

# REPORTER'S PRIVILEGE: SOUTH CAROLINA

**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)

## Credits & Copyright

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

Copyright 2002-2010 by The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209. Phone: (703) 807-2100 Email: [rcfp@rcfp.org](mailto:rcfp@rcfp.org). All rights reserved.

Reproduction rights in individual state and federal circuit outlines are held jointly by the author of the outline and The Reporters Committee for Freedom of the Press. Rights for the collective work and other explanatory and introductory material are held by the Reporters Committee.

*Educational uses.* Those wishing to reproduce parts of this work for educational and nonprofit uses can do so freely if they meet the following conditions. *Educational institutions:* No charge is passed on to students, other than the direct cost of reproducing pages. *Nonprofit groups:* No fee is charged for the seminar or other meeting where this will be distributed, other than to cover direct expenses of the seminar. *Distribution:* This license is meant to cover distribution of printed copies of parts of this work. It should not be reproduced in another publication or posted to a Web site. Those needing to provide Web access can post links directly to the project on the Reporters Committee's site: <http://www.rcfp.org/privilege>

*All other uses.* Those wishing to reproduce materials from this work should contact the Reporters Committee to negotiate a reprint fee based on the amount of information and number of copies distributed.

*Reprints.* This document will be available in various printed forms soon. Please check back for updates, or contact the Reporters Committee for more information.

## 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

# SOUTH CAROLINA

*Prepared by:*

Jay Bender  
 Baker, Ravenal & Bender, L.L.P.  
 PO Box 8057  
 3710 Landmark Drive, Suite 400  
 Columbia, South Carolina  
 (803) 799-9091

<p>I. Introduction: History &amp; Background..... 2</p> <p>II. Authority for and source of the right..... 2</p> <p style="padding-left: 20px;">A. Shield law statute ..... 2</p> <p style="padding-left: 20px;">B. State constitutional provision ..... 3</p> <p style="padding-left: 20px;">C. Federal constitutional provision ..... 3</p> <p style="padding-left: 20px;">D. Other sources..... 3</p> <p>III. Scope of protection ..... 3</p> <p style="padding-left: 20px;">A. Generally ..... 3</p> <p style="padding-left: 20px;">B. Absolute or qualified privilege ..... 3</p> <p style="padding-left: 20px;">C. Type of case ..... 3</p> <p style="padding-left: 20px;">D. Information and/or identity of source..... 4</p> <p style="padding-left: 20px;">E. Confidential and/or non-confidential information ..... 4</p> <p style="padding-left: 20px;">F. Published and/or non-published material ..... 4</p> <p style="padding-left: 20px;">G. Reporter's personal observations ..... 4</p> <p style="padding-left: 20px;">H. Media as a party ..... 4</p> <p style="padding-left: 20px;">I. Defamation actions ..... 4</p> <p>IV. Who is covered ..... 4</p> <p style="padding-left: 20px;">A. Statutory and case law definitions ..... 4</p> <p style="padding-left: 20px;">B. Whose privilege is it? ..... 5</p>	<p>V. Procedures for issuing and contesting subpoenas ..... 5</p> <p style="padding-left: 20px;">A. What subpoena server must do ..... 5</p> <p style="padding-left: 20px;">B. How to Quash ..... 6</p> <p>VI. Substantive law on contesting subpoenas ..... 7</p> <p style="padding-left: 20px;">A. Burden, standard of proof ..... 7</p> <p style="padding-left: 20px;">B. Elements ..... 7</p> <p style="padding-left: 20px;">C. Waiver or limits to testimony..... 8</p> <p>VII. What constitutes compliance?..... 9</p> <p style="padding-left: 20px;">A. Newspaper articles..... 9</p> <p style="padding-left: 20px;">B. Broadcast materials ..... 9</p> <p style="padding-left: 20px;">C. Testimony vs. affidavits..... 9</p> <p style="padding-left: 20px;">D. Non-compliance remedies ..... 9</p> <p>VIII. Appealing ..... 9</p> <p style="padding-left: 20px;">A. Timing ..... 9</p> <p style="padding-left: 20px;">B. Procedure ..... 10</p> <p>IX. Other issues ..... 10</p> <p style="padding-left: 20px;">A. Newsroom searches ..... 11</p> <p style="padding-left: 20px;">B. Separation orders ..... 11</p> <p style="padding-left: 20px;">C. Third-party subpoenas ..... 11</p> <p style="padding-left: 20px;">D. The source's rights and interests ..... 11</p>
---	--

