REPORTER'S PRIVILEGE: TEXAS

The Reporters Committee for Freedom of the Press

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

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

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The Reporter's Privilege Compendium: An Introduction

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

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

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

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

Above the law?

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dissented from the Court's opinion and said that the First Amendment provided journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority. Although the high court has not revisited the issue, almost all the federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege.

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

If your state has a shield law, your lawyer must determine whether it will apply to you, to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, or if your situation seems to fall outside its scope, the state's courts may have recognized some common law or constitutional privilege that will protect you. Each state is different, and many courts do not recognize the privilege in certain situations.

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

TEXAS

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I. Introduction: History & Background

The state of the Reporter's Privilege is considerably improved with the recent passage of the state's shield law, although there is still uncertainty as to how some provisions will be interpreted. The new shield law (signed on May 13, 2009, and effective upon signing) has already been used on a number of occasions with mostly positive results. Not only have numerous court proceedings resulted in favorable rulings for reporters and the media, but there is considerable anecdotal evidence of many media outlets convincing the subpoenaing party to withdraw the subpoena upon being informed of the passage of the new law.

II. Authority for and source of the right

On May 13, 2009, Texas became the thirty-seventh state to enact a reporter's privilege. The law was signed by Governor Rick Perry that day and became effectively immediately. The law is now codified at Texas Civil Practices & Remedies Code § 22.021-22.027 and Texas Code of Criminal Procedure Arts. 38.11 and 38.111. Prior to the passage of the shield law, advocates of a reporter's privilege and Texas courts looked to the First Amendment to the United States Constitution, and, specifically, to the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and cases following *Branzburg* in the federal circuits, to find the basis of a reporter's privilege. *See, e.g., Holland v. Centennial Homes, Inc.*, 22 Med. L. Rptr. 2270 (N.D. Tex. 1993); *but see State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App 1994) (en banc). Additionally, some support for such a privilege was also found in Article I, § 8 of the Texas Constitution. *See Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987). In that case, the appellate court found that a reporter's privilege existed based on the Texas Constitution. The court applied the three-part test of Justice Powell's concurrence in *Branzburg*, holding that a party seeking materials or testimony must show that it is:

(1) highly material and relevant;

(2) necessary or critical to the claim; and

(3) not obtainable from other sources.

Channel Two, 725 S.W.2d at 472.

A. Shield law statute

The Texas Free Flow of Information Act (also known as a reporter's privilege) is a qualified privilege with separate civil and criminal sections. The civil section, codified at Texas Civil Practices & Remedies Code § 22.021-22.027, applies to confidential and non-confidential sources, journalist's work product, and published and unpublished materials. In order to require a reporter to testify or produce materials, the party who issued the subpoena must show by clear and specific evidence that they have satisfied a three part test: (1) they have exhausted all reasonable efforts to get the information elsewhere; (2) the information is relevant and material to the proper administration of justice; and, (3) the information sought is *essential to the maintenance of the claim or defense* of the person asking for it.

The criminal section, on the other hand, codified at Texas Code of Criminal Procedure Arts. 38.11 and 38.111, is separated into three parts with different tests applying to different matters. The first part deals with confidential sources, the next with unpublished work product and non-confidential sources, and the third with published information. When a confidential source is involved, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or, (3) probable cause exists that the source committed a felony. In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere. Further, a journalist can be compelled to give up his confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. With regard to unpublished materials (*i.e.*, work product) in the criminal setting, the same

three part test as the civil arena applies. Published materials are not covered by the statute so one would look to common law with regard to those materials.

The bill that was proposed in the 2005 and 2007 and ultimately passed in the 2009 legislative session is a qualified privilege patterned in large part after the Department of Justice Guidelines. In 2007, there were two chief opponents to the legislation – law enforcement and the business community. During the 2007 session, the proponents of the law were able to negotiate with the business community to alleviate their concerns about disclosure of trade secrets and other information they deemed to be "private" or "proprietary" in nature. Ultimately the business community groups signed a letter to the Legislature indicating they no longer opposed the bill. Despite repeated efforts, there were no fruitful negotiations with the prosecutors in either 2005 or 2007. In 2007, the bill passed out of the Texas Senate and the House Judiciary Committee, but was killed on a technical point of order during the last days of the 80th regular legislative session.

During the interim, the newspapers, broadcasters, and FOI advocates continued to work hard to better educate people through grass roots efforts and the establishment of a very informative website – www.freeflowact.com. The website gives examples of demonstrated need for the law, shows what laws have been adopted in other states and when their laws were enacted, provides editorials on the issue, and has a section on subpoena abuse and prosecutorial misconduct.

In the 2009 legislative session, long-time sponsors in the Senate – Senator Rodney Ellis (D-Houston) and Senator Robert Duncan (R-Lubbock) – continued as steadfast supporters of the legislation. Having lost the prior House sponsor in a primary election, a new House sponsor was needed. San Antonio Representative Trey Martinez-Fischer signed up to sponsor the legislation and was key in its passage. HB 670 (the Texas Free Flow of Information Act) was heard by the newly-reconstituted House Judiciary and Civil Jurisprudence committee in 2009. There were only three returning members of the committee who had heard the issue in previous sessions. Proponents were concerned that the learning curve would be detrimental to the cause, but this proved not to be a problem, in large part, because of the strength of the new chairman of the committee – Chairman Todd Hunter (R-Corpus Christi).

From the beginning, Chairman Hunter worked to have the bill heard early, and he put tremendous pressure on the prosecutorial community to sit down and have a meaningful discussion and negotiate with the media on the bill. As a result of Chairman Hunter's tenacity and dedication, those advocating for the bill had four different negotiation sessions with the prosecutors – the final one lasting more than thirteen hours. In the end, everyone agreed upon the language in the bill; prosecutors testified before the House and Senate committees that they no longer had opposition to the bill, and the bill sailed through the House and the Senate with unanimous votes on third reading.

B. State constitutional provision

There is no express shield law provision in the Texas Constitution. In pre-shield law cases, there was little constitutional protection found in case law; courts simply applied the same law to subpoenas to reporters as they did to any other subpoena.

Nevertheless, pre-shield law, some Texas courts did recognize a privilege. The Fifth Circuit recognized the privilege in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *modified on reh'g*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), stating:

> We hold that a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants.

Id. at 725. Seealso, In re Selcraig, 705 F.2d 789, 792 (5th Cir. 1983) (holding *Miller* establishes the rule for the Fifth Circuit). Two Texas courts of appeals also recognized the privilege. *See Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App. – San Antonio 1991, orig. proceeding); *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470 (Tex. App. – Houston [1st Dist.] 1987, orig. proceeding).

