

REPORTER'S PRIVILEGE: UTAH

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 and helped shape the law in their states and federal circuits, this guide is meant to help both journalists who want to know more about the reporter's privilege and lawyers who need to know the ins and outs of getting a subpoena quashed.

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

Above the law?

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

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

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

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

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

UTAH

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I. Introduction: History & Background

In January 2008, the Utah Supreme Court adopted Utah Rule of Evidence 509. This rule provides broad protection to news reporters. In particular, it provides nearly absolute protection for confidential source information and qualified protection for non-confidential newsgathering information. Adoption of Rule 509 culminated nearly three years of intensive efforts by Utah news organizations and media outlets to enact a shield law. In adopting this rule, Utah became one of the last states to adopt a reporter's privilege (either by statute, court rule, or appellate court opinion). Although there are not yet any judicial decisions interpreting the new rule, its robust protection for newsgathering expands the protection previously recognized under the First Amendment by state and federal trial courts in Utah. Prior to the adoption of this rule, Utah journalists and news organizations had been successful in persuading state and federal trial courts to quash subpoenas seeking reporters' testimony and news gathering material in a variety of criminal and civil cases on the grounds that the First Amendment provided a qualified privilege protecting such material. *See generally* Edward L. Carter, *Reporter's Privilege in Utah*, 18 *BYU Journal of Public Law* 163 (2003). State trial judges also had recognized the existence of a qualified reporter's privilege for both confidential and non-confidential information, such as outtakes and reporter notes. However, some Utah trial judges, citing the lack of a shield law or reported appellate decision defining the reporter's privilege, had been reluctant to afford journalists more than token protection from subpoenas. News reporters and photographers covering several high-profile criminal cases in 2001 and 2002 were forced to defend themselves against prosecutors' subpoenas and threats of subpoenas. Now that Rule 509 has been adopted, it is likely that courts will be much more willing, indeed obligated, to broadly protect both confidential and non-confidential newsgathering information.

Authors' note: The authors would like to thank Professor Edward Carter, Brigham Young University, who provided valuable research and writing assistance on this project.

II. Authority for and source of the right

Neither the Utah Constitution nor the Utah Code explicitly recognizes a reporter's privilege. However, in January 2008, the Utah Supreme Court adopted Utah Rule of Evidence 509, which creates a privilege for reporters. Utah appellate courts have yet to apply this rule, although prior to this rule, both the Utah Supreme Court and the Utah Court of Appeals mentioned in dicta the existence of some form of newsgathering protection based on *Branzburg v. Hayes*, 408 U.S. 665 (1972). *See* *Redding v. Jacobsen*, 638 P.2d 503 (Utah Ct. App. 1981); *State v. Krueger*, 975 P.2d 489 (Utah Ct. App. 1999). Various Utah trial courts and the U.S. District Court for the District of Utah also found a qualified First Amendment privilege based not only on *Branzburg* but also *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

A. Shield law statute The Utah Legislature has not enacted a statutory shield law. Under the Utah Constitution, the Utah Supreme Court – not the Legislature – is given primary authority for enacting rules of evidence, including evidentiary privileges. See Utah Const. art. VIII, § 4. Accordingly, in January 2008, the Utah Supreme Court adopted Utah Rule of Evidence 509—a rule which created a reporter's privilege for Utah. This rule was the culmination of two-and-one-half years of study and debate by the Utah

Supreme Court Advisory Committee—a committee of lawyers and judges. Media Counsel representing nearly every journalism and news organization in Utah petitioned the Committee to create a reporter's privilege rule and were intensely involved in the drafting and comment process. The Advisory Committee Note indicates that the purpose of this rule is “to address any uncertainty that may exist under Utah Law and to provide for uniformity in the recognition of the privilege by Utah courts.”

Under Rule 509, which provides an expansive privilege to news reporters, a reporter may be compelled to disclose confidential source information only when “the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.”

R. Evid. 509(b). Unpublished information also is protected. If the unpublished information is confidential, then the person seeking that information must demonstrate a need “for that information which substantially outweighs the interest of a continued free flow of information to news reporters.”

509(c). For nonconfidential unpublished news information, the person claiming the privilege must demonstrate “that the interest of a continued free flow of information to news reporters outweighs the need for disclosure.”

509(d). The Advisory Committee Note provides guidance on how courts should apply this rule. Specifically, a court should “consider the interests of the person seeking disclosure and the interests of the free flow of information to news reporters.”

