *overcome* the privilege when the materials at issue were sought by a criminal defendant. The limitation was meant to lower the bar of the showing required of such a defendant to obtain disclosure of reporters' materials; it resulted from our view in *Cutler* that *Burke* had undervalued the needs of criminal defendants in putting on a defense.") (emphasis in original).

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

Any subpoena *duces tecum* in New York must pass the threshold requirement that the material sought be relevant and material to facts at issue in a pending judicial proceeding. *Valdez v. Sharaby*, 258 A.D.2d 458, 684 N.Y.S.2d 585 (2d Dep't 1999). As one court expressed,

In order to require production [of documents and things] prior to trial, the moving party must show that 1) the materials are relevant and evidentiary; 2) the request is specific; 3) the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; 4) the party cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and 5) the application is made in good faith and is not intended as a general 'fishing expedition'.

*People v. Price*, 100 Misc.2d 372, 379, 419 N.Y.S.2d 415, 420 (1979). Put in another way, the subpoena *duces tecum* may not be used to "fish" for impeaching material. *People v. Bova*, 118 Misc.2d 14, 460 N.Y.S.2d 230 (Sup. Ct. Kings County 1983).

While any subpoena can be quashed for being overbroad, *see, e.g. West 16th Realty Co. v. Ali*, 176 Misc.2d 978, 676 N.Y.S.2d 401 (Civ. Ct. N.Y. County 1998), this rarely occurs when the request bears a reasonable relation to the subject matter and is supported by factual basis. Requests to journalists usually seek notes or outtakes from a specific or discrete number of published articles or broadcasts. Such targeted subpoenas are unlikely to be deemed overbroad, and even less so when the requestor anticipates being challenged under the much stricter Shield Law requirements.

In cases where the Shield Law is invoked, therefore, the threshold requirements are touched on only generally. *See, e.g., Bova*, 118 Misc.2d 14 (subpoena may not be used for "fishing"). The Shield Law requirements, that the material must be (i) highly material and relevant, (ii) critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto, and (iii) not obtainable from any other source, creates such a high burden that it virtually ensures that any subpoena passing the Shield Law test has, by definition, passed the much less rigorous test of *People v. Price*, *supra*, applicable to subpoenas generally.

#### 5. Threat to human life

There is no statutory or case law addressing this issue.

#### 6. Material is not cumulative

If the subpoenaed material or testimony is merely cumulative, it "cannot be credibly urged that the proffered evidence is necessary or critical." *U.S. v. Marcos*, 17 Med. L. Rep. 2005, 1990 WL 74521, \*4 (S.D.N.Y. 1990). *See also U.S. v. Burke*, 700 F.2d 70, 78 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). Accordingly, the Shield Law protects such material from disclosure.

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

As a general matter, any subpoena can be contested by motion to quash under § 2304 of the New York CPLR. Where a subpoena is "palpably overbroad," the court will not "prune the request to cull the good from the bad," but instead may simply grant the motion to quash in its entirety, though the court retains discretion to engage in such "culling." *West 16th Realty Co.*, 676 N.Y.S.2d at 403. This general rule applies equally to subpoenas issued to reporters and is an alternative basis for a motion to quash.

CPLR § 3103(a) grants the court power to fashion a protective order on its own initiative or by motion of any party or person "denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts."

#### 8. Other elements

There are no other elements that are considered.

#### C. Waiver or limits to testimony

## 1. Is the privilege waivable at all?

Under Civil Rights Law §79-h(g),

A person entitled to claim the exemption provided under subdivision (b) or (c) of this section waives such exemption of such person voluntarily discloses or consents to the disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section.

Waiver is limited to only the particular information disclosed, and only when the person to whom the information is disclosed is not otherwise entitled to claim the privilege. For example, publication of a source's identity does not grant a waiver of privilege as it relates to information gleaned from that source. Furthermore, disclosure to another reporter or editor in the news organization is not deemed disclosure for the purposes of waiver. *See Simpson v. Schneiderman*, 21 Med. L. Rptr 1542 (Sup. Ct. Kings County 1973); *Matter of Mark Peterson*, NYLJ Oct 29, 1996 at 26 Col.4 (journalist privilege deemed waived by disclosure to someone other than journalist or editor); *Wigand*, 24 Med. L. Rep. 1720; *People v Wolf*, 69 Misc.2d 256, 261, 329 N.Y.S.2d 291, 297, *aff'd*, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1st Dep't 1972) (waiver applies to statements made by the informer which are actually published or publicly disclosed).

Disclosure to third parties who cannot claim the privilege will be considered a waiver only of the disclosed information. *Matter of Dan*, 80 Misc.2d 399, 363 N.Y.S.2d 493 (Sup. Ct. Erie County 1975) (privilege was waived when Dan gave statement about the events he observed during the Attica prison riots to Special Assistant Attorney General, gave a statement to the McKay Commission which were published, and answered questions before the grand jury, which were also published); *See Guice-Mills v. Forbes*, 12 Misc.3d at 857, 819 N.Y.S.2d at 436 (defendant who disclosed name of source to third party waived the privilege, but solely "with respect to the limited information shared").

Once the material has been published, the privilege as it relates to the published material is deemed waived, since "[t]he statute ... cannot be used as a shield to protect that which has already been exposed to view." *Troiano*, 486 N.Y.S.2d 991 at 994, *quoting Wolf*, 39 A.D.2d 864. *See In the Matter of Grand Jury Subpoena Dated January 26, 2000*, 269 A.D.2d 475, 703 N.Y.S.2d 230 (2d Dep't 2000); *People v. Craver*, 569 N.Y.S.2d 859; *In re Grand Jury Subpoena Dated January 26, 2000*, 269 A.D.2d 477, 711 N.Y.S.2d 888 (2d Dep't 2000) (since material in question had been broadcast or published, the privilege did not protect newscasters from testifying with respect to limited questions concerning the accuracy of statements contained in the broadcast).