Under federal and Texas case authority, a few courts found that Plaintiff's burden was to make a clear and specific showing that (i) the information sought was highly material and relevant to the inquiry at hand; (ii) there was a compelling need for the information; and (iii) the information was not obtainable from other available sources.

See, e.g., Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App. – San Antonio 1991, orig. proceeding); *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470 (Tex. App. – Houston [1st Dist.] 1987, orig. proceeding). This test was recognized and applied by the Houston First District Court of Appeals and the San Antonio Court of Appeals. In the libel context, the Texas Supreme Court has found that Article I, § 8 of the Texas Constitution (the Texas counterpart to the First Amendment) does not contain any greater protection than the First Amendment. *See Bentley v. Bunton*, 94 S.W.3d 561, 45 Tex. Sup. Ct. J. 1172 (Tex.2002).

In the criminal context, the Texas Court of Criminal Appeals, which is the state's highest criminal court, consistently held that there was no support in the Texas constitution for finding a reporter's privilege in criminal cases. *State ex. Rel. Healey v McMeans*, 884 S.W.2d 772 (Tex.Crim. App. 1994) (en banc); *see also Ex Parte Groethe*, 687 S.W.2d 736 (Tex. Crim. App. 1984) (denying a reporter's privilege where the reporter personally viewed the criminal activity, but implicitly leaving open the possibility of such a privilege in other circumstances). One criminal case that did find for the reporter, although not a reporter's privilege, is *Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc). In that case, the Court of Criminal Appeals ruled that failure to force a reporter to testify at the underlying criminal trial (based on the trial court's grant of the reporter's motion to quash based on a First Amendment privilege) did not cause a denial of compulsory process because the defendant failed to show the information would have been material and favorable to the defense.

C. Federal constitutional provision

To the extent Texas courts have recognized any sort of reporter's privilege based on federal law, it has been grounded upon the First Amendment to the United States Constitution, and the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). *See, e.g., Holland v. Centennial Homes, Inc.*, 22 Med. L. Rptr. 2270 (N.D. Tex. 1993); *but see State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App 1994) (en banc). The amount of protection afforded has varied depending on whether the subpoena arose in the civil or criminal context and whether the information or source sought was confidential or not. To the extent a balancing test was applied, the test consisted of three prongs – the information sought must be highly relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources. *See Dallas Morning News v. Garcia*, 822 S.W.2d 675 (Tex. App. – San Antonio 1991, orig. proceeding); *Texas v. Lyon*, 19 Med. L. Rptr. 2153 (Tex. Crim. Dist. Ct. – Dallas 1991).

D. Other sources

The Texas Rules of Evidence, which do not recognize a privilege unless they are based on a constitution, state, or rule of evidence, s*ee* Tex. R. Evid. 501, do not recognize a testimonial privilege for reporters. Thus, Texas does not recognize a common law basis for a reporter's privilege.

Nevertheless, attorneys have been searching for other legal avenues to bolster protection of such materials and, in fact, there is some protection granted to news organizations in the criminal context. Article 18.01(e) of the Texas Code of Criminal Procedure grants special protection to news organizations for evidentiary searches, which has been relied upon as an argument for providing protection from subpoenas, as well. Advocates have argued that a prosecutor or private litigant should not be able to obtain by subpoena material that police are not able to obtain by court order. In *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994)(en banc), this question was posed in a concurrence by one Justice, inquiring in regard to Article 18.01(e): "We might ask if you can't seize it by a court order (search warrant), how can you subpoena it by a clerk order?" Additionally, media attorneys have also argued that unpublished and confidential information should be protected as proprietary information or trade secrets, although no Texas court has ruled directly on that issue.

III. Scope of protection

The Texas Free Flow of Information Act (also known as a reporter's privilege) is a qualified privilege with separate civil and criminal sections. The civil section applies to confidential and non-confidential sources, journalist's work product and published and unpublished materials. In order to require a reporter to testify or produce materials, the party who issued the subpoena must show by clear and specific evidence the following: (1) they have ex-

hausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and, (3) the information sought is *essential to the maintenance of the claim or defense* of the person asking for it. Tex. Civ. P. & Rem. Code § 22.024.

The criminal section, on the other hand, is separated into three parts with different tests applying to different matters. The first part deals with confidential sources, the next with unpublished work product and non-confidential sources, and the third with published information. *See* Tex. Code of Crim. Proc., art. 38.11 and 38.111.

A. Generally

The bill that was originally proposed is a qualified privilege patterned in large part after the United States Department of Justice Guidelines. Proponents believe that the right balance has been struck in Texas' reporter's privilege – one in which the goal of increasing the free flow of information and preserving a free and active press has been balanced with protecting the right of the public to effective law enforcement and the fair administration of justice. The purpose of the statute is expressly set forth in the civil statute at Tex. Civ. Prac. & Rem. Code § 22.022 and in the criminal statute at Tex. Code of Crim. Proc., art. 38.11, § 2.

B. Absolute or qualified privilege

The Texas Free Flow of Information Act (also known as a reporter's privilege) is a qualified privilege as to civil subpoenas. The civil section applies to confidential and non-confidential sources, journalist's work product, and published and unpublished materials. In order to require a reporter to testify or produce materials, the party who issued the subpoena must show by clear and specific evidence the following: (1) they have exhausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and (3) the information sought is *essential to the maintenance of the claim or defense* of the person asking for it. Tex. Civ. P. & Rem. Code § 22.024.

The criminal section, on the other hand, is separated into three parts with different tests applying to different matters. *See* Tex. Code. Crim. Proc., art. 38.11. The first part deals with confidential sources, the next with unpublished work product and non-confidential sources, and the third with published information. When a confidential source is involved, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. Tex. Code Crim. Proc., art. 38.11, § 4(a)(1)-(3). In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere. *Id.* Further, a journalist can be compelled to give up his or her confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. Tex. Code Crim. Proc., art. 38.11, § 4(a)(4).

With regard to unpublished materials (*i.e.*, work product) and non-confidential sources in the criminal setting, the subpoenaing party must make a clear and specific showing that: (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; (2) the information sought is relevant and material to the proper administration of the official proceeding and is essential to the maintenance of a claim or defense of the person seeking the information; and (3) the information sought is central to the investigation or prosecution of a criminal case and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred. Tex. Code of Crim. Proc., art. 38.11, § 5(a). The court should also consider several other factors including the reasonableness, timely notice, the balancing of interests involved and the speculative nature of the subpoena when considering an order to compel testimony. Tex. Code of Crim. Proc., art. 38.11, § 5(b).

Published materials are not covered by the statute so one would look to common law with regard to those materials. Tex. Code Crim. Proc., art. 38.11, § 8.