In balancing the various interests of the parties, courts should consider those factors set forth in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), including “(1) whether the party seeking the information has attempted independently to obtain the information, (2) whether the information being sought goes to the heart of the matter, (3) whether the information is of certain relevance, and (4) the type of controversy.”

Utah R. Evid. 509 advisory committee note. The Note also emphasizes that “[a]s the law in this area continues to develop, the court should consider other factors found to influence the open and free flow of information that is vital to our culture and form of government.”

Id.

The privileges provided under this rule may “be claimed by the news reporter, the organization or entity on whose behalf the news reporter was acting, the confidential source, the news reporter or confidential source’s guardian or conservator or the personal representative of a deceased news reporter or confidential source.”

Utah R. Evid. 509(e). Significantly, the definition of news reporter is broad and flexible. It provides, “‘News reporter’ means a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system and other organization with whom that person is connected.”

The Advisory Committee Note explains that “[t]he rule incorporates a relatively broad and flexible definition of news reporter to accommodate the ever changing methods of expression and publication. While there are not many ‘lone pamphleteers’ still functioning, they may have modern-day counterparts on the internet.”

Id. 509 advisory committee note.

Finally, subparagraph (f) gives reporters an additional layer of protection. It pro-

vides that once a court makes an initial determination that information claimed to be published should be disclosed, “the court shall conduct an in camera review of that information before making a final determination requiring disclosure.” <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Evid. 509(f).</p>

B. State constitutional provision

The Utah Constitution does not have an express shield law provision.

C. Federal constitutional provision<p class="MsoNormal">The Advisory Committee Note to Utah Rule of Evidence 509 recognizes that “[p]rotection of news gathering and dissemination has roots in the First Amendment of the United States Constitution.” <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Evid. 509 advisory committee note. </p>Even before the adoption of this rule, Utah appellate courts indirectly recognized the existence of First Amendment protections for news gathering based on *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Utah Supreme Court, writing in dicta in the case of a reporter seeking access to government information, quoted the statement from *Branzburg* that “news gathering is not without its First Amendment protections.” *Redding v. Jacobsen*, 638 P.2d 503, 508 (<st1:state w:st="on">Utah</st1:state> 1981) (quoting *Branzburg*, 408 <st1:place w:st="on"><st1:country-region w:st="on">U.S.</st1:country-region></st1:place> at 707); see also *State v. Krueger*, 975 P.2d 489, 497 (Utah Ct. App. 1999) (citing *Branzburg* for “recognizing First Amendment protection for news gathering”). </p>

Utah trial courts presented with the issue likewise have found the existence of a qualified First Amendment privilege based on *Branzburg* and *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977). For example, a Third District judge in Salt Lake County quashed a subpoena of a newspaper reporter who had interviewed a murder defendant because “[a]s a newspaper reporter, Ms. Donaldson enjoys a qualified First Amendment privilege from being compelled to testify at the trial of the defendant.” *State v. Koolmo*, No. 981905396 (Utah 3d Dist. Ct. March 29, 1999) (Judge Robert K. Hilder). Other state trial judges have made similar statements with respect to the reporter's privilege granted by the First Amendment. See, e.g., *In re: Inquiry of the State Ballot Law Commission of the State of Massachusetts*, No. 020905264 (Utah 3d Dist. Ct. June 25, 2002) (Judge Ronald E. Nehring) (applying qualified First Amendment privilege to subpoena demanding reporter's deposition testimony and allowing affidavit from reporter in lieu of deposition); *Lester v. Draper*, No. 000906048 (Utah 3d Dist. Ct. Jan. 16, 2002) (Judge J. Dennis Frederick) (applying qualified First Amendment privilege to subpoena of reporter in civil case and quashing subpoena because subpoenaing party failed to meet burden to show need, relevance and lack of alternative sources); *State v. Michaels*, No. 011902114 (Utah 3d Dist. Ct. July 9, 2001) (Judge Dennis M. Fuchs) (quashing subpoena seeking unaired videotape where information on videotape was available through an alternative source); *Diaz v. DeLeura*, No. 040916320 (Utah 3d Dist. Ct. 2006) (quashing subpoena seeking to depose newspaper reporter in a civil defamation case not involving the newspaper). </p>