At least one court has held that even where the information has been "leaked" and subsequently disclosed, the waiver applies only to the leaked information. In *Brown & Williamson v. Wigand*, *supra*, the plaintiff tobacco company argued that a leak of portions of the transcript of a "60 Minutes" interview to the Daily News acted as a blanket waiver of all unpublished material related to the interview. *Brown & Williamson*, 24 Med. L. Rep. at 1721. The court rejected plaintiff's argument, stating that under plaintiff's interpretation a "specific but limited disclosure would become the launching pad for a massive, unlimited and unspecified foray into matters undisclosed but related to the disclosed information" which would "fly in the face of the purpose of the shield law." The *Brown & Williamson* court held that "even if, arguendo, CBS did authorize the leak to the Daily News, CBS waived its protection only to what was published by that newspaper, and the limited disclosure in the Daily News cannot serve as a basis to gain unfettered access to CBS news files or to depose reporters." *Id* at 1724.

Similarly, a federal court has held that a journalist does not necessarily waive the qualified privilege for nonconfidential information by conducting interviews in the presence of third parties. In *Pugh v. Avis Rent a Car System, Inc.*, 1997 WL 669876 \*5, 26 Med. L. Rep. 1311, 1316 (S.D.N.Y. 1997), the subpoenaed journalist had conducted an interview of several litigants in a discrimination action. The *Pugh* court held that

The mere presence of third parties during an interview does not undermine the interests served by the qualified privilege, which allow a journalist to review privately his or her notes, tapes, or videotapes of an interview, and then decide what information to publish and how to incorporate it as part of a news story without fear that what he or she publishes can result in easy obtainment of those notes, tapes, and videotapes by litigants in search of any unpublished material relevant to a lawsuit.

Since the 1990 amendment to the Shield Law, at least one state court has held that if a confidential source later waives the absolute privilege, the material becomes "nonconfidential" and thus subject to the three-part test of the qualified privilege. *People v. Lyons*, 151 Misc.2d 718, 574 N.Y.S.2d 126 (Buffalo County Ct. 1991).

In a recent case decided under federal law, a New York federal court held that a radio industry newsletter — which was the plaintiff in a defamation action against another such newsletter — had waived the reporters privilege with respect to confidential sources by putting the existence of and communications with the sources in issue. *Inside Radio, Inc. v. Clear Channel Communications*, 2002 WL 1446620 (S.D.N.Y. 2002). Inside Radio (IR) sued Clear Channel Communications (CCC) for defamation — the allegedly defamatory statements being the published accusation by CCC in its newsletter that IR had itself knowingly and deliberately publishing false and defamatory stories about CCC, and that IR had suggested that it had confidential sources for its stories about CCC when in fact it did not. Essentially, IR's claim was that it had been defamed by CCC's accusation that IR had defamed it.

Because one of the allegedly defamatory statements by CCC was that IR did not have the confidential sources it claimed, by bringing the suit IR put the existence of these sources in issue; if it did not have the sources, the CCC articles were true (at least in this regard) and therefore not defamatory. Similarly, the IR "reporter's" state of mind — whether he knew that the articles concerning CCC were false — was also directly relevant to the issue of actual malice. The court held that "the question whether [IR] had any sources for the purportedly factual statements in the [IR] article and, if so, precisely what they told [IR] not only is clearly relevant, but it is pivotal to the claim or defense and unavailable from anyone but [IR]." *Id.* at \*6. Accordingly, the court determined that IR had waived the journalists privilege in bringing its defamation claim and thereby putting the very existence of purported confidential sources and what they told IR directly in issue.

While the court styled its decision as one involving waiver of the reporters privilege, it could just as easily (and perhaps more accurately) be described simply as a case in which the three-part test applied in *Burke* and its progeny was met, as the above-quoted language indicates.

## **2. Elements of waiver**

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

As stated above, disclosure of a confidential sources' name to an editor or other journalist does not waive the privilege, as these persons are also protected by the "cloak of confidentiality," but publication of a source's name will waive the privilege only with respect to the source's identity. *Wolf*, 39 A.D.2d 864.

Prior to the statute's expansion to include a qualified privilege for nonconfidential news, the privilege was deemed waived if the source later identified himself as the source of "any such news." *Andrews v. Andreoli*, 92 Misc.2d 410, 400 N.Y.S.2d 442 (Sup. Ct. Onondaga County 1977). *See People v. Zagarino*, 97 Misc.2d 181, 411 N.Y.S.2d 494 (Sup. Ct. Kings County 1978) (fact that a source testified at trial and thus disclosed his identity waived privilege). However, more recent decisions indicate that if a confidential source's identity is disclosed by the source voluntarily, the formerly confidential information is simply treated as "nonconfidential" and is protected by the qualified privilege. *Lyons*, 574 N.Y.S.2d 126.

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

See above, if the source's name is disclosed, the privilege is waived only with regard to the source's identity. *See, e.g., See Guice-Mills v. Forbes*, 12 Misc.3d 852, 819 N.Y.S.2d 432 (Sup. Ct. N.Y. Co. 2006).

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

See above, partial disclosure may be considered waiver with regard to that particular information disclosed.

### **d. Other elements**

There is no statutory or case law regarding this issue.

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

In *Matter of Dan*, 80 Misc.2d at 404, the court observed that it would be "an exercise in futility to require a newsman to testify before a grand jury and not be able to require his testimony at the trial of indictments based on his grand jury testimony." In *Dooley v Boyle*, 140 Misc.2d 171, 531 N.Y.S.2d 158 (Sup. Ct. N.Y. County 1988), decided prior to the 1990 amendment to the Shield Law, the court held that while a media reporter's notes from a confidential source are not discoverable en masse, to the extent that the reporter already has sworn to the accuracy of the statements, specific notes of such statements are discoverable.