## I. Introduction: History & Background

The South Carolina General Assembly adopted a reporter's shield law in 1993 in response to a major lobbying effort by the South Carolina Press Association with assistance from the South Carolina Broadcasters Association. The only appellate decision involving the shield law arose out of the murder trial of Susan Smith, the woman who rolled her car into a lake with her young sons strapped in their car seats. Twila Decker, a reporter for *The State* newspaper in Columbia, S.C. had obtained access to information in a report on the court-ordered psychiatric examination of the defendant in spite of what the trial judge believed was an airtight order of confidentiality for the report. Decker was called to the stand by the court and interrogated as to her source. Upon refusing to disclose her source Decker was held in contempt. Her imprisonment was stayed pending an accelerated appeal to the Supreme Court of South Carolina.

Recent cases involving motions to quash subpoenas served on journalists have generally met with success. The major points of dispute have been the scope of coverage, *e.g.*, who is a journalist, and the exhaustion of alternative sources for the information.

## II. Authority for and source of the right

### A. Shield law statute

The South Carolina General Assembly adopted a shield law as Act No. 138 of 1993. The Act became effective upon the signature of the governor on June 14, 1993. The enactment is codified as *S.C. Code Ann.* §19-11-100 (Supp. 2001) and provides:

(A) A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium has a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any judicial, legislative, or administrative proceeding in which the compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding.

(B) The person, company, or other entity may not be compelled to disclose any information or document or produce any item obtained or prepared in the gathering or dissemination of news unless the party seeking to compel the production or testimony establishes by clear and convincing evidence that this privilege has been knowingly waived or that the testimony or production sought:

- (1) is material and relevant to the controversy for which the testimony or production is sought;
- (2) cannot be reasonably obtained by alternative means; and,
- (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

(C) Publication of any information, document, or item obtained in the gathering and dissemination of news does not constitute a waiver of the qualified privilege against compelled disclosure provided for in this section.

The push for a shield law grew out of a federal court prosecutions of members of the state's General Assembly for corruption. The U.S. Attorney called four reporters to the stand in the trial of a state senator. When each reporter declined to testify the court held them in contempt and confined them over the course of three days until the government withdrew the subpoenas. The contempt citations were appealed to the Fourth Circuit and resulted in a majority opinion which declined to recognize a privilege in the absence of bad faith on the part of the government. A concurring judge rejected the majority's rationale and characterized it as "a one-dimensional look at a two-dimensional problem." *In re Shain*, 978 F.2d 850 (4th Cir. 1992).

The shield law is not generally known to the bench and bar, and each subpoena directed at a reporter or news organization is in the first instance an educational exercise. Many lawyers and some judges are incredulous that the legislature would impose such a barrier to the quest for evidence. There have been no efforts since 1993 to amend the law.

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

The South Carolina Constitution contains at Art. I, §2 a free press guarantee that has been described by the Supreme Court of South Carolina as protecting the same rights as are protected by the First Amendment to the United States Constitution. *City of Rock Hill v. Henry*, 244 S.C. 74, 135 S.E.2d 718 (1963), rev'd on other ground 376 U.S. 776 (1964). There is no shield law protection in the South Carolina Constitution.

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

The Supreme Court of South Carolina has said that the First Amendment to the United States Constitution does provide a "qualified privilege in *limited* situations, such as when the grand jury acts in bad faith or the press is being subjected to official harassment. *Branzburg v. Hayes*, 408 U.S. 665 (1992)," but refused to apply it in circumstances where a trial judge was seeking from a reporter the identity of her confidential source for information in the court-ordered psychiatric evaluation of a murder defendant. *Matter of Decker*, 322 S.C. 215, 471 S.E.2d 462 (1995), n.4 (emphasis in original).

### **D. Other sources**

The only evidentiary privileges recognized under the South Carolina rules of evidence are those required by the constitution, statutes or common law. Rule 501, SCRE. The South Carolina Rules of Civil Procedure provide the basis for an order for a journalist or any other person who is not a party to the litigation to protect against burdensome, expensive or harassing subpoenas for production of documents. Rules 26(c) and 45 (c), SCRPC.