C. Type of case

1. Civil

The Texas Free Flow of Information Act has separate civil and criminal sections. The civil section, codified at Texas Civil Practices & Remedies Code § 22.021-22.027, applies to confidential and non-confidential sources,

journalist's work product and published and unpublished materials. In order to require a reporter to testify or produce materials, the party who issued the subpoena must show by clear and specific evidence the following: (1) they have exhausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and (3) the information sought is *essential to the maintenance of the claim or defense* of the person asking for it. *See* Tex. Civ. Prac. & Rem. Code § 22.024, and generally.

Additionally, the shield law makes all broadcasts self-authenticating, so a reporter will not have to testify solely for the purpose of authenticating a broadcast tape. *See* Tex. Civ. Prac. & Rem. Code § 22.027, and Tex. Code Crim. Proc., art. 38.111.

2. Criminal

The criminal section of the shield law is separated into three parts with different tests applying to different matters. *See* Tex. R. Crim. Proc., art. 38.11. The first part deals with confidential sources, the next with unpublished work product and non-confidential sources, and the third with published information. When a confidential source is involved, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. Tex. Code Crim. Proc., art. 38.11, § 4(a)(1)-(3). In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere. *Id.* Further, a journalist can be compelled to give up his confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. Tex. Code Crim. Proc., art. 38.11, § 4(a)(4).

With regard to unpublished materials (*i.e.*, work product) and non-confidential sources in the criminal setting, the subpoenaing party must make a clear and specific showing that: (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; (2) the information sought is relevant and material to the proper administration of the official proceeding and is essential to the maintenance of a claim or defense of the person seeking the information; and (3) the information sought is central to the investigation or prosecution of a criminal case and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred. Tex. Code of Crim. Proc., art. 38.11, § 5(a). The court should also consider several other factors including the reasonableness, timely notice, the balancing of interests involved and the speculative nature of the subpoena when considering an order to compel testimony. Tex. Code of Crim. Proc., art. 38.11, § 5(b).

Published materials are not covered by the statute so one would look to common law with regard to those materials. Tex. Code Crim. Proc., art. 38.11, § 8.

Some unique aspects of the criminal statute include: (1) the elected district attorney (or a suitable substitute under the statute) is required to sign all criminal subpoenas issued to journalists, and (2) the subpoenaing party is required to pay the journalist a reasonable fee for the journalists' time and costs incurred in responding to the subpoena (the calculation of cost is based on the cost provision in the Texas Public Information Act). *See* Tex. Code Crim. Proc., art. 38.11, § § 5 and 9. Additionally, as with civil subpoenas, with regard to criminal subpoenas, the shield law makes all broadcasts self-authenticating, so a reporter will not have to testify solely for the purpose of authenticating a broadcast tape. Tex. Code Crim. Proc., art. 38.111.

3. Grand jury

The criminal shield law also addresses grand jury subpoenas for confidential source information under certain circumstances. In particular, if the information or document was disclosed in violation of an oath given to a juror or a witness, a journalist can only be compelled to testify when the person seeking the testimony, production or disclosure makes a clear and specific showing that the subpoenaing party has exhausted reasonable efforts to obtain the confidential source information from alternate sources. *See* Tex. Code Crim. Proc., art. 38.11, § 4(c). In this situation, the Court has the discretion to order an *in camera* hearing. Furthermore, a court may not order the production of the confidential source until a ruling has been made on the motion. *Id.*

D. Information and/or identity of source

The privilege protects the identity of the source, as well as the information, document, or other item that could identify the source or that was provided by the source. In the civil context, the qualified privilege can be overcome if the subpoenaing party can show by clear and specific evidence the following: (1) they have exhausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and (3) the information sought is *essential to the maintenance of the claim or defense* of the person asking for it. Tex. Civ. Prac. & Rem. Code § 22.024. In the criminal context, the identity of a confidential source is absolutely privileged unless, (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. Tex. Code Crim. Proc., art. 38.11, § 4(a).

E. Confidential and/or non-confidential information

The civil section of the shield law does not distinguish between confidential and non-confidential information for purposes of privilege. The criminal section of the shield law does make a distinction. When a confidential source is involved in a criminal matter, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. Tex. Code Crim. Proc., art. 38.11, § 4(a)(1)-(3). In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere. *Id.* Further, a journalist can be compelled to give up his confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. Tex. Code Crim. Proc. art. 38.11, § 4(a)(4). When non-confidential information or sources are involved, the subpoenaing party must make a clear and specific showing that: (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; (2) the information sought is relevant and material to the proper administration of the official proceeding and is essential to the maintenance of a claim or defense of the person seeking the information; and (3) the information sought is central to the investigation or prosecution of a criminal case and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred. Tex. Code of Crim. Proc., art. 38.11, § 5(a). The court should also consider several other factors including the reasonableness, timely notice, the balancing of interests involved and the speculative nature of the subpoena when considering an order to compel testimony. Tex. Code of Crim. Proc., art. 38.11, § 5(b).

F. Published and/or non-published material

The civil section of the shield law does not distinguish between published and unpublished materials. *See* Tex. Code. Civ. P. § 22.023. The criminal section does. *See* Tex. Code Crim. Proc., art. 38.11, § § 5 and 8. With regard to unpublished materials (*i.e.*, work product) in the criminal setting, the subpoenaing party must make a clear and specific showing that: (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; (2) the information sought is relevant and material to the proper administration of the official proceeding and is essential to the maintenance of a claim or defense of the person seeking the information; and (3) the information sought is central to the investigation or prosecution of a criminal case and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred. Tex. Code of Crim. Proc., art. 38.11, § 5(a). The court should also consider several other factors including the reasonableness, timely notice, the balancing of interests involved and the speculative nature of the subpoena when considering an order to compel testimony. Tex. Code of Crim. Proc., art. 38.11, § 5(b).

Published materials are not covered by the statute so one would look to common law with regard to those materials. Tex. Code Crim. Proc., art. 38.11, § 8. Under common law, in the criminal setting, courts have not been very supportive of a privilege regardless of whether the material has been published or not. *See, e.g.*, *Ex Parte Grothe*, 687 S.W.2d 736 (Tex. Cr. App. 1984) (finding no privilege to withhold evidence in criminal prosecution); *ex. Re. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994 (en banc) (finding no newsman's privilege for reporters called to testify in criminal proceeding); *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) (finding no reporter's privilege for un-broadcast material sought in criminal proceeding).

As discussed earlier, some advocates have argued that unpublished material should be protected as proprietary information or trade secrets, but there have been no opinions directly ruling on that issue.

G. Reporter's personal observations

An exception to the absolute privilege in the criminal context concerning confidential sources exists when the journalist observes the commission of a felony or a person has admitted the commission of a felony to the journalist. In those circumstances, the journalist may be compelled to testify if the person seeking the testimony makes a clear and specific showing that the subpoenaing party has exhausted reasonable efforts to obtain the confidential source of the information, document, or item. Tex. Code Crim. Proc., art. 38.11, § 4(a)(2).