A U.S. District Court Magistrate Judge found a First Amendment privilege that justified quashing the subpoena of two <st1:city w:st="on"><st1:place w:st="on">Salt Lake City</st1:place></st1:city> newspaper reporters in an employment discrimination case. *Bottomly v. Leucadia Nat'l Corp.*, 24 Med. L. Rep. 2118, 1996 <st1:country-region w:st="on"><st1:place w:st="on">U.S.</st1:place></st1:country-region> Dist. LEXIS 14760 (D. Utah July 2, 1996) (Magistrate Judge Ronald N. Boyce). <st1:state w:st="on"><st1:place w:st="on">Utah</st1:place></st1:state>'s federal district court judges have followed *Silkwood* and *Bottomly* in recognizing a qualified First Amendment reporter's privilege, and have applied the privilege in criminal and civil cases. See, e.g., *United States v. Jenkins*, No. 2:03CR0526 (D. Utah 2003) (applying qualified First Amendment privilege to quash, in part, subpoena seeking photographs taken by newspaper at Rainbow Family Campout); *Nilson v. Layton City*, No. 92-NC-112W (D. Utah 1994) (applying qualified First Amendment privilege in upholding subpoena seeking testimony in civil trial from television reporter who reported statements of police officer that plaintiff had a prior expunged criminal conviction). </p>

D. Other sources

The reporter's privilege in <st1:state w:st="on"><st1:place w:st="on">Utah</st1:place></st1:state> was created through the adoption of Utah Rule of Evidence 509 by the Utah Supreme Court.</o:p></o:p>

III. Scope of protection

A. Generally

With the adoption of Rule 509, the scope of protection afforded to journalists in <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> by the reporter's privilege has become relatively broad.Under this rule, a reporter may be compelled to disclose confidential source information only when “the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.”<st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Evid. 509(b).Unpublished informationalso is protected.If the unpublished information is confidential, then the person seeking that information must demonstrate a need “for that information which substantially outweighs the interest of a continued free flow of information to news reporters.”<st1:state w:st="on"><st1:place w:st="on"><i style="">Id.</i></st1:place></st1:state>509(c).For nonconfidential unpublished news information, the person claiming the privilege must demonstrate “that the interest of a continued free flow of information to news reporters outweighs the need for disclosure.” <st1:state w:st="on"><st1:place w:st="on"><i style="">Id.</i></st1:place></st1:state> 509(d). </o:p></o:p>

B. Absolute or qualified privilege

Under Rule 509, the reporter's privilege is nearly absolute with regard to confidential source information, and a court can compel a reporter to disclose such information only when “the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.”<st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Evid. 509(b).A qualified privilege protects unpublished information.</o:p></o:p>

C. Type of case

1. Civil

As an evidentiary rule, Rule 509 applies to both civil and criminal cases.<i style="">See also Lester v. Draper, No. 000906048 (<st1:state w:st="on">Utah</st1:state> 3d Dist. <st1:place w:st="on"><st1:state w:st="on">Ct.</st1:state></st1:place> Jan. 16, 2002) (“The reporter's privilege applies in civil as well as criminal cases.”). Likewise, the factors previously defined by the U.S. Court of Appeals for the Tenth Circuit and employed by Utah trial courts to determine whether a reporter's privilege prevails over a subpoena do not differ in civil and criminal cases: “(1) whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful, (2) whether the information goes to the heart of the matter, (3) whether the information is of certain relevance, [and] (4) the type of controversy.” *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); <i style="">see also Utah R. Evid. 509 advisory committee note (indicating the courts should consider the <i style="">Silkwood factors as well as factors that support the open and free flow of information). </i>The fourth <i style="">Silkwood factor distinguishes civil cases, where the privilege is stronger, from criminal cases, where the privilege is weaker. A state trial judge found that “the balancing of interests requires a stronger showing of need by a party seeking production of privileged newsgathering material in a civil case, as compared to a criminal case, because the constitutional rights of a criminal defendant are not implicated.” *Lester v. Draper*, No. 000906048 (<st1:state w:st="on">Utah</st1:state> 3d Dist. <st1:place w:st="on"><st1:state w:st="on">Ct.</st1:state></st1:place> Jan. 16, 2002).</o:p></o:p>

2. Criminal

The factors weighed by Utah trial courts in determining the scope of protection afforded by the reporter's privilege in criminal cases do not differ from the factors applied in civil cases: “(1) whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful, (2) whether the information goes to the heart of the matter, (3) whether the information is of certain relevance, [and] (4) the type of controversy.” *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

Although the fourth factor weighs in favor of requiring a reporter to testify in a serious criminal case, prior to the enactment of Rule 509, one Utah trial court quashed a subpoena after the reporter who conducted a jailhouse interview with a murder defendant offered to submit testimony by affidavit. *State v. Koolmo*, No. 981905396 (Utah 3d Dist. Ct. March 29, 1999). Another trial judge quashed a subpoena after an *in camera* review revealed that the video outtake sought by prosecutors contained the identical information as a publicly available written statement made by a criminal defendant. *State v. Michaels*, No. 011902114 (Utah 3d Dist. Ct. July 9, 2001).