## VII. What constitutes compliance?

New York's Civil Practice Law and Rules ("CPLR") § 2305 sets forth the basic compliance requirements for testimonial subpoenas, or subpoenas *ad testificandum* (sub-section (a)) and subpoenas *duces tecum* (sub-section (b)), as follows:

§ 2305. Attendance required pursuant to subpoena; possession of books, records, documents or papers

(a) When person required to attend. A subpoena may provide that the person subpoenaed shall appear on the date stated and any recessed or adjourned date of the trial, hearing or examination. If he is given reasonable notice of such recess or adjournment, no further process shall be required to compel his attendance on the adjourned date. At the end of each day's attendance, the person subpoenaed may demand his fee for the next day on which he is to attend. If the fee is not then paid, he shall be deemed discharged.

(b) Subpoena *duces tecum*; attendance by substitute. Any person may comply with a subpoena *duces tecum* by having the requisite books, documents or things produced by a person able to identify them and testify respecting their origin, purpose and custody.....

Accordingly, when a valid testimonial subpoena is issued, the person directed to attend must do so. In contrast, a subpoena *duces tecum* (which, by definition seeks documents and things rather than testimony of a person) is, as the Practice Commentaries to the CPLR note, "deemed complied with as long as the person who shows up with the subpoenaed things can identify them and discuss their 'origin, purpose and custody.'" (David D. Siegel, Practice Commentaries, McKinney's Consolidated Laws of New York Annotated Civil Practice Law and Rules § 2305 (b)). Although few New York cases have applied this provision of the CPLR, it appears that the person testifying must be competent to satisfy all three criteria. *See Standard Fruit & Steamship Co. v. Waterfront Commission of New York Harbor*, 43 N.Y.2d 11, 400 N.Y.S.2d 732 (1977) (corporation failed to comply with subpoena *duces tecum* issued by government agency investigating use of corporate checks when it merely produced corporate officer who had no knowledge of purpose for which checks were issued); *Castro v. Alden Leeds, Inc.*, 144 A.D.2d 613, 535 N.Y.S.2d 73 (2d Dep't 1988) (corporation failed to comply with subpoena *duces tecum* served on its vice president, which ordered vice president to produce for trial book describing characteristics of chemicals, when vice president delivered book but immediately left trial court's jurisdiction).

### A. Newspaper articles

Where a valid subpoena is testimonial (*i.e.*, it provides that a specific person must appear), the subpoenaed person must be produced. CPLR § 2305 (a). Where a valid subpoena calls for documents or things (*i.e.*, a subpoena *duces tecum*), the question of compliance posed to newspaper publishers is less clear. No New York cases have addressed the interplay between the general requirements of CPLR § 2305(b) (*see above*) and CPLR § 4532 (providing that newspapers and "periodicals of general circulation" are self-authenticating).

Pursuant to CPLR § 4532:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to printed materials purporting to be newspapers or periodicals of general circulation; provided, however, nothing herein shall be deemed to preclude or limit the right of a party to challenge the authenticity of such printed material, by extrinsic evidence or otherwise, prior to admission by the court or to raise the issue of authenticity as an issue of fact.

Accordingly, as an *evidentiary* matter, CPLR § 4532 frees publishers from having to produce testimony from employees verifying the authenticity of a newspaper or periodical article (subject to an opponent's opportunity to

challenge authenticity). Although a party issuing a subpoena duces tecum may still technically insist on compliance with CPLR § 2305 (b) to demand that the subpoenaed party produce someone to identify the newspaper and testify as to its origin, purpose and custody, this requirement seems particularly inapposite in the context of a self-authenticating newspaper, especially when the publisher is a third party and has been subpoenaed to produce a newspaper to establish the fact of publication. Moreover, as a practical matter, especially where the newspaper publisher is a non-party, the parties are likely to stipulate that the newspaper article is authentic so that there will be no need for the publisher to produce an employee to testify.

In the event that CPLR § 2305 (b) is deemed to require a newspaper publisher to produce a person to testify, the language of the rule would apparently permit anyone with sufficient knowledge to identify the document and explain its origin, purpose and custody, including not only editors and reporters but also administrators and archivists with the requisite knowledge. If the newspaper is subpoenaed to prove its content, the reporter or publisher could be called to testify.

### **B. Broadcast materials**

Although no New York cases specifically address the issue, the general requirements of CPLR § 2305 (b) appear to apply to valid subpoenas duces tecum directed at broadcasters seeking broadcast materials such as tapes. (*See* above). Thus, a broadcaster would have to produce a person with sufficient knowledge to identify the broadcast materials and testify as to their origin, purpose and custody. CPLR § 2305 (b). Assuming that the witness has the requisite knowledge, he or she could be an editor, reporter, newscaster or archivist.

To the extent that the broadcaster is also required as an evidentiary matter to authenticate the broadcast materials for trial, New York does not have a self-authenticating rule for such materials analogous to CPLR § 4532 for newspapers and periodicals. (*See* sub-section A above). Therefore, the broadcaster could be subject to the general evidentiary rubrics including "[s]ome reliable authentication and foundation," *People v. Patterson*, 93 N.Y.2d 80, 84, 688 N.Y.S.2d 101, 104 (1999) (referring to non-exclusive methods of authentication, including that "a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted."). Thus, testimony from a camera operator might be sufficient, depending on the nature of the broadcast materials. In *People v. Ely*, 68 N.Y.2d 520, 527-28, 510 N.Y.S.2d 532 (1986), the New York Court of Appeals explained the authentication requirements for audio tapes as follows:

Admissibility of tape-recorded conversation requires proof of the accuracy or authenticity of the tape by "clear and convincing evidence" establishing "that the offered evidence is genuine and that there has been no tampering with it". The necessary foundation may be provided in a number of different ways. Testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered or of a witness to the conversation or to its recording, such as the machine operator, to the same effect are two well-recognized ways. Testimony of a participant in the conversation together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either is a third available method.

A fourth, chain of custody, though not a requirement as to tape recordings is also an available method.

68 N.Y.2d at 527-28 (citations omitted). *See People v. Curcio*, 169 Misc.2d 276, 280, 645 N.Y.S.2d 750, 752 (Sup. Ct. St. Lawrence County 1996). As a practical matter, however, as with newspapers, the parties are likely to stipulate to at least the authenticity of broadcast material that has been aired.