H. Media as a party

The Texas shield law does not differentiate between cases where the media is a party and where it is not.

I. Defamation actions

There have been no reported cases in Texas, to date, interpreting the state shield law in the context of a libel proceeding.

IV. Who is covered

The Texas shield law defines the terms "journalist," "news medium," and "communication service provider." *See* Tex. Civ. P. & Rem. Code § § 22.021(1), (2), and (3) and Tex. Code Crim. Proc., art. 38.11, § § 1(1), (2), and (3). The "journalist," as defined in the statute, cannot be compelled to testify unless the tests set forth in the statute are met. Additionally, a subpoena may not compel a "communications service provider" or "news medium," as defined by the statute, to disclose information unless the tests set forth in the statute are met. *See* Tex. Civ. Prac. & Rem. Code § 22.023 and Tex. Code. Crim. Proc., art. 38.11, § 3.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The shield law defines a "journalist" as "a person, including a parent, subsidiary, division or affiliate of a person, who for a substantial portion of the person's livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider and includes: (a) a person who supervises or assists in gathering, preparing, and disseminating the news or information; or (b) notwithstanding the foregoing, a person who is or was a journalist, scholar, or researcher employed by an institution of higher education at the time the person obtained or prepared the requested information, or a person who at the time the person obtained or prepared the information: (i) is earning a significant portion of the person's livelihood by obtaining or preparing information for dissemination by a news medium or communication service provider; or (ii) was serving as an agent, assistant, employee, or supervisor of a news medium or communication service provider." *See* Tex. Civ. P. & Rem. Code § 22.021(2) and Tex. Code Crim. Proc., art. 38.11, § 1(2).

b. Editor

The Texas shield law does not have a specific definition for editor, but editor falls within the definition for journalist.

c. News

There is no specific definition of news under the Texas shield law. However, "news medium" is defined as indicated below.

d. Photo journalist

There is no specific definition of photojournalist under the Texas shield law, but a photojournalist falls into the definition of a journalist.

e. News organization / medium

The shield law defines "News Medium" as "a newspaper, magazine or periodical, book publisher, news agency, wire service, radio or television station or network, cable, satellite, or other transmission system or carrier or channel, or a channel or programming service for a station, network, system, or carrier, or an audio or audiovisual production company or Internet company or provider, or the parent, subsidiary, division, or affiliate of that entity, that disseminates news or information to the public by any means, including: (a) print; (b) television; (c) radio; (d) photographic; (e) mechanical; (f) electronic; and (g) other means, known or unknown, that are accessible to the public." *See* Tex. Civ. P. & Rem. Code § 22.021(3) and Tex. Code Crim. Proc., art. 38.11, § 1(3).

2. Others, including non-traditional news gatherers

The shield law defines "Communication service provider" as "a person or the parent, subsidiary, division, or affiliate of a person who transmits information chosen by a customer by electronic means, including: (a) a telecommunications carrier, as defined by § 3, Communications Act of 1934 (47 U.S.C. § 153); (b) a provider of information service, as defined by § 3, Communications Act of 1934 (47 U.S.C. § 153); (c) a provider of interactive computer service, as defined by § 230, Communications Act of 1934 (47 U.S.C. § 230); and (d) an information content provider, as defined by § 230, Communications Act of 1934 (47 U.S.C. § 230)." *See* Tex. Civ. P. & Rem. Code § 22.021(1) and Tex. Code Crim. Proc., art. 38.11, § 1(3).

The statute does not expressly apply to student journalists and would only apply to academic researchers if they fall within the definition of journalist.

B. Whose privilege is it?

The privilege belongs to the source, the journalist, and the news organization.

V. Procedures for issuing and contesting subpoenas

In Texas, serving a subpoena on a reporter or media organization is no different than serving a subpoena on anyone else. There is no special proceeding or showing that needs to be made before a subpoena is served. However, subpoenas should not be lightly served on the media. Private litigants wishing to acquire information about their case should attempt to exhaust all non-media sources before burdening the press with a subpoena. Irrelevant subpoenas will, justifiably, provoke strong responses, costing both parties additional legal expenses and time.

A subpoena is, in essence, a court order commanding the subpoenaed person or entity to appear to testify or to permit inspection of documents or items. The issuance of subpoenas in civil cases is governed by the Texas Rules of Civil Procedure. In criminal cases, the issuance of a subpoena is governed by the Texas Code of Criminal Procedure.

A. What subpoena server must do

1. Service of subpoena, time

The Texas Rules of Civil Procedure (Rule 176) do not state how much advance notice must be given for issuing a subpoena for a hearing or trial. The subpoenaing party must be diligent in procuring the testimony. Further, both the civil and the criminal reporter's privilege statutes expressly state that an order to compel privileged information may only be issued after timely notice has been given to the journalist and a hearing has been held. *See* Tex. Civ. Prac. & Rem. Code § 22.025 and Tex. Crim. Proc., art. 38.11, § 6. Finally, one of the factors the court is required to consider prior to ruling on a motion is whether reasonable and timely notice was given of the demand for information. *See* Tex. Civ. Prac. & Rem. Code § 22.024(3) and Tex. Code of Crim. Proc., art. 38.11, § 5(b)(2).

2. Deposit of security

For all subpoenas for a witness' testimony (whether to media or not), the subpoena must be accompanied by one day's witness fee. Tex. R. Civ. P. 176.5. In addition, for criminal subpoenas, the subpoenaing party is required to pay a reasonable fee for the journalists' time and costs incurred in responding to the subpoena. *See* Tex. Code Crim. Proc., art. 38.11, § 9.

3. Filing of affidavit

There is no explicit requirement for a subpoenaing party to file an affidavit; however, the burden is on the subpoenaing party to meet the test to overcome the privilege by clear and specific evidence. *See* Tex. Civ. P. & Rem. Code § 22.024 and Tex. Code of Crim. Proc., art. 38.11 § § 4 and 5.

4. Judicial approval

Subpoenas generally do not have to be approved by a judge or magistrate before a party can serve them, and can usually be issued by the clerk of court, a court reporter, or an attorney licensed to practice in the state. But, under the new shield law, criminal subpoenas issued to journalists must be signed by the elected district attorney, elected criminal district attorney, or elected county attorney as applicable. Tex. Code Crim. Proc., Art. 38.11, § 4(d). If the elected district attorney, criminal district attorney, or county attorney has been disqualified, recused, or has resigned, the subpoena must be signed by the person succeeding such person. *Id.* If the elected representative is not in the jurisdiction, the highest ranking assistant to the elected officer must sign the subpoena. *Id.* Additionally, where a grand jury wishes to subpoena a witness located outside of the county, it must apply to the district court for a subpoena for that witness. Tex. Code Crim. Proc., art 20.11.