## **III. Scope of protection**

### **A. Generally**

The scope of the South Carolina privilege is broad and includes information, documents or items obtained or prepared in the gathering and dissemination of news. Since the most common subpoenas seek to compel the production of unpublished photographs of automobile accident scenes and the confirmation of published material, the shield law works to retard the annexation of reporters and photographers as investigators for the litigants.

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

The South Carolina privilege is qualified.

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

#### **1. Civil**

The privilege provided by the statute makes no distinction as to type of proceeding. The procedure to object to a subpoena is more clearly defined in the rules of civil procedure. Rule 45(c) SCRPC.

#### **2. Criminal**

South Carolina trial courts generally do not distinguish on the basis of civil or criminal jurisdiction when dealing with a motion to quash a subpoena based on the shield law.

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

There does not seem to have been a grand jury subpoena for a reporter since the adoption of the shield law. There is language in *Matter of Decker*, 471 S.E.2d 462 (1995), that could limit the protection of the shield law if the court should conclude that it is the grand jury seeking to compel testimony or production rather than the prosecutor. In *Decker* the Supreme Court held that the privilege was effective only against a "party" to the proceeding and

did not limit the ability of the court to seek information from a reporter. If the grand jury is a "party" to a grand jury proceeding, the privilege would be applied. If the grand jury is not a party, the privilege would not apply.

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

The language of the statute is broad, and seeks to protect against compelled disclosure of "any information...obtained or prepared in the gathering or dissemination of news," so, in theory, the identity of the source would be protected. This provision has not been the subject of litigation at the time of the preparation of this outline.

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

As first introduced the shield statute would have created an absolute privilege for confidential information, but in a compromise to obtain passage the privilege was made qualified for both confidential and non-confidential information.

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

The privilege applies with equal force to published and unpublished material, and provides that publication is not a waiver of the qualified privilege.

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

The language of the statute provides a privilege against compelled disclosure of "any information" "obtained" "in the gathering or dissemination of news," so it would seem that a reporter's personal observations would have the same qualified privilege as other information. This provision has not been the subject of litigation at the time of the preparation of this outline.

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

The qualified privilege under the statute is available only in those cases where "the one asserting the privilege is not a party in interest to the proceeding." An interesting situation could arise where the publisher or broadcaster is the party in interest and the reporter seeks to assert the privilege. Unsympathetic courts might resort to strained alter ego and agency principles to compel the production of information.

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

There is no differential treatment for libel cases under the South Carolina shield statute, and the only appellate court decision on the statute did not concern libel.

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

The South Carolina shield statute provides a qualified privilege against compelled testimony or production for "A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium." "News" is not defined, but under the rules of decision in state courts, the legislature will have been credited with using the word as it is generally understood.

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

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

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

There is no definition of reporter. The privilege has application to persons engaged in the gathering and dissemination of news for the public.

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

There is no definition of editor. If the editor is engaged in the gathering and dissemination of news for the public, the qualified privilege is available.

### **c. News**

There is no definition of "news," but the word will be given its ordinary meaning in the absence of an indication by the legislature that it intended another meaning. There is no contrary meaning in the statute.

### **d. Photo journalist**

There is no definition of "photojournalist," but if a photojournalist is engaged in the gathering and dissemination of news, the privilege applies.

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

The South Carolina shield law has a comprehensive scope with respect to covered persons and entities. If the person or entity is engaged or has been engaged in the gathering or dissemination of news to the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium, the qualified privilege applies.

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

There has been one trial court order holding that an unpublished book author could assert the privilege, but that the party seeking to compel production of the author-to-be's notes and videotapes had overcome the qualified privilege with respect to certain material. The privilege is available for those engaged in the gathering and dissemination of news. A newspaper librarian could assert the privilege on behalf of a newspaper to challenge a subpoena to produce past editions of the paper. These challenges are not unusual, and are most often successful when microfilm copies of the newspaper are available at a public library.

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

The privilege is for the person or entity engaged in the gathering of news. A source would not have the privilege.

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

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

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

A subpoena seeking to compel attendance at a deposition or trial may be served at any time prior to the deposition or trial, but the person served has the right to move to quash the subpoena if insufficient time for compliance has been provided. Rule 45(c)(3)(A)(i), SCRPC. A subpoena seeking to compel the production of material for trial must be served at least 10 days prior to trial. Other subpoenas for production do not have a minimum time for response, but the person compelled may move prior to the time for responding for a protective order.