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

Although as an evidentiary matter, a party on whom a subpoena is served may authenticate a newspaper or broadcast material by means of an affidavit, *see e.g., Gonzales v. NBC*, 194 F.3d 29, 30 (2d Cir. 1999) (affirming District Court decision which had directed NBC to produce outtakes of videotapes and an affidavit authenticating them); *Gavenda v. Orleans County*, 1997 WL 65870, \*2 n.5 (W.D.N.Y. 1997), it is less clear whether in response to a subpoena a sworn affidavit can be used as a substitute for court testimony. In light of the wording of CPLR § 2305 which at least on its face calls for live testimony (*see* sub-section A above) and the general principle that live testimony must be given at trial (*see* David D. Siegel, *New York Practice* § 396, 2002 Supplement), the rule

seems to be that affidavits will generally not suffice. *See, e.g., People v. Slochowsky*, 116 Misc.2d 1069, 1075, 456 N.Y.S.2d 1018, 1022 (N.Y. Sup Ct. Kings County 1982) (where testimony of District Attorney was inconsistent with other testimony, court noted that "the use of affidavits in substitute of live testimony is inappropriate under the conditions of this particular case").

Even a recent decision which one commentator has described as "what appears to be the first New York opinion approving [an] affidavit procedure," Faust F. Rossi, *1998-99 Survey of New York Law: Evidence*, 50 Syracuse Law Review 649, 684-85 & n.351 (2000), allowed only direct testimony to be introduced by affidavit in lieu of live testimony subject to various limitations, including the qualifications that each witness still had to take the witness stand to swear to the accuracy of the affidavit and had to be available for live cross-examination. *See Campaign for Fiscal Equity v. State of New York*, 182 Misc.2d 676, 699 N.Y.S.2d 663 (Sup. Ct. N.Y. County 1999) (presented with as many as 140 witnesses whose testimony a public interest group sought to introduce, court held that the group would be permitted to introduce direct non-expert witness testimony in affidavit form in lieu of live testimony in court, subject to various qualifications). Accordingly, it is unlikely, absent consent of both sides, that an affidavit could be regarded as a sufficient substitute for live testimony in response to a subpoena.

Nonetheless, as a practical matter, both sides may agree that an affidavit is sufficient. Accordingly, an offer of an affidavit by the reporter confirming, for example, that the quotes were accurate, should be made to the subpoenaing party. The non-subpoenaing party's agreement either not to insist on cross-examination or upon some mutually satisfactory language in the affidavit may be negotiated.

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

CPLR § 2308 sets forth the penalties available for disobedience of subpoenas, assuming the Shield Law's protections have been overcome Pursuant to § 2308 (a), non-compliance with a *judicial subpoena* (defined as a "subpoena issued by a judge, clerk or officer of the court") is punishable as a contempt of court. Additionally, the subpoenaed person, whether or not a party witness, may be liable to the issuer of the subpoena for damages caused by non-compliance and a fine of up to \$50. If the subpoenaed person is a party, the court may strike his or her pleadings. And the court may issue a warrant directing the sheriff to forcibly commit the witness to jail until he or she complies. CPLR § 2308 (a).

Pursuant to § 2308 (b), non-compliance with a *non-judicial subpoena* (i.e., one issued in an out-of-court proceeding such as an administrative hearing or an arbitration) is not immediately punishable as a contempt of court. Instead, the issuer or person on whose behalf the subpoena was issued may move in the New York Supreme Court to compel compliance. On such a motion, if the court finds that the subpoena was authorized, it must order compliance and may impose costs of up to \$50. If the court orders compliance and the subpoenaed person continues to disobey, as with judicial subpoenas pursuant to sub-section (a), he or she will be liable to the issuer for damages caused by non-compliance and a fine of up to \$50. Additionally, the court may direct the sheriff to produce the witness before the appropriate body (e.g., an administrative tribunal) and, if he refuses without reasonable cause to be examined or otherwise comply with the subpoena, to commit him to jail until he complies.

The key difference between a judicial subpoena and a non-judicial subpoena was aptly summarized by the First Department of New York's Appellate Division in *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 662 N.Y.S.2d 450 (1st Dep't 1997). As the court noted:

In the case of judicial subpoenas, including those issued by an attorney of record in a matter pending before a court, a person who fails to comply, without making a motion to quash, runs the risk of being held in contempt based directly on that failure. In distinction, a person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until a court has issued an order compelling compliance, which order has been disobeyed. Thus, there is no need to move to quash such a subpoena in order to avoid sanctions, and one who is served and does not wish to comply may safely wait until the party who served the subpoena moves to compel compliance.

*Id.* at 341. (citations omitted). *See also* David D. Siegel, *New York Practice* § 385 (West Publishing, 3d Ed. 1999); David D. Siegel, *Practice Commentaries*, McKinney's Consolidated Laws of New York Annotated Civil Practice Law and Rules § 2308.

## 1. Civil contempt

This section addresses situations where a reporter is held in civil contempt to compel compliance, with the proverbial keys to the cell in his own pocket. In the words of the New York Court of Appeals, contempt "usually involves imprisonment, a fine or both," and is "considered a drastic measure," *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 623 N.Y.2d at 165, 476 N.Y.S.2d at 272.(1984). To sustain a civil contempt, "a lawful judicial order expressing an unequivocal mandate must have been in effect disobeyed" and "prejudice to the rights of a party to the litigation must be demonstrated." *McCain v. Dinkins*, 84 N.Y.2d 216, 226, 616 N.Y.S.2d 335 (1994).

While recent high profile federal cases have brought the possibility of contempt to the forefront of the media's collective consciousness, it remains exceptional for reporters in New York to be found in contempt and fined and/or imprisoned, no doubt due to the robust protections afforded to professional journalists and newscasters by New York's Shield Law. Where such sanctions have been imposed, they have typically been overturned on appeal. By the express terms of the Shield Law, contempt would only be available where the qualified privilege for materials had been overcome and the reporter refused to produce the nonconfidential materials. As a practical matter, where no confidential sources are implicated, it is unlikely that a reporter would refuse to comply with an order to disclose the information that has been upheld on appeal. (*See below*).