5. Service of police or other administrative subpoenas

There are no special rules regarding the use and service of police or other administrative subpoenas; although, search warrants on Texas newsrooms are prohibited under Tex. Code Crim. Proc., art. 18.01(e).

B. How to Quash

As a preliminary matter, and especially because the Texas shield law is so new, the media party receiving the subpoena should make the subpoenaing party aware of the new Texas shield law and the requirements they must meet in order to obtain the requested information (if at all). This is especially true when the requested information is simply to authenticate a broadcast, which is self-authenticating under the Texas shield law and, therefore, should not be the subject of a subpoena. In addition, as discussed more below, if the subpoenaing party does not withdraw the subpoena, the journalist should file a Motion for Protection and to Quash as soon as possible, but in any event, prior to the time provided for compliance with the subpoena.

1. Contact other party first

The law does not require that the subpoenaing party be contacted prior to moving to quash. However, some courts do require a certificate of conference before considering any motion or setting a hearing. Check the local rules for the court where you are filing. Furthermore, as a practical matter, because many subpoenaing parties may be unaware of the shield law, the journalist or their attorney should contact the subpoenaing party first and provide a copy of the shield law (or relevant portions) and explain why the subpoena is not allowed. In some instances, the subpoenaing party will withdraw the subpoena. If they do not, a journalist will likely have to file a motion to quash.

2. Filing an objection or a notice of intent

A notice of intent is not required prior to filing a Motion for Protection or to Quash. Once the journalists have served objections on the subpoenaing party or filed a Motion for Protection or to Quash, the journalist does not have to comply with that portion of the subpoena (or the subpoena overall) until or unless ordered to do so by a Court.

Generally, in the case of civil subpoenas, a person must comply with a subpoena unless discharged by the court or by the party summoning the witness. *See* Tex. R. Civ. Proc. 176.6(a). Therefore, a witness should timely raise objections or seek protection from an oppressive subpoena, if necessary. If the subpoena requires the person to produce documents and items, a subpoenaed person may serve upon the subpoenaing party, at any time before compliance is due, written objections to producing any or all of the designated materials, alleviating the requirement to comply with that portion of the subpoena until ordered to do so by a court. Tex. R. Civ. Proc. 176.6(d). A subpoenaed person who is commanded to appear for a hearing, deposition, or trial may move for protection under Tex. R. Civ. Proc. 192.6, as long as a motion is filed with the court before compliance is due. Tex. R. Civ. Proc. 176.6(e). Furthermore, if the subpoenaed person objects to the time and/or place for a deposition, filing a motion

to quash or for protection within three days after receiving the subpoena automatically stays the deposition until the motion can be determined. *See* Tex. R. Civ. Proc. 199.4.

In the case of criminal or a grand jury subpoenas, a subpoenaed person must generally comply on the same terms and grounds as a civil litigant. Thus, the subpoenaed person should timely file a motion to quash.

3. File a motion to quash

a. Which court?

For civil subpoenas, a Motion for Protection and to Quash should be filed in the court where the action is pending or in any district court in the county where the subpoena was served. Tex. R. Civ. Proc. 176.6(e), 192.6(b). In the context of grand jury of criminal subpoenas, the motion should be filed in the court where the criminal proceeding is taking place.

b. Motion to compel

If the subpoena otherwise complies with the Texas Rules of Civil, the journalist should not wait for the subpoenaing party to file a motion to compel, but should serve objections or file a Motion for Protection and to Quash prior to the time of compliance.

c. Timing

Notice and an opportunity to be heard must precede any attempt to compel testimony by the journalist. Tex. Civ. Prac. & Rem. Code § 22.024 and Tex. Code Crim. Proc., art. 38.11, § 6. For a trial subpoena, the journalist should object or move for a protective order or to quash prior to the time specified for appearing in court. For any other kind of discovery subpoena, the journalists must object or move for protection or to quash prior to the time specified for compliance in the subpoena. Furthermore, if this is an issue the journalist or news organization is willing to appeal, keep in mind that if the motion is denied, you will need time to respond or file a mandamus or appeal. Finally, if it is the time or place for a deposition that the journalist objects to, one must file a motion for protection or to quash within three days of receiving the subpoena to automatically stay the deposition until the motion can be determined. *See* Tex. R. Civ. Proc. 199.4.

d. Language

The motion to quash should recite the statutory privilege and the purpose of the law. *See* Tex. Civ. P. & Rem. Code § § 22.021 – 22.025 and Tex. Code of Crim. Proc., art. 38.11. It should also make it clear that the subpoenaing party has the burden and the burden is a heightened standard of clear and specific evidence. *See* Tex. Civ. P. & Rem. Code § 22.024 and Tex. Code of Crim. Proc., art. 38.11, § § 4 and 5. *See also,* Texas Rule of Civil Procedure 176.6. When filing a Motion to Quash, it is helpful to cite to the language in the privilege which presumes the privilege applies when asserted ¯ "except as otherwise provided by this article, a judicial, legislative, administrative, or other body with the authority to issue a subpoena or other compulsory process may not compel a journalist to testify regarding or to produce or disclose." *See* Tex. Civ. Prac. & Rem. Code § 22.023 and Tex. Code of Crim. Proc., art. 38.11, § 3.

e. Additional material

As a practical matter, the journalists should attach to the Motion to Quash an affidavit supporting the motion to ensure that the Court knows that the reporter falls within the definition of journalist contained in the shield law.

4. In camera review

The shield law does not require *in camera* review. Nevertheless, one may be conducted in the context of a grand jury subpoena where a subpoena seeks confidential source information. Tex. Code Crim. Proc., art. 38.11, § 4(c). If the information or document was disclosed in violation of an oath given to a juror or a witness in a grand jury proceeding, a court has the discretion to conduct an *in camera* hearing. *Id*. In such an instance, a journalist can be compelled to testify if the person seeking the testimony, production or disclosure makes a clear and specific showing that the subpoenaing party has exhausted reasonable efforts to obtain the confidential source information from alternate sources. *Id.* The court may not order the production of the confidential source until a ruling has been made on the motion. *Id*.

a. Necessity

The law does not direct that an *in camera* review of materials or interview with the reporter be conducted prior to ruling on a motion to quash.

b. Consequences of consent

This issue is not specifically addressed in the statute. As a practical matter, a stay should be requested.

c. Consequences of refusing

If the court orders an *in camera* review and the journalist does not comply, there is a possibility that the motion will be denied and the journalists will be held in contempt.

5. Briefing schedule

There is not a set briefing schedule for motions to quash.