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

South Carolina Rules of Civil Procedure require the party serving a subpoena to compel attendance at a trial or deposition to tender \$25.00 and mileage at the official rate to the person served at the time of service. Rule 45(b)(1), SCRPC.

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

No affidavit is required by the shield statute.

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

Under South Carolina Rules of Civil Procedure subpoenas are issued in blank by the clerks of court in each of the counties, or the subpoena may be issued by an attorney licensed to practice in the state. For criminal courts the subpoenas are to be issued by the clerk of court.

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

Civil subpoenas can be served by anyone not less than 18 years of age who is not a party to the proceeding. Criminal subpoenas are to be served by the sheriff in the county where the person served is located. Service is made by personal delivery.

## **B. How to Quash**

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

The law does not require that the party serving the subpoena be contacted as a first step, but in hopes that the issue can be resolved by a little education, that is a good place to begin the process. If a subpoena is served in a civil case to compel the production of things, the first step may be to write to the party serving the subpoena to object to the subpoena. If a written protest has been made, the party serving the subpoena may then bring a motion to compel.

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

South Carolina rules of civil practice require consultation in advance with respect to motions, so prior to moving to quash a subpoena in a civil case one would attempt to consult to resolve the issue. If the subpoena is for the production of documents and things, a letter of objection is sufficient to place the subpoena in issue.

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

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

The motion to quash should be filed in the court in whose name the subpoena was issued. For example, a subpoena compelling attendance at a deposition in a civil case shall issue from the court in the county where the deposition is to be held. A non-party may be deposed in the county where he works or resides. If neither of these counties is the county where the action is pending, the subpoena must come from the county where the deposition is to be held. Depositions in criminal cases issue from the county where the case is pending, so motions to quash should be directed to that court.

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

Operating on the principle that the party who files the motion sets the agenda, I would always recommend moving to quash a subpoena. If you are convinced that the attorney serving the subpoena will fail to act in response to a letter of objection in those circumstances where the subpoena seeks the production of documents or things only, you may choose not to move to quash.

#### **c. Timing**

In civil cases the written objection to production must be made within 14 days of the receipt of the subpoena or prior to the date for response if shorter than 14 days. Motions to quash or for a protective order must be made in advance of the time set for production or testimony.

#### **d. Language**

In civil cases a motion to quash or for a protective order made on grounds of the privilege must describe the privileged material in sufficient detail to allow the responding side to contest the issue. There is no similar requirement in responding to a criminal court subpoena, but a description phrased in your language helps set the agenda.

A customary response to a subpoena to a reporter seeking to compel the production of notes or testimony might state: "Movant is a reporter for the Daily Planet, and the information or documents sought by the attached subpoena was obtained in the process of gathering or dissemination of news and is privileged under S.C. Code Ann. §19-11-100 (Supp. 2001)."

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

State court judges generally have too many cases, too little help and too little time to read expansive material submitted in support of motions. Since all motions are decided after oral argument, the customary practice is to keep the motion short and to the point, and to argue in the same fashion.

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

### **a. Necessity**

There is no requirement for in camera review in the South Carolina statute.

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

If an appeal is taken from an order denying a motion to quash, and, in effect, compelling the production or testimony, that order would be in the nature of an injunction, which is not automatically stayed on appeal. In such a case it would be necessary to seek a writ of *supersedeas* from first the trial court and then the appellate court where the appeal has been filed. Rule 225, SCACR.

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

As a practical matter the consequence of refusal will likely be a denial of the motion to quash. I would argue that just as in camera review is not the norm in cases involving the assertion of attorney-client privilege, it should not be required in journalist privilege cases.

## **5. Briefing schedule**

There is no prescribed briefing schedule, and it is not uncommon to offer a brief memorandum of law to the court at argument.

## **6. Amicus briefs**

Amicus briefs are rare but not unknown at the trial court level. Rule 213 of the South Carolina Rules of Appellate Procedure describes the mechanism for seeking leave of the court to file an amicus brief. In the only appellate case involving the South Carolina shield law an amici brief was filed on behalf of the Reporters Committee for Freedom of the Press and the South Carolina Press Association. The most likely organization to petition for leave to participate as an amicus is the South Carolina Press Association, P.O. Box 11429, Columbia, S.C. 29211, 803/750-9561.