### a. Fines

Under the CPLR, a court can assess a "penalty" for disobedience of a judicial subpoena and can also award damages. While the penalty is capped at \$50, the damages amount is not. CPLR § 2308 (a). The disobeying party may also be fined under N.Y. Judiciary Law § 753 (A) (5), which states:

A. A court of record has the power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy or a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced in any of the following cases...

5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness...

In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted or practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

As the *McCain* court stated, "[c]ivil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss or interference with the benefits of the mandate" that has been disobeyed. *McCain*, 84 N.Y.2d at 226 (imposing civil contempt penalties on city of \$50 for the first night and \$100 per additional night spent in emergency welfare assistance offices to be paid to homeless families to compensate for city's violation court order to provide emergency housing). Speculative or conjectural proof cannot form a basis for a fine imposed as indemnity for actual loss or injury suffered as a result of the contempt. 21 NY Jur. Contempt § 109 (1996). If the civil contempt is proven, but the complaining party either cannot prove loss or injury, or cannot show amount of loss, then a punitive fine may be imposed, not to exceed \$250 plus the cost of the complainant's costs and expenses. N.Y. Jud. § 773.

For disobedience of a non-judicial subpoena, only if the issuer or person on whose behalf the subpoena was issued moves in the Supreme Court to compel compliance, and the court finds that the subpoena was authorized, may the court impose "costs", which are capped at \$50, and a penalty, also capped at \$50. CPLR § 2308(b). However, like the procedure for judicial subpoenas, the recalcitrant party is liable for damages caused by non-compliance once the court has ordered compliance; and this damages amount is not subject to a cap. *Id.* The damages are compensatory and are governed by the same rules as for judicial subpoenas, described above. (For fines in connection with findings of criminal contempt, *see* Section VII (D) (2), below.)

In practice, journalists and news organizations in New York have seldom been fined for non-compliance with a subpoena and, on the rare occasions they have, the fines have typically been overturned on appeal. *See, e.g., In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.), *cert. denied sub nom Arizona v. McGraw-Hill, Inc.*, 459 U.S. 909 (1982) (vacating civil contempt order and fine of \$100 per day imposed by lower court after McGraw Hill complied only in part with subpoena, declining to produce certain documents which contained the

names of confidential sources; issuer had failed to demonstrate the necessity of the information and had not attempted to obtain the information elsewhere); *In re NBC (Krase v. Graco)*, 79 F.3d 346 (2d Cir. 1996), *rev'g In re NBC, Inc. (Krause v. Graco Children Prods., Inc.)*, 24 Media L. Rep. 1607 (S.D.N.Y. 1995) (reversing District Court's ruling finding NBC in contempt for failing to comply with subpoena and imposing fine of \$5,000 per day, where information sought was not critical or necessary in the sense that the issuer's claim or defense "virtually rises or falls" with the admission or exclusion of the information sought and the information was obtainable from other sources); *In re Dow Jones & Co.*, 182 F.3d 899 (2d Cir. 1999) (table) (vacating order of contempt); *In Re WBAI-FM (People v. Doe)*, 39 A.D.2d 869, 333 N.Y.S.2d 876 (1st Dep't 1972) (reversing order finding radio station in contempt — unclear whether civil or criminal contempt — and imposing fine of \$250, in addition to committing general manager of radio station to jail for 30 days, where subpoena was overbroad). *But see, Von Bulow v. Von Bulow*, 811 F.2d 136, 13 Media L. Rep. 2041 (2d Cir. 1987), *aff'g* 652 F. Supp 823 (S.D.N.Y. 1986), *cert. denied*, 481 U.S. 1015 (1987) (affirming order of civil contempt and fine of \$500 per day, stayed pending appeal, imposed on third party witness who had written manuscript but was deemed not to be a professional journalist therefore unable to claim reporter's privilege either under the First Amendment or New York's Shield Law).

### **b. Jail**

While courts have the power to jail journalists who fail to comply with valid subpoenas pursuant to CPLR § 2308 as long as they disobey court orders (*see* Section VII(D) above), it is extremely rare for such sanctions to have been imposed on journalists without being reversed on appeal. *See, e.g., In Re WBAI-FM (People v. Doe)*, 39 A.D.2d 869, 333 N.Y.S.2d 876 (1st Dep't 1972) (reversing order finding radio station in contempt — unclear whether civil or criminal contempt — and committing general manager of radio station to jail for thirty days in addition to imposing fine of \$250, where subpoena was overbroad). Moreover, in the rare instances where such sanctions have been imposed and upheld, they have been issued in older cases prior to the enactment of New York's Shield Law. *See In re Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964) (applying California law, court found journalist for bi-weekly periodical liable for criminal contempt and committed him to custody of Attorney General for ten days for refusing to name confidential sources during deposition in New York and during hearing before court, holding that he did not fall within protections of California's Shield Law); *Garland v. Torre*, 259 F.2d 545, 1 Media Law Rep. 2541 (2d Cir.) (journalist for the *New York Herald Tribune* held in criminal contempt and sentenced to ten days in jail, though promptly released, for refusing to divulge at pre-trial deposition confidential source of quotation attributed to a CBS "network executive" in defamation lawsuit brought by actress Judy Garland), *cert denied*, 358 U.S.910 (1958).

## **2. Criminal contempt**

Since a finding of contempt is a "drastic measure," *Oak Beach Inn Corp.*, 62 N.Y.2d at 165, in the case of confidential material, imposition of a fixed criminal contempt sentence on a journalist or news organization is virtually unheard of in New York (at least since the enactment of the Shield Law). The offenses that constitute a criminal contempt are listed in § 750 of New York's Judiciary Law and, in general terms, as one commentator has noted, "a contempt is or becomes criminal when it threatens the power and dignity of the law itself." David D. Siegel, *Practice Commentaries*, McKinney's Consolidated Laws of New York Annotated. It is "designed to vindicate and uphold the authority of the judiciary and the penalty is punitive." David D. Siegel, *New York Practice* § 482. Pursuant to Judiciary Law § 751 (1), criminal contempt is punishable "by fine, not exceeding \$1000, or by imprisonment, not exceeding 30 days, . . . or both . . . ."