In a capital homicide prosecution, however, a trial judge declined to quash a subpoena seeking the testimony of a reporter who received a confession letter and then conducted a jailhouse interview with the accused murderer. *State v. Martinez*, No. 011501042 (Utah 5th Dist. Ct. April 29, 2002). Despite the fact that the information sought from the reporter arguably was available from other sources, the judge reasoned that the public interest in prosecuting the homicide outweighed the reporter's privilege. However, the judge was careful to point out that his decision was based on the particular facts of the case before him, and that the case involved an especially brutal and senseless murder in a small community. *See id.* It is also unclear whether the court's holding would have been the same had Rule 509 been enacted at the time.

Utah trial courts have not had occasion to distinguish between subpoenas from government prosecutors and private defendants.

3. Grand jury

There is no statutory or case law addressing this issue.

D. Information and/or identity of source

There is no statutory or case law addressing this issue.

E. Confidential and/or non-confidential information

Rule 509 provides a nearly absolute privilege for confidential source information, only compelling disclosure if “the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.” Id. 509(b). Confidential unpublished information is protected “unless the person seeking such information demonstrates a need for that information which substantially outweighs the interest of a continued free flow of information to news reporters.” Id. 509(c). A reporter also has a privilege to refuse to disclose unconfidential, unpublished information “if the person claiming the privilege demonstrates that the interest of a continued free flow of information to news reporters outweighs the need for disclosure.” Id. 509(d). No Utah appellate court has applied Rule 509. However, even prior to the adoption of this rule, Utah trial court's generally treated confidential information as deserving greater protection under the reporter's privilege.

For example, one Utah trial judge wrote in a memorandum decision, “[i]nformation that is unpublished or confidential is really at the heart of the reporter's privilege. Reporters will not be compelled to testify as to information that falls into these categories.” *State v.*

Halvorson, No. 001500343 (<st1:state w:st="on">Utah</st1:state> 5th Dist. <st1:state w:st="on"><st1:place w:st="on">Ct.</st1:place></st1:state> Oct. 13, 2000). In that case, the trial court recognized that ABC News had an interest in blurring the faces of individuals who appeared on a videotape that depicted an alleged crime. The court said that ABC News “clearly [had] the right to [blur the videotape] to protect the confidential and unpublished identities of those shown in the video.” <st1:place w:st="on"><st1:state w:st="on">*Id.*</st1:state></st1:place> However, the court then reasoned that ABC News's protection of confidential source identities would make the testimony of the ABC News reporter who witnessed the crime even more crucial. Ultimately, the court declined to quash the subpoena seeking the reporter's testimony in part because ABC News's confidentiality claims were outweighed by the public interest in the prosecution of the crime. *See id.* The reporter did not have to testify, however, because the defendants entered into a plea agreement with prosecutors. <o:p></o:p>

Another trial judge reasoned that a reporter should testify about her jailhouse interview with a murder defendant in part because the information sought was not confidential. *State v. <st1:city w:st="on">Martinez</st1:city>*, No. 011501042 (<st1:state w:st="on">Utah</st1:state> 5th Dist. <st1:state w:st="on"><st1:place w:st="on">Ct.</st1:place></st1:state> April 29, 2002). In that case, the trial judge also found that the reporter's privilege was weakened by the fact that the reporter had not cultivated a source or sought confidential information on her own initiative; rather, the reporter merely received a confession letter from the murder defendant and then followed up on the letter with a personal interview. However, the judge cited no authority for examining whether the source or the reporter initiated the contact that led to creation of the journalistic “work product,” and no other <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> trial court has employed such reasoning. <o:p></o:p>

F. Published and/or non-published material

Rule 509 does not specifically address published information. It does, however, provide a qualified privilege for both confidential and other unpublished news information. Under this rule “confidential unpublished information” is defined to mean “the name or any other information likely to lead directly to the disclosure of the identity of a person who gives information to a news reporter with a reasonable expectation of privacy.” <st1:place w:st="on"><st1:state w:st="on"><i style="">Id.</i></st1:state></st1:place> 509(a)(3). “Other unpublished news information” is defined to mean “information, other than confidential unpublished news information, that is gathered by a news reporter. This includes notes, outtakes, photographs, tapes, or other data that are maintained by the news reporter or by the organization or entity on whose behalf the reporter was acting.” <st1:place w:st="on"><st1:state w:st="on"><i style="">Id.</i></st1:state></st1:place><i style=""> 509(a)(4).</i><o:p></o:p>