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

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

The South Carolina statute provides that the party seeking to compel testimony or production must establish either waiver of the privilege or the enumerated factors to overcome the privilege by clear and convincing evidence.

### **B. Elements**

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

The information or document sought must be shown to be "material and relevant to the controversy for which the testimony or production is sought."

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

The party seeking to compel testimony or production must show that it "cannot be reasonably obtained by alternative means." This exhaustion hurdle is often the basis for a favorable ruling on the motion to quash because many of those seeking to compel testimony or production have made no effort to identify an alternative source for what is sought.

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

No appellate court has dealt with this provision of the South Carolina statute, but reasonable probably means some logical, but unsuccessful effort to identify another source besides the reporter.

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

The party seeking to overcome the privilege must show by clear and convincing evidence that a reasonable effort has been made to obtain the information from an alternative source, but the effort failed.

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

The privilege is most likely to be overcome if the source was either an eyewitness to a crime or a participant in a crime, but the party seeking to overcome the privilege still must make the appropriate showing of exhaustion.

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

Since the privilege may be overcome by making a showing that includes materiality, relevancy and necessity, there is an implicit balancing of interests in the application of the test.

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

If a motion for a protective order is made on grounds that a subpoena is overbroad or unduly burdensome, the court hearing the motion will be required to make a determination on the issue to rule on the motion.

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

There is no requirement to weigh whether the matter subpoenaed involves a threat to human life, but if the party seeking to compel the production of that matter were able to establish the threat to human life, the motion for a protective order would most likely be denied.

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

If the testimony or production would be cumulative, an argument can be made that the exhaustion and relevancy prongs of the shield law test cannot be met.

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

The rules of civil procedure specifically provide for the filing of a motion to quash or for a protective order. There is not equivalent provision in the criminal procedure rules, but such motions are accepted by the courts.

### **8. Other elements**

There are no elements other than those identified in the statute that must be shown to overcome the privilege.

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

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

There are no cases addressing the waiver of the privilege, but the South Carolina statute provides that the privilege belongs to the journalist, and that a person seeking to overcome the claim of privilege must establish waiver by clear and convincing evidence.

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

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

There are no cases on the waiver issue, but if publication does not constitute waiver of the privilege, it is unlikely that disclosure of the information to an editor or attorney involved in the dissemination aspect of the news could constitute a waiver.

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

The statute requires a knowing waiver of the privilege, and if publication itself does not constitute waiver, identification of a non-confidential source in a publication will not constitute waiver.

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

If waiver is to be established by the party seeking to overcome the privilege, it is most likely to be established by circumstantial evidence. Such evidence might include the partial disclosure of information within the scope of the claim of privilege to someone not involved in the gathering and dissemination of news. As a parallel, the disclosure by a client of information within the scope of the attorney client privilege is a waiver of that privilege.

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

There are no court decisions discussing elements of waiver of the journalist's privilege in South Carolina, but a situation that might lead to a finding of waiver exists where a publisher provides a contact sheet of unpublished photographs of an automobile accident scene to one side in a civil case and then attempts to resist a subpoena for the same photographs by the other side.

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

It is not a good practice to let reporters talk to lawyers about the scope of their testimony. Any discussion by the reporter might provide a basis to challenge the claim of privilege. If the issue is the confirmation of publication, there is no need for such testimony because newspapers and other periodicals are self-authenticating documents under the South Carolina Rules of Evidence. As for whether or not the story is true, there are likely other sources besides the reporter to testify on that point so the exhaustion requirement cannot be met.

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

### **A. Newspaper articles**

Newspapers and other periodicals are self-authenticating documents. Rule 902(6), SCRE.

### **B. Broadcast materials**

If the issue is whether a particular piece was broadcast, the parties typically will stipulate regarding a broadcast to avoid having a representative of the broadcaster appear. If no stipulation is reached, a representative who has first-hand knowledge of what was broadcast or who is the custodian of business records revealing broadcast information would have to appear.

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

If the issue is whether a particular item was broadcast, very often the parties will agree to accept an affidavit from the station. If the question is whether a particular story was true, the parties are not likely to accept an affidavit.