6. Amicus briefs

Texas courts will accept amicus briefs from interested media organizations. Because the shield law is so new, there have not been amicus briefs filed against its interpretation based on the legislative history. One can anticipate the Texas District and County Attorneys Association would oppose a broad interpretation of the statute.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

The standard of proof for a subpoenaing party is a "clear and specific showing." This standard is more than a preponderance of the evidence but likely less than clear and convincing evidence. The standard was taken from language in the case of *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470, 472 (Tex. App. – Hou. [1st Dist.] 1987, no writ).

In the civil context, the subpoenaing party must make a clear and specific showing that:

(1) all reasonable efforts have been exhausted to obtain the information from alternative sources;

(2) the subpoena is not overbroad, unreasonable, or oppressive and, when appropriate, will be limited to the verification of published information and the surrounding circumstances relating to the accuracy of the published information;

(3) reasonable and timely notice was given of the demand for the information, document, or item;

(4) in this instance, the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist;

(5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and

(6) the information, document, or item is relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure.

Tex. Civ. Prac. & Rem. Code § 22.024.

In the criminal context, the burden is also on the subpoenaing party; however, the test that must be met varies based upon whether one is seeking confidential or non-confidential source information, or published or unpublished documents. When a confidential source is involved, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. Tex. Code Crim. Proc., art. 38.11, § 4(a)(1)-(3). In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information

elsewhere. *Id.* Further, a journalist can be compelled to give up his confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. Tex. Code Crim. Proc., art. 38.11, § 4(a)(4).

With regard to unpublished materials (*i.e.*, work product) and non-confidential sources in the criminal setting, the subpoenaing party must make a clear and specific showing that: (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; (2) the information sought is relevant and material to the proper administration of the official proceeding and is essential to the maintenance of a claim or defense of the person seeking the information; and (3) the information sought is central to the investigation or prosecution of a criminal case and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred. Tex. Code of Crim. Proc., art. 38.11, § 5(a). The court should also consider several other factors including the reasonableness, timely notice, the balancing of interests involved and the speculative nature of the subpoena when considering an order to compel testimony. Tex. Code of Crim. Proc., art. 38.11, § 5(b).

Published materials are not covered by the statute so one would look to common law with regard to those materials. Tex. Code Crim. P Art. 38.11, § 8.

B. Elements

1. Relevance of material to case at bar

In the civil context, the subpoenaing party must make a clear and specific showing that the information, document, or item is relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure. Tex. Civ. Prac. & Rem. Code § 22.024.

In the criminal context, the subpoenaing party must make a clear and specific showing that the information, document, or item is relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production or disclosure or is central to the investigation or prosecution of a criminal case and based on something other than the testimony of the requestor, reasonable grounds exist to believe a crime has been committed. Tex. Code Crim. Proc., art. 38.11, § 5(a).

Pre-statute case law addressing the relevance factor in applying the reporter's privilege, looked at the relationship between what the materials or information sought was likely to contain and what the material issues in the case were for the party that was seeking the information through subpoena. If the material or information sought by subpoena was not likely to pertain to the issues of the subpoenaing party, then the information was generally found to be not highly material and relevant.

Additionally, Texas rules of both civil and criminal procedure also contain requirements of relevancy. Under the Texas Rules of Civil Procedure, a party is entitled to conduct discovery only to the extent "reasonably calculated to lead to the discovery of admissible evidence." Tex. R. Civ. Proc. 192.3. This rule also applies to criminal proceedings pursuant to Texas Code of Criminal Procedure, article 39.04. *See also, Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 1998). Furthermore, the Texas Code of Criminal Procedure requires that any subpoena issued in a criminal case must constitute or contain evidence material to any matter involved in the action and that, when applying for a subpoena, the applicant must state that the information sought is material to the case. Tex. Code of Crim. Proc., art. 39.14 and 24.03.

2. Material unavailable from other sources

Under the statute, the subpoenaing party must make a clear and specific showing that all reasonable efforts have been exhausted to obtain the information from alternative sources. This requirement must be met by the subpoenaing party with regard to all civil subpoenas and all criminal subpoenas for confidential or non-confidential source information and for unpublished work product unless disclosure of the confidential source is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. Tex. Code Crim. Proc., art. 38.11, § 4(a)(4). But, due to the fact that the statute was only recently adopted, there are no reported decisions yet on what constitutes "unavailable" under the statute. Pre-statute, courts looked to whether the information or mate-

rial was unavailable from other sources (the second prong of the test outlined by Justice Powell in *Branzburg*), without providing much guidance as to how that factor should be determined.

In one case that provides *some* guidance, *Campbell v. Klevenhagen*, 760 F. Supp. 1206 (S.D. Tex. 1991), the court found that a state court's order compelling four reporters to appear at a criminal trial and remain on call throughout the trial in order to identify possible witnesses to a crime violated the First Amendment press freedoms more than it enforced the criminal defendant's Sixth Amendment right to compel witness testimony. *Id.* at 1211-1214.

a. How exhaustive must search be?

Under the statute, the subpoenaing party must make a clear and specific showing that all reasonable efforts have been exhausted to obtain the information from alternative sources. But, due to the recent adoption of the statute, there are no reported decisions yet on what constitutes "exhaustion" for purposes of the statute. Pre-statute, there was not much law detailing the level of exhaustion required.

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

The subpoenaing party must make a clear and specific showing that all reasonable efforts have been exhausted to obtain the information from alternative sources. This standard is greater than a preponderance of evidence but likely lower than clear and convincing evidence.

c. Source is an eyewitness to a crime

An exception to the absolute privilege in the criminal context concerning confidential sources exists when the journalist observes the commission of a felony or a person has admitted the commission of a felony to the journalist. *See* Tex. Code Crim. Proc., art. 38.11, § 4(a).

In those circumstances, the journalist may be compelled to testify if the person seeking the testimony makes a clear and specific showing that the subpoenaing party has exhausted reasonable efforts to obtain from alternative sources the confidential source of the information, document, or item. *Id.*

3. Balancing of interests

The subpoenaing party must demonstrate, by a clear and specific showing, the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including concerns of the journalist. *See* Tex. Civ. P. & Rem. Code § 22.024 and Tex. Code Crim. Proc., art. 38.11, § § 4 and 5. As both the civil and criminal shield statutes, state the purpose "is to increase the free flow of information and preserve a free and active press and, at the same time, protect the right of the public to effective law enforcement and the fair administration of justice." Tex. Civ. P. & Rem. Code § 22.022 and Tex. Code Crim. Proc., art. 38.11, § 2.

4. Subpoena not overbroad or unduly burdensome

The subpoenaing party must make a clear and specific showing that the subpoena is not overbroad, unreasonable, or oppressive and, when appropriate, will be limited to the verification of published information and the surrounding circumstances relating to the accuracy of the published information. *See* Tex. Civ. P. & Rem. Code § 22.024(2). *See also*, Tex. Code Crim. Proc., art. 38.11, § 5(b)(1).