Prior to the implementation of this rule, one <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> trial judge suggested that unpublished information should be afforded greater protection than published information. That judge's memorandum decision stated that “[r]eporters will not be compelled to testify” as to unpublished information. *State v. Halvorson*, No. 001500343 (<st1:state w:st="on">Utah</st1:state> 5th Dist. <st1:state w:st="on"><st1:place w:st="on">Ct.</st1:place></st1:state> Oct. 13, 2000). In that case, the program “20/20” had broadcast portions of a tape sought by a county prosecutor. The tape allegedly contained the operative criminal act in the case of two men charged with practicing medicine without a license for drilling a hole in a woman's skull in a New Age procedure called trepanation. The trial court rejected a claim by ABC News that a reporter's testimony and portions of a video outtake were unpublished. Although the judge refused to quash the subpoena, the issue became moot before the reporter testified because the defendants entered guilty pleas and thus avoided trial.<o:p></o:p>

G. Reporter's personal observations

Rule 509 does not exempt a reporter's personal observations from the protection of the rule. In cases where the leak of information to the reporter is alleged to be a crime, and thus the reporter a witness to the crime, a court must balance the need for disclosure of confidential and nonconfidential unpublished information against the interest in preserving the “continued free flow of information to news reporters” (and thus

the public).
 See Utah R. Evid. 509 (c) & (d). This language allow for consideration of the public value of the information reported to the public, a factor not expressly provided by Silkwood or Bottomly, but which is critical in leak cases.

H. Media as a party

There is no statutory or case law addressing this issue.

I. Defamation actions

Rule 509 does not contain any exception for defamation actions against a news reporter, unlike the statutes in some other states. The privilege applies equally in such actions.

IV. Who is covered

There is no statutory or case law addressing this issue.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Rule 509 defines a “news reporter” as “a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected.”
 Id. 509(a)(1).
 The Advisory Committee Note to this rule indicate that “[t]he rule incorporates a relatively broad and flexible definition of news reporter to accommodate the ever-changing methods of expression and publication. While there are not many ‘lone pamphleteers’ still functioning, they may have modern-day counterparts on the internet.” See Rule 509 advisory committee note.

b. Editor

A “editor” falls within the definition of a “news reporter” under Rule 509(a)(1).

c. News

There is no statutory or case law addressing this issue.

d. Photo journalist

Photojournalists fall within the definition of “news reporter” under Rule 509(a)(i).

e. News organization / medium

The definition of “news reporter” under Rule 509 includes “any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system, or other organization” with whom a person gathering news “for the primary purpose of disseminating [it] to the public” is

connected. *Id.* 509(a)(1).

2. Others, including non-traditional news gatherers

The reporter's privilege in Utah protects "a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public." Utah R. Evid. 509(a)(1).

B. Whose privilege is it?

The privileges set forth in Rule 509 may "be claimed by the news reporter, the organization or entity on whose behalf the news reporter was acting, the confidential source, the new reporter or confidential source's guardian or conservator or the personal representative of a deceased news reporter or confidential source." Utah R. Evid. 509(e).

V. Procedures for issuing and contesting subpoenas

A subpoena in a criminal case must be personally served and "may compel the attendance of a witness from anywhere in the state." Utah R. Crim. P. 14(a)(3) and 14(a)(4). In a civil case, a process server other than an attorney, sheriff, constable or deputy U.S. marshal must provide proof of service by affidavit. Utah R. Civ. P. 4(e). Unless the subpoena is issued on behalf of the state or federal government, the process server must give the person receiving the subpoena fees for one day's attendance and mileage. Utah R. Civ. P. 45(b)(2). A subpoena in a civil case requiring appearance at trial or a hearing may be served anywhere in the state. Utah R. Civ. P. 45(c).

A. What subpoena server must do

1. Service of subpoena, time

A subpoena in a criminal case must be personally served and "may compel the attendance of a witness from anywhere in the state." Utah R. Crim. P. 14(a)(3) and 14(a)(4). In a civil case, a process server other than an attorney, sheriff, constable or deputy U.S. marshal must provide proof of service by affidavit. Utah R. Civ. P. 4(e). Unless the subpoena is issued on behalf of the state or federal government, the process server must give the person receiving the subpoena fees for one day's attendance and mileage. Utah R. Civ. P. 45(b)(2). A subpoena in a civil case requiring appearance at trial or a hearing may be served anywhere in the state. Utah R. Civ. P. 45(c).