Generally, imposition of a contempt sentence for refusing to testify subject to a valid subpoena will require a showing of willful defiance, even though § 750 of the Judiciary Law makes no reference to willfulness or intent. *Abrams v. New York Foundation for the Homeless*, 190 A.D.2d 578, 593 NYS2d. 518, *app dismissed without opp.*, 81 NY2d 954, 597 NYS2d939, 613 NE2d 971 (1st Dep't 1993) (finding that the defendant's persistent and willful defiance of the Supreme Court's subpoena warranted a finding of contempt.). It is the moving party's burden to establish not only that the subpoena is valid, but that the respondent's non-compliance is deliberate and willful. 21 N.Y. Jur. *Contempt* §20 (1996).

While some New York cases have found journalists liable for criminal contempt, typically they have been reversed or were decided prior to the enactment of New York's Shield Law. *See* discussion in section VII D (1) (b), *supra*.

### 3. Other remedies

Under CPLR § 2308 (a), where a witness has been issued a judicial subpoena and is a party to the action, the court may punish non-compliance with the subpoena by striking out the party's pleading. According to one commentator, the court may also have discretion to invoke the lesser sanctions contemplated by CPLR § 3126 for disobedience of pre-trial disclosure orders (i.e., other than striking pleadings, an order resolving issues to which the non-disclosed evidence is relevant in favor of the movant and an order prohibiting the disobedient party from producing certain evidence or witnesses in support of his or her case). David D. Siegel, Practice Commentaries, McKinney's Consolidated Laws of New York Annotated § 2308. *See also Sprewell v. NYP Holdings, Inc.*, 11 Misc.3d 1091(A), 819 N.Y.S.2d 851 (Sup. Ct. N.Y. Co. 2006) (precluding defendants, pursuant to CLPR 3126, from relying on the existence of undisclosed sources in defense of defamation claims). In any event, New York courts view the remedy of striking a party's pleadings as a drastic one and not to be lightly invoked. *See Oak Beach Inn Corp.*, 62 N.Y.2d at 166, (alternative sanctions to contempt provided for by CPLR § 3126 regarded as at least as serious as contempt; "[a] newspaper involved in a substantial libel action may well find the threat of contempt less intimidating than the thought of being entirely stripped of its defenses if it continues to preserve the confidentiality of its source."); *Segal v. Princess Ann Girl Coat, Inc.*, 285 A.D. 811 (1st Dep't 1955) (striking of pleadings for failure to comply with court order or subpoena characterized as an "extreme penalty"). Other consequences may include precluding a reporter from relying on the testimony of undisclosed sources, but this remedy, as well, has been narrowly construed. *See* discussion at section III.C.(1) and III.H., *supra*.

## VIII. Appealing

As a general matter, it is strongly advised that a person wishing to appeal an order granting or denying a motion to quash or for a protective order consult the rules for the court in which the order to be appealed has been made and the rules for the court in which the appeal will be brought. Unlike the trial courts, there are no Uniform Rules for the various departments of the appellate division. The individual rules for each of the departments can be found at title 22 of the New York Codes, Rules and Regulations (22 NYCRR). In addition, McKinney's annually publishes a pamphlet containing the rules. It should also be noted that in the first and second departments there are "appellate terms," which hear appeals of actions originating in the district, city, town and village courts. The appellate term rules should also be consulted, if necessary.

### A. Timing

#### 1. Interlocutory appeals

Under paragraph 2 of CPLR § 5701 (a), an appeal to the appellate division may be taken as a matter of right on certain orders, including interlocutory orders, where the motion resulting in the order was made on notice. (Appeals stemming from *ex parte* orders are governed by CPLR § 5701 (a) 3.) Among the categories of orders which may be appealed as of right are those that "involve[] some part of the merits" of the action and orders that "affect[] a substantial right." CPLR § 5701 (a) 2. These categories sweep broadly, and there are "precious few" orders which may not be appealed from as a matter of right. Siegel, *New York Practice* at 858 (West Publishing, 3d Ed. 1999). In addition, an appeal may be taken on permission of the judge who issued the order appealed from. CPLR § 5701 (c). While there does not appear to be any case law addressing whether a reporter appealing the denial of a motion to quash should proceed "as of right" or by permission, a substantial right of the reporter will be affected by the order to disclose the material, and he or she should bring the appeal under CPLR § 5701 (a) 2, as of right. *See People v. Marin*, 86 A.D.2d 40, 448 N.Y.S.2d 748 (2d Dep't 1982) (denial of motion to quash trial subpoena issued to nonparty law firm in criminal action deemed final and appealable).

It should also be noted that pursuant to the CPRL, only "judgments" or "orders" may be appealed. *See* CPLR § 5512; *Grisi v. Shainswit*, 119 A.D.2d 418 507 N.Y.S.2d 155 (1st Dep't 1986) (no appeal lies from a ruling, as distinct from an order). Civil Rights Law § 79-h (c) requires that any court which orders disclosure of nonconfiden-

tial information "shall support such order with clear and specific findings made after a hearing." Accordingly, the order compelling disclosure will likely be reduced to writing and denominated an "order" as a matter of course. However, a party seeking to appeal an adverse ruling should make sure that this is the case by submitting an order to the court for signature, if none has been issued, so that an appeal may be taken.

An appeal as of right "must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry...." CPLR § 5513 (a). Usually the prevailing party on the motion will serve the judgment and notice of entry (a one-page document attaching the judgment or order, which is filed with the clerk of the issuing court) on the losing party. However, where the party appealing the judgment or order (usually the losing party) has served it and the notice of entry on his or her adversaries, the thirty days in which to appeal runs from the time of this service. *Id.* Additional time to file a notice of appeal is allowed where the judgment and notice of entry are served by mail or overnight delivery rather than by hand. *See* CPLR § 5513 (d).