5. Threat to human life

In the criminal context, a journalist can be compelled to give up a confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. *See* Tex. Code Crim. Proc., art. 38.11, § 4(a)(4).

6. Material is not cumulative

The party who issued the subpoena must demonstrate they have exhausted all reasonable efforts to get the information elsewhere. Therefore, if the expected testimony or material would be cumulative, it may not be obtained.

7. Civil/criminal rules of procedure

Subpoenas can be contested as unduly burdensome (regardless of whether issued to a journalists or not). Tex. R. Civ. P. 176.7. The shield law also requires that the subpoena not be unduly burdensome. The reporter's privilege

expressly provides for a court to consider whether the subpoena at issue is overbroad, unreasonable or oppressive, or being used to obtain peripheral, non-essential or speculative information. Tex. Civ. Prac. & Rem. Code § § 22.024(2) and (5) and Tex. Code. Crim. Proc., art 38.11, § § 5(b)(1) and 5 (b)(4). In a civil case, the subject of the subpoena should file a Motion for Protection or a Motion to Quash. Tex. R. Civ. P. 192. In a criminal case or a response to a grand jury subpoena, a Motion to Quash is the appropriate pleading to file. One basis for objecting to pre-trial subpoenas in a criminal case is that the Texas Code of Criminal Procedure does not provide pre-trial discovery. *See* Order Quashing Subpoenain *State of Texas v. Coe*, Cause No. 1227878, in Harris County District Court, signed June 15, 2010, quashing subpoena issued by Coe on Non-Party Houston Community Newspapers.

8. Other elements

There are no other elements that must be met.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

In the civil context, publication of information, documents, or items privileged under the shield law is not a waiver of the privilege. *See* Tex. Civ. P. & Rem. Code § 22.026. In the criminal context, publication of information, documents, or items privileged under the shield law is not a waiver of the privilege regarding sources and unpublished information, documents, or items. *See* Tex. Code Crim. Proc., art. 38.11, § 7. But, the statute does not apply to any information, document, or item that has been published; instead, the common law, as adopted pre-statute, continues to govern published information sought through criminal subpoenas. Tex. Code Crim. Proc., art. 38.11, § 8. To date, there is no case law determining under what conditions the statutory privilege can be waived.

2. Elements of waiver

a. Disclosure of confidential source's name

To date, there is no case law determining under what conditions the statutory privilege can be waived.

b. Disclosure of non-confidential source's name

To date, there is no case law determining under what conditions the statutory privilege can be waived.

c. Partial disclosure of information

Partial disclosure does not waive disclosure of unpublished or un-broadcast information.

d. Other elements

None.

3. Agreement to partially testify act as waiver?

To date, there is no case law determining under what conditions the statutory privilege can be waived.

VII. What constitutes compliance?

A. Newspaper articles

Pursuant to Texas Rule of Evidence 902(6), newspapers are self-authenticating.

B. Broadcast materials

Under the new shield law, recordings of broadcasts by television and radio stations are self-authenticating. *See* Tex. Civ. Prac. & Rem. Code § 22.027, and Tex. Code Crim. Proc., art. 38.111. As a practical matter if a journalist receives a civil subpoena and if the broadcast is on the media entity's website, the journalist should tell the subpoenaing party to download it from the website, and it is self authenticating. If the journalist receives a criminal subpoena, the journalists should make a copy and charge the subpoenaing party for the cost of production. In

either instance, the journalist does not need to provide a business records affidavit with the video nor should they have to testify to authenticate the materials because the video is self-authenticating.

C. Testimony vs. affidavits

No testimony – either by affidavit or live testimony – is required to authenticate a newspaper article or broadcast. If, despite the statute and rules of evidence, a party insists on an affidavit and the media entity wants to avoid a costly dispute, a business records affidavit (or a deposition on written questions) from the organization's custodian of records will suffice to authenticate the records. Texas Rule of Evidence 902(10) provides the form business records affidavit under Texas law. A deposition on written questions should *not* be addressed directly to the journalist. Note that business records affidavits must be filed with the court at least 14 days prior to trial, so such measures should be taken in a timely manner to avoid having to file a last minute motion to quash or having the reporter testify. *Id*.

D. Non-compliance remedies

"Broadly defined, contemptof court is disobedience of a court by an action in opposition to its authority." *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).Contempt of court may be civil or criminal. The purpose of civil contempt is to persuade or coerce the contemnor to obey an order of the court, while criminal contempt has the purpose of punishing the contemnor for some past conduct or disobedience to a court order that constitutes an affront to the dignity and authority of the court. *Ex parte Hawkins*, 885 S.W.2d 586, 588 (Tex. App.— El Paso 1994, orig. proceeding).

1. Civil contempt

Generally, the media would be subject to the same punishment for refusing to comply with a subpoena as non-media would be, keeping in mind the protections offered by the shield law. Failure to comply with a subpoena can result in a finding of civil contempt of court and may be punishable by a fine, confinement, or both. Tex. R. Civ. P. 176.8. Under Texas Rule of Civil Procedure 176.8, refusal to comply with a subpoena can be deemed contempt of court of either the court issuing the subpoena or by the court in the county in which the subpoena was served.

a. Fines

Failure to comply with a subpoena may be punishable by a fine, confinement, or both. Tex. R. Civ. P. 176.8. There is no limit in the Texas Rules of Civil Procedure to the amount of a fine that may be imposed for civil contempt.

b. Jail

As stated above, failure to comply with a subpoena may also be punishable by confinement. Tex. R. Civ. P. 176.8. There is no limit in the Texas Rules of Civil Procedure to the maximum confinement time a court may order for civil contempt, although, as a general rule, a court will order confinement until compliance or until the reason for confinement is moot.

2. Criminal contempt

The Texas Code of Criminal Procedure authorizes a discretionary punishment for refusal to obey a subpoena of up to $500 for a felony case and up to $100 for a misdemeanor case. Tex. Code Crim. Proc., art. 24.05. Furthermore, if a subpoenaed witness does not appear, the state or the defendant may issue an attachment for that witness to appear, which will command a peace officer to take bring the witness before such court, magistrate or grand jury on a day named. Tex. Code Crim. Proc., art. 24.11. A grand jury foreman may also issue a writ of attachment pursuant to Article 24.11 to force the appearance of a witness. A refusal to comply with a grand jury subpoena is punishable by a maximum fine of $500 and confinement until compliance. Tex. Code Crim. Proc., art. 20.15. Pre-statute, the book author Vanessa Leggett refused to testify before a grand jury and was cited for contempt. She argued that she had a First Amendment privilege under *Branzburg* that protected her against the grand jury subpoena she had been served with. The Fifth Circuit turned down her appeal, relying on its prior holding in *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998). *See In Re Grand Jury Subpoenas*, 29 Media L. Rep. 2301

(5th Cir. 2002) (unpublished). As a result, Leggett spent 168 days in jail, and was only released when the grand jury term expired.