2. Deposit of security

There is no statutory or case law addressing this issue.

3. Filing of affidavit

There is no statutory or case law addressing this issue.

4. Judicial approval

In the case of a judicially approved criminal investigation used as an alternative to the grand jury process, a prosecutor seeking to subpoena any person must first apply to a state trial judge for approval to serve a subpoena. *See* Utah Code Ann. § 77-22-2(3)(b)(i). The prosecutor must "show that the requested information is reasonably related to the criminal investigation authorized by the court." Utah Code Ann. § 77-22-2(3)(b)(ii).

5. Service of police or other administrative subpoenas County and state prosecutors investigating violations of controlled substance laws may issue administrative subpoenas to third parties. Utah Code Ann. § 77-22a-1. The administrative subpoena power in this context is not explicitly limited by the First Amendment, although the power is restricted where "it is clear" that the information sought is "subject to a claim of protection under the Fourth, Fifth, or Sixth Amendment" and corresponding state constitutional provisions. Utah Code Ann. § 77-22a-1(1)(a).

Parties appearing before the State Records Committee may subpoena witnesses with the approval of the committee chair, as long as the subpoenas are served at least seven days before the scheduled hearing. Utah Admin. Code R35-5-2(c). A former city councilman seeking certain city records in 1998 gained approval of the committee chair to subpoena three newspaper reporters who had covered the story of the councilman's criminal citation for allegedly assaulting a city police officer. One of the subpoenas was not served because the reporter had temporarily left the state. Attorneys for one of the other journalists argued before the committee that his testimony could not be compelled and the reporter simply did not show up at the hearing. The subpoena of the third journalist was quashed by the State Records Committee because the subpoena placed an undue burden on the reporter and because the reporter's testimony was not material. *See* State Records Committee Appeal 98-08, *available at* <http://www.archives.utah.gov/src/srcappeal-1998-08.html>.

B. How to Quash

1. Contact other party first

Utah law does not require that the party being subpoenaed contact the subpoenaing party before filing a motion to quash. *See* Utah R. Civ. P. 7; Utah R. Civ. P. 45. However, some subpoenas directed to news reporters can be resolved informally without the need to file a motion to quash, and it is generally a good idea to attempt such a resolution initially.

2. Filing an objection or a notice of intent

Utah law does not require that a notice of intent to quash be filed before the motion to quash a subpoena. *See* Utah R. Civ. P. 7; Utah R. Civ. P. 45. If a party is subpoenaed solely for the production of documents (a subpoena duces tecum), then the party may serve a written objection on the requesting party within the time afforded for compliance. Upon service of this objection, the requesting party is not permitted to inspect the requested documents absent a court order obtained by filing a motion to compel with the court. *See* Utah R. Civ. P. 45(e)(5). However, a written objection does not relieve a party of its obligation to appear to give testimony pursuant to a subpoena. The party subpoenaed should file a motion to quash before the scheduled date for such an appearance.

3. File a motion to quash

a. Which court?

The motion to quash a subpoena should be filed in the same court from which the subpoena was issued, generally the court hearing the underlying case. *See* Utah R. Civ. P. 45.

b. Motion to compel

The media party does not have to wait for the subpoenaing party to file a motion to compel before filing a motion to quash a subpoena. *See* Utah R. Civ. P. 7; Utah R. Civ. P. 45. Even if the media party serves a written objection to a subpoena duces tecum, the media party may, as a strategic matter, want to file a motion to quash rather than wait for the requesting party to file a motion to compel.

c. Timing

A motion to quash should be filed or a written objection should be served before the time for compliance specified in the subpoena. A subpoena duces tecum must provide the media party at least fourteen (14) days for compliance. *See* <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Civ. P. 45(e)(2). A subpoena seeking testimony must provide the media party a "reasonable time for compliance." <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Civ. P. 45(e)(3)(A).<o:p></o:p>

d. Language

There is no stock language or preferred text that needs to be included in a motion to quash a subpoena. Aside from discussing the substantive elements of the reporter's privilege, the party should discuss generally the grounds for quashing a subpoena set forth in the applicable Rules of Criminal and Civil Procedure. *See* <st1:state w:st="on">Utah</st1:state> R. Civ. P. 45(e); <st1:state w:st="on">Utah</st1:state> R. Civ. P. 26(b) and 26(c); <st1:state w:st="on"><st1:place w:st="on">Utah</st1:place></st1:state> R. Crim. P. 14.<o:p></o:p>

e. Additional material

Courts generally accept attachments such as the Reporters Committee for Freedom of the Press report "Agents of Discovery," although the extent to which courts consider such materials in making decisions is difficult to assess.