Filing a notice of appeal (i.e., "taking" an appeal) should not be confused with "perfecting" it. Taking an appeal is a relatively simple process which usually involves only filing and serving the notice of appeal. (Some appellate courts also require that a brief statement of the issues also be filed along with the notice, and the particular court's rules should be consulted in this regard.) The notice of appeal is a straightforward document which contains the case caption, names of the party appealing, the judgment or order (or part thereof) being appealed, and specifies the court to which the appeal is taken. *See* CPLR § 5515 (1). To be safe, the appealing party should appeal every part of the order (i.e., "every part thereof") in order to avoid waiving the right to appeal any discrete part of it. *See City of Mt. Vernon v. Mt. Vernon Housing Auth.*, 235 A.D.2d 516, 652 N.Y.S.2d 771 (2d Dep't 1997) (denying leave to amend notice of appeal to include appeal of parts of underlying order not initially appealed from). Perfecting the appeal, on the other hand, consists of, among other things, securing the transcripts from the proceeding (if any), drawing the record, writing briefs and getting the required papers printed, served and submitted to the court, all of which are governed by their own rules. However, the first step in the appeal process, once the notice of entry has been filed and served, is to file and serve the notice of appeal, which should be done sooner rather than later in order to avoid waiving the right to an appeal due to a failure to timely serve the notice of appeal.

## 2. Expedited appeals

New York has various appellate courts, all of which have their own rules and practices. As a result, the procedure for getting an expedited hearing may vary substantially from court to court. It is strongly recommended that the reporter seeking to expedite an appeal consult the rules of the court in which the appeal will be heard. The rules for many New York courts, including certain appellate courts, can be found online at <http://www.courts.state.ny.us/>. In addition, it may also be helpful to speak with the clerk of the court to determine the procedure for seeking expedited relief.

Frequently, an expedited appeal schedule will be requested along with a motion for a stay of enforcement of the judgment or order pursuant to CPLR § 5519 (c), or it may be made a condition of granting such a stay. In the First Department, Rule 600.2 of that department governs the timing for motions. Motions must be made on eight days' notice, if service is by personal delivery, unless the parties agree to abbreviated service, in which case the motion may be heard sooner. Thus, the reporter could have his or her motion for a stay heard within eight days (or less) of filing it. The other appellate division courts have similar rules, which should be consulted prior to filing an appeal.

If relief is required immediately, the reporter can and should call the clerk of the court to arrange an application for such relief. *See* Mark Davies, *et al.*, 8 New York Civil Appellate Practice § 17.3 (West Publishing Co. 1996). In the First Department it is possible to get an expedited hearing before a court attorney, who will then take the matter to a judge to be decided. The reporter seeking such relief should first obtain the order to be appealed and have it file-stamped by the clerk of the court in which the order was rendered. The next step is to draft a notice of motion requesting a stay of enforcement pursuant to CPLR § 5519 (c) and seeking expedited relief, with the return date on the notice left blank. The reporter should then contact his or her adversary to let them know that they will be seeking such expedited relief and when the matter will be heard (24 to 48 hours notice is preferred), so that the opposing counsel can be present for the hearing before the court attorney. If it is truly an emergency, the

matter can be heard on the same day that the order to be appealed is rendered, but opposing counsel should still be given notice of the application for expedited relief. The procedure for seeking such relief varies from court to court, and the reporter should not hesitate to call the clerk's office of the appellate court to determine how best to obtain an expedited hearing.

In addition, it is also possible to seek a preference. *See* CPLR § 5521 ("preferences in the hearing of an appeal may be granted in the discretion of the court to which the appeal is to be taken"). A preference is simply a device whereby an appeal can be moved up on the colander, rather than being heard in the usual order. In the First and Second Departments, their respective rules provide in relevant part that a "preference under CPLR 5521 may be obtained upon good cause shown in an application made to the court on notice to the other parties to the appeal." First Department Rule 600.12 (a) (2); Second Department Rule 670.7 (b) (2).

## **B. Procedure**

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

As noted above, it is advisable for the practitioner to consult the rules for both the court of original instance (from which the order to be appealed was issued) and for the court in which the appeal will be brought before beginning the appeal process. New York appellate courts do not have uniform rules that cover all of them, nor do the various departments have uniform court structures, all of which may effect where — and how — an appeal should be taken.

For the most part, reporters privilege issues arise in proceedings before supreme courts of New York, in which case the appeal goes to the appellate division of the department in which the judgment or order was entered (e.g., an order entered in the supreme court, New York county would be appealed to the Appellate Division, First Department). The appellate division courts also have jurisdiction to hear appeals arising from orders or judgments of the county courts or "appellate terms." *See* CPLR § 5501 (c). Not all departments, however, have appellate terms. The First and Second Departments do, and these appellate term courts may hear appeals of judgments and orders entered in the city civil courts, town and village courts. *See* Rules of New York Supreme Court, Appellate Term, First Department § 640.1. In the Third and Fourth departments, however, the county courts sit as appellate tribunals over city, town and village courts.

While the appeal may be heard by, e.g., the Appellate Division, First Department for an order entered in the Supreme Court, New York county, the notice of appeal itself should be filed with the court of original instance. *See* CPLR § 5515 (1).

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

The reporter may seek a stay pending appeal pursuant to CPLR § 5519 (c), which gives either the court of original instance or the reviewing court (the party seeking the stay may apply for it before either) the discretion to stay the enforcement of any order pending appeal. *See Grisi v. Shainswit*, 119 A.D.2d 418 507 N.Y.S.2d 155 (1st Dep't 1986) (granting of stays pending appeal is, "for the most part, a matter of discretion"). Given that disclosing the material sought from the reporter prior to an appeal being heard would render the appeal academic, such a request for a stay should be granted. *See Van Amburgh v. Curran*, 73 Misc.2d 1100, 344 N.Y.S.2d 966 (Sup. Ct. Albany County 1973) (stay pending appeal of execution order dismissing petitions for modification of subpoenas requiring policemen to appear at a hearing granted where, absent stay, policemen would be required to attend hearing and appeal would be rendered academic).