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

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

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

There are no caps on civil fines imposed to compel compliance with a court order. Fines in the form of sanctions have been imposed against recalcitrant litigants in civil cases, but these cases have not involved reporters.

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

If the purpose of the confinement is to coerce compliance with a court order, confinement can last as long as compliance remains relevant to the controversy before the court. If the reporter fails to comply with an order compelling testimony, but the trial continues without the testimony, the confinement must end when the trial ends because there will be no opportunity to purge the contempt. One South Carolina reporter, Twila Decker, was sentenced to jail for civil contempt, but the Supreme Court of South Carolina stayed the confinement pending an accelerated appeal of the contempt citation. *Matter of Decker*, 322 S.C. 212, 471 S.E.2d 459 (1995).

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

There are no cases in South Carolina where a reporter has been convicted of criminal contempt.

## **VIII. Appealing**

### **A. Timing**

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

Since the shield law has application only when the person or entity asserting the privilege is not a party to the proceeding a denial of the motion to quash or for a protective order would be immediately appealable. If the order is in a civil court the time for appeal is 30 days from the date of the order denying the motion. In criminal cases the notice of appeal must be filed within 10 days of the order. No distinction should be drawn with respect to the claim of privilege based on whether the subpoena is for discovery or trial.

Accelerated appeal is appropriate where the reporter has been cited for contempt for failing to comply with an order following assertion of the privilege. In all cases where the reporter has been found to be in contempt, move to stay the coercive action pending appeal.

## **2. Expedited appeals**

There are no special rules for expedited appeals. An appeal may be expedited upon motion of the reporter, the party seeking to compel or the appellate court on its own motion. There is no special treatment for appeals by news media.

### **B. Procedure**

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

Appeals from magistrate courts must be taken to circuit court. Appeals from administrative tribunals must be taken to circuit court. Appeals from circuit court go to the South Carolina Court of Appeals unless a constitutional issue is involved. In the instance of a constitutional question, the appeal may be to the Supreme Court of South Carolina.

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

Civil contempt is not automatically stayed by appeal. To obtain a stay or writ of supersedeas pending appeal the party must first seek relief from the trial court. If relief is denied, a petition may be filed with the appellate court where the appeal is pending. A stay or supersedeas may be issued upon a showing of irreparable harm. Since the Supreme Court of South Carolina has recognized a First Amendment privilege in a limited set of circumstances, a claim that those circumstances exist but have been disregarded by the court below should be included in the motion if they exist. If the facts are outside the scope of the limited circumstances identified by the Supreme Court, it would not be acceptable to assert a privilege based on the First Amendment.

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

Appeal would be as a matter of right.

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

The standard for review will be abuse of discretion. If the limited circumstances under which the South Carolina Supreme Court will recognize a First Amendment privilege exist, the argument can be made that review should be de novo.

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

The question of mootness has not been addressed in the context of the shield law, but in other cases involving First Amendment issues the court has been willing to grant review where the action below has ended, but the deprivation complained of is capable of repetition while evading appellate review if the mootness issue were strictly applied.

#### **6. Relief**

Depending upon the nature of the ruling below the appellate court should be asked to vacate the contempt citation or remand the case for consideration of the appropriate elements that must be proved by clear and convincing evidence to overcome the claim of privilege.

## **IX. Other issues**

### **A. Newsroom searches**

There have been no newsrooms searches in South Carolina. There have been cases where photojournalists have been arrested at the scene of accidents, but the prosecutions have been dismissed. In one case where a photographer had his camera confiscated a civil action under the Civil Rights Act resulted in a settlement with the law enforcement agencies making payments to the photographer and his newspaper.

### **B. Separation orders**

It is unlikely that any newspaper in South Carolina would rely on a reporter who is to be a witness in a case to cover the trial of the case. In the federal case discussed above, *In re Shain*, the reporters who were most knowledgeable on the subject of the corruption trials were the ones who were subpoenaed to testify. This removed them from trial coverage and had the effect of diminishing the ability of the public to receive the most complete coverage of the trial.

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

No court in South Carolina has dealt with this issue although the third-party subpoenas were used in the *Food Lion v. ABC* case. As a theoretical matter, could ABC have moved to quash those subpoenas on privacy grounds?

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

There are no cases in South Carolina addressing intervention by a source to halt disclosure of source identifications.