4. In camera review

a. Necessity

Once the court makes an initial determination that information which is claimed to be privileged should be disclosed, the court is required to conduct an in camera review of the subject information before making a final determination requiring disclosure. <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Evid. 509(f)<o:p></o:p>

b. Consequences of consent

There is no statutory or case law addressing this issue.

c. Consequences of refusing

There is no statutory or case law addressing this issue.

5. Briefing schedule

Unless otherwise ordered by the court, motions to quash subpoenas follow the normal briefing schedule set forth by the Utah Rules of Civil Procedure. Under this schedule, a party opposing a motion may file an opposition memorandum within ten (10) days of service of the motion. The moving party may file a reply memorandum within five (5) days of service of this opposition memorandum. *See* Utah R. Civ. P. 7. Computation of these time periods is governed by Rule 6(a) of the Utah Rules of Civil Procedure.

Often, this normal briefing schedule will not allow the motion to quash to be resolved before the time for scheduled testimony, and the parties should therefore request an expedited briefing schedule and hearing.

6. Amicus briefs

There is no general rule regarding the acceptance of *amicus* briefs in cases involving reporter's privilege issues, although at least some trial judges have been amenable to *amicus* participation. Two groups that have previously been involved in such cases as *amici* are the Utah Headliners Chapter of the Society of Professional Journalists and the Utah Press Association.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

With respect to confidential source information and confidential unpublished news information, the burden of proof is on the party seeking such information. See Rule 509(c) & (d). With respect to nonconfidential unpublished news information, the initial burden of proof is upon the party claiming the privilege to demonstrate that “the interest of a continued free flow of information to news reporters outweighs the need for disclosure.” See Rule 509(d). This burden is satisfied by applying the factors set forth in *Silkwood* and *Bottomly*, i.e. materiality and relevance of information sought, availability of information from alternative source, the type of controversy, as well as other public interest factors. See Rule 509 advisory committee note. Once a news reporter establishes that application of the *Silkwood/Bottomly* and public interest factors weigh in favor of non-disclosure, the burden shifts to the party seeking disclosure of the information.

B. Elements

1. Relevance of material to case at bar

The Advisory Committee Note to Rule 509 states that in determining whether the need for the information outweighs the interest of a continued free flow of information to news reporters, the court should consider the factors set forth in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977). In that case, the U.S. Court of Appeals for the Tenth Circuit held that litigants seeking evidence or testimony from a reporter through a subpoena had to demonstrate that the information sought was “of certain relevance” to the case. *Silkwood*, 563 F.2d at 438. A magistrate judge in the U.S. District Court for the District of Utah quashed a subpoena of two reporters in part because the party seeking the reporters' testimony had failed to demonstrate certain relevance. *Bottomly v. Leucadia Nat'l Corp.*, 24 Med. L. Rep. 2118, 1996 U.S. Dist. LEXIS 14760 (D. Utah July 2, 1996). Instead, the magistrate judge concluded, the reporters' testimony had only been shown to be potentially logically probative but likely peripheral.

A related requirement expounded by the Tenth Circuit in *Silkwood* is that the information sought must “go[] to the heart of the matter.” *Silkwood*, 563 F.2d at 438. The U.S. District Court for the District of Utah described this requirement as “central or core to the litigation.” *Bottomly*, 1996 U.S. Dist. LEXIS at *7. A Utah trial court ruled that, in civil cases at least, litigants must demonstrate a “critical need” for information in order to overcome the reporter's privilege. *Lester v. Draper*, No. 000906048 (Utah 3d Dist. Ct. Jan. 16, 2002).

2. Material unavailable from other sources

The Advisory Committee Note to Rule 509 cites *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) for the principle that, in balancing the interests, the court should consider “whether the party seeking the information has attempted independently to obtain the information.” Utah R. Evid. 509 advisory committee note.

Prior to adoption of Rule 509, several Utah trial courts applied the Silkwood factors and found the existence of alternative sources to be a convenient way to avoid compelling reporters to testify in court. For example, one state trial judge found a published newspaper article along with an affidavit from the reporter authenticating the article to be “an adequate and sufficient alternative form for the testimony sought by the State” in a murder prosecution. *State v. Koolmo*, No. 981905396 (Utah 3d Dist. Ct. March 29, 1999). Another trial court found that a criminal defendant's publicly available written statement, which was identical to the defendant's televised reading of the statement sought by prosecutors, was an appropriate alternative. *State v. Michaels*, No. 011902114 (Utah 3d Dist. Ct. July 9, 2001). In that case, the court relied on the alternative source analysis to quash the subpoena despite finding that the information sought was relevant and went to the heart of the matter.