3. Other remedies

There is no rule in Texas that, where a party refuses to testify about certain facts, the trier of fact may infer a presumption of actual malice against that party. But, Texas does have a spoliation rule applicable to parties (not just media) that allows a presumption to attach where evidence is *intentionally* destroyed to avoid disclosure. Such presumption can be defended against if the party can demonstrate that the evidence was destroyed in the regular course of business, rather than intentionally or negligently. *See e.g., Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40 (Tex. App.—Corpus Christi 2001) (holding that spoliation of videotapes of entire television broadcasts did not render remaining portions inadmissible in action for invasion of privacy and defamation, or entitle plaintiffs to presumption that missing portions of broadcasts were unfavorable to television station, where spoliation occurred in regular course of station's business and, thus, did not amount to negligent or intentional destruction).

VIII. Appealing

A. Timing

1. Interlocutory appeals

Interlocutory appeals are not available from an order denying a motion to quash or an order of contempt. However, a person may seek appellate review of the denial of a motion to quash by way of an original proceeding for mandamus or habeas corpus relief – initiated in the appropriate court of appeals. A petition for writ of mandamus is the appropriate procedure where the trial court's order did not involve confinement as a remedy for noncompliance. Where the order involves confinement, the appropriate procedure is a writ of habeas corpus. Both mandamus and habeas corpus are extraordinary writs that should be issued only when the trial court has clearly abused its discretion and there is no adequate remedy by normal appeal. Any petition for a writ of mandamus or habeas corpus must be made within twenty (20) days of the trial court's order denying the motion to quash. Tex. R. Civ. Proc. 306a(1).

2. Expedited appeals

An expedited appeal is not available for an order denying a motion to quash or a motion for contempt. As stated above, the only relief available is mandamus or habeas corpus relief, depending on the circumstances.

B. Procedure

1. To whom is the appeal made?

A petition for extraordinary relief, such as a writ of mandamus or habeas corpus, is governed by Texas Rule of Civil Procedure 52 and is commenced by filing a petition with the clerk in the appropriate appellate court. Tex. R. App. P. 52. The appropriate appellate court will be the one with jurisdiction over the underlying trial court that issued the order of contempt or denying the motion to quash.

2. Stays pending appeal

There is no automatic stay pending the outcome of the petition for mandamus or habeas corpus. A stay may be sought in either the trial court of the appellate court, and is entirely up to the discretion of the court. The fact that constitutional implications may be involved in the "appeal" does not necessarily mean that a requested stay is any more likely to be granted. In fact, one court found that a petition involving constitutional issues must include "substantive analysis of the facts and authorities relied upon" or it may be considered inadequate. *In re Kuhler*, 60 S.W.3d 381, 384 (Tex. App.—Amarillo 2001, orig. proceeding).

3. Nature of appeal

Rule 52 of the Texas Rules of Appellate Procedure authorizes both a writ of mandamus and habeas corpus, and the contents of a petition for writ of mandamus and habeas corpus are the same. All statements in the petition must be verified by affidavit and the petition must follow the instructions of Rule 52 carefully. Tex. R. App. P.

52. The petition must include the following: identification of the parties; a table of contents; an index of authorities; a statement of the case; a list of the issues presented; a statement of the facts; the argument for relief; a prayer; and, an appendix containing the order of the trial court denying the motion to quash.*Id*. If the relief being requested is from confinement, the petition for habeas corpus should also include proof that the person seeking relief is actually being confined or restrained. Additionally, the person filing the petition must file and certify by affidavit every document that is related to the claim for relief that was previously filed in the trial court. *Id*.

4. Standard of review

A party seeking mandamus relief must show that the trial court either failed to perform a clear legal duty or committed a clear abuse of discretion, that the person has no adequate legal remedies, and that the petition raises important issues for the state's jurisprudence. *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996); *see also*, *In re Team Rocket, L.P.*, 256 S.W.3d 257 (Tex. 2008). The standard of review is "clear abuse of discretion." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Because this is a high standard, the appellate court must give the trial court's determination of factual issues wide latitude, but it is not required to be so deferential to legal determinations made by the trial court. Thus, the subpoenaed party should argue that the trial court's denial of the motion to quash was a "clear abuse of discretion."

5. Addressing mootness questions

Courts have not addressed this issue.

6. Relief

The appellate court reviewing the petition for mandamus (or habeas corpus) may either grant or deny the request for relief. If the court grants the petition, the appellate court must issue an opinion. *See* Tex. R. App. P. 52.8. But, if the court denies the relief, the appellate court does not have to issue an opinion explaining why it is denying such relief. *Id.*

IX. Other issues

A. Newsroom searches

Article 18 of the Texas Code of Criminal Procedure Texas provides statutory protection for newsrooms from search warrants. In particular, Article 18 provides:

> A search warrant may not be issued … [for items] in an office of a newspaper, news magazine, television station, or radio station, and in no event may property or items … be legally seized in any search pursuant to a search warrant of an office of a newspaper, news magazine, television station, or radio station.

Tex. Code Crim. Proc., art. 18.01(e). As stated previously, pre-shield law, this provision was cited to as support for a reporter's privilege.

B. Separation orders

There are no reported cases on this issue, although the concern over subpoenaing reporters to testify at a trial when they are actively reporting on the trial or hearing is an issue of concern for reporters and has been cited by lawyers as an additional reason to quash a subpoena in this circumstance.

C. Third-party subpoenas

Anyone affected by a subpoena may file a motion to quash or for a protective order seeking to have the subpoena quashed in whole or in part. Tex. R. Civ. Proc. 192.6(b). Therefore, not only the party to whom the subpoena is directed, but also any party affected by the subpoena, may attempt to get the subpoena quashed. Thus, if a reporter discovers that a civil litigant has subpoenaed telephone records in an effort to discover the reporter's confidential source, the reporter may file a motion to quash the subpoena based on an assertion of the reporter's privilege, even if the subpoena is not directed at the reporter him or herself.

D. The source's rights and interests

Anyone affected by a subpoena may file a motion to quash or for a protective order seeking to have the subpoena quashed in whole or in part. Tex. R. Civ. Proc. 192.6(b). Thus, while there has not yet been any reported case in Texas where one has tried to subpoena a confidential source since the shield law was passed, the source could file a motion to prevent disclosure. In *Cohen v. Cowles Media*, 501 U.S. 663 (1991),the United States Supreme Court protected the confidential source relationship by holding that, under a theory of promissory estoppel, a reporter could be held liable for monetary damages for breaking a promise of confidentiality to a source. 501 U.S. 663 (1991).