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

See section VIII (a) (1) above.

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

The standard of review on appeal of a motion to quash a subpoena or for a protective order is abuse of discretion. *See In re Beach v. Shanley*, 62 N.Y.2d 241, 476 N.Y.S.2d 765 (1984). The appellate division courts may review questions of law and of fact on appeal from a judgment or order of a court of original jurisdiction, and they may affirm, reverse and vacate a lower court's order. *See* CPLR § 5501 (c). The New York Court of Appeals, however,

"shall review questions of law only," except where the appellate division court has found new facts and a final judgment is entered based on those facts. CPLR § 5501 (b).

### 5. Addressing mootness questions

The possibility of mootness will sometimes arise in the criminal context where the trial proceeds without the reporter's testimony or materials or where a grand jury, having previously issued a subpoena to a reporter, disbands before an appeal on a motion to quash the subpoena can be heard. *See, e.g., In re Codey*, 82 N.Y.2d 521, 606 N.Y.S.2d 661 (1993) (grand jury disbanded prior to appeal). The New York Court of Appeals has articulated a three-element analysis test to determine if a given matter presents an exception to the mootness doctrine which, if met, may allow an appeal to proceed. The three elements considered are: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15, 431 N.Y.S.2d 400, 402 (1980). While many appellate courts will not be inclined to hear an appeal on a moot issue given their often over full dockets, the possibility of obtaining appellate review still exists. *See In re Codey*, 82 N.Y.2d 521 (applying three element analysis articulated in *Hearst Corp.*, *supra*); *Johnson Newspaper Corp. v. Parker*, 101 A.D.2d 1027, 475 N.Y.S.2d 951, *appeal dismissed*, 63 N.Y.2d 673 (1984).

### 6. Relief

The reporter generally should seek a reversal of the order compelling disclosure. In the unlikely event that a finding of contempt has been entered or a fine levied, the reporter should seek a reversal of the order imposing these sanctions. The appellate court may affirm, reverse or vacate an order, and may also remand the matter to the trial court for reconsideration, though this latter option is less frequently exercised.

## IX. Other issues

### A. Newsroom searches

There are no New York cases applying the federal Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa-2000aa-12, to journalists in connection with newsroom searches, nor are there any similar provisions under state law.

### B. Separation orders

There is no statutory or case law addressing this issue.

### C. Third-party subpoenas

New York courts have not been as receptive as other state courts to the efforts of journalists and news organizations to quash subpoenas directed to third parties in order to obtain information such as phone, credit card or other records which would, if disclosed, reveal confidential sources. *See, e.g., Philip Morris v. ABC*, 23 Media L. Rptr. 2438 (Va. Cir. Ct. 1995) (cognizant of ABC's First Amendment interests in the confidentiality of its sources, court applied tripartite analysis of *Branzburg v. Hayes*, 408 U.S. 665 (1972) to ABC's motion to quash subpoena for expense records of third parties which would have revealed confidential sources).

In the leading New York case, *Greenfield v. Schultz*, 173 Misc.2d 31, 660 N.Y.S.2d 624 (Sup. Ct. N.Y. County 1997), *aff'd in part, modified in part on other grounds, vacated in part on other grounds*, 251 A.D.2d 67, 673 N.Y.S.2d 684 (1st Dep't 1998), an editor at *The New York Times* sought to compel the defendant to return phone records it had allegedly obtained from a phone company pursuant to a third party subpoena in the context of a landlord-tenant lawsuit with the editor. The editor, among other things, contended that production of the phone records would violate his rights under First Amendment and New York's Shield Law by revealing the identity of his confidential sources. Rejecting this argument, the court applied the reasoning in *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1042-1046 (D.C. Cir.), *cert. denied*, 440 U.S. 949 (1979), finding that no journalistic privilege based on the First, Fourth and Fifth Amendments attaches to third-party billing records. Having noted the provisions of the Shield Law, the court concluded that it "perceive[d] no reason to expand

the constitutional protection so that it cloaks third-party sources of non-confidential information with a . . . qualified privilege." 173 Misc.2d at 38, 660 N.Y.S.2d at 630. The First Department of the Appellate Division, while modifying the order of the lower court and vacating its award of sanctions against the editor individually and against his attorney, affirmed the lower court's rejection of the editor's argument regarding the subpoena. 251 A.D.2d 67, 673 N.Y.S.2d 684.

As to the question of standing to bring an action to quash a subpoena directed towards a third party where disclosure would reveal confidential sources, no New York court has explicitly addressed whether a journalist or media organization can premise its right to sue on the basis of its First Amendment interests in confidentiality of its sources. In the absence of any such valid interest, the general rule may be that some sort of possessory or proprietary interest in the information subpoenaed is required. *See, e.g., People v. Di Raffaele*, 55 N.Y.2d 234, 433 N.E.2d 513 (1982) (rejecting claim by non-media defendant that his toll-billing records were obtained in violation of his constitutional privilege against self-incrimination because defendant, "having no possessory or proprietary interest in the records, [had] no standing to sue").

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

One New York case, decided after the U.S. Supreme Court's ruling in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) that the First Amendment does not prohibit a source from recovering damages for a journalist's breach of a promise of confidentiality, has held that a claim for breach of a promise not to identify an individual is not barred by either the federal or the New York constitutions. *See Anderson v. Strong Memorial Hospital*, 151 Misc.2d 353, 573 N.Y.S.2d 828 (Sup. Ct. Monroe County 1991) (denying newspaper's motion to dismiss action for indemnification and contribution brought by hospital which had been found liable for breach of confidential patient-physician relationship, after publication of photo identifying hospital patient as HIV positive in breach of newspaper's promise to hospital not to make patient recognizable in photo). Although *Anderson* did not involve an action by a source given a promise of confidentiality, journalists and newspapers should be aware of potential exposure to liability in New York for breach of promises of confidentiality if a source is promised anonymity and that promise is subsequently broken.