However, one Utah trial court required a newspaper reporter to comply with a subpoena seeking her testimony at the preliminary hearing of a murder defendant even though the information sought from the reporter was available from other sources. *State v. Martinez*, No. 011501042 (Utah 5th Dist. Ct. April 29, 2002). In that case, the defendant had been accused of stabbing a barber to death with scissors after taking \$200. From jail, the defendant sent confession letters to a newspaper reporter and the victim's wife. The defendant also reportedly confessed, at least in part, to police investigators. Nevertheless, the trial court neglected to consider the alternative sources and reasoned that the prosecution's interest in putting on its evidence as it saw fit at a preliminary hearing outweighed the reporter's privilege. The reporter testified at the preliminary hearing, but the defendant entered a guilty plea before trial.

In another case involving a published news article, a trial court concluded that there was “more evidentiary value from sworn testimony than from the news article alone.” *In re: Inquiry of the State Ballot Law Commission of the State of Massachusetts*, No. 020905264 (Utah 3d Dist. Ct. June 25, 2002). Consequently, the court ordered the reporter to provide her sworn testimony via affidavit concerning whether the source said what the reporter attributed to the source in the article.

a. How exhaustive must search be?

There is no statutory or case law addressing this issue.

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

There is no statutory or case law addressing this issue.

c. Source is an eyewitness to a crime

Rule 509 does not exempt news source's eyewitness observations to a crime from the protection of the Rule. In cases where the leak of information to the source is alleged to be a crime, and thus the source a witness to the crime, a court must balance the need for disclosure of confidential and nonconfidential information against the interest in preserving the “continued free flow of information” to the source (and thus the public). See Utah R. Evid. 509 (c) & (d). This language allows for consideration of the public value of the information reported to the public, a factor not expressly provided by Silkwood or Bottomly, but which is critical in leak cases.

Before the adoption of this rule, a single Utah trial court confronted this issue. Although the court's treatment of this topic has no precedential value, it may serve to illustrate one way Utah trial courts might approach this question. On February 10, 2000, the ABC news program “20/20” broadcast a tape of a British woman allegedly undergoing a New Age procedure called trepanation, in which a hole is drilled in the skull in an attempt to relieve pressure and achieve heightened

consciousness. The tape showed two men who were later charged by county prosecutors with practicing medicine without a license. The tape also showed that ABC News reporter Chris Cuomo was present and witnessed the trepanation procedure. <o:p></o:p>

ABC, however, had placed a dot on the tape to cover the depiction of the woman's skull at the moment of actual drilling due to the graphic nature of the procedure. Thus, using only the broadcast version of the tape, prosecutors could not demonstrate that the two defendants actually conducted the procedure; the woman later claimed that she drilled the hole herself. In order to bolster their case, prosecutors subpoenaed Cuomo and the unedited ABC News tape. A state trial judge, in declining to quash the subpoena, relied heavily on the fact that Cuomo was present and witnessed the alleged crime: "At this point, Mr. Cuomo is the only eyewitness whose identity is known to the State. At this point, either Mr. Cuomo testifies, or the State will likely be obliged to dismiss their prosecution." *State v. Halvorson*, No. 001500343 (<st1:state w:st="on">Utah</st1:state> 5th Dist. <st1:state w:st="on"><st1:place w:st="on">Ct.</st1:place></st1:state> Oct. 13, 2000). Thus, the trial judge said, the state had "met its burden to demonstrate that it has attempted to gather the evidence from other sources." <st1:state w:st="on"><st1:place w:st="on">*Id.*</st1:place></st1:state> <o:p></o:p>

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3. Balancing of interests

Utah Rule of Evidence 509 "requires the court to consider the interests of the person seeking disclosure and the interests of the free flow of information to news reporters." <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Evid. 509 advisory committee note. In doing so, the Advisory Committee directed courts to consider the <i style="">Silkwood v. Kerr-McGee Corp., 563 F. 2d 433 (10th Cir. 1977) factors of "(1) whether the party seeking the information has attempted independently to obtain the information, (2) whether the information being sought goes to the heart of the matter, (3) whether the information is of certain relevance, and (4) the type of controversy." It also indicated that "[a]s the law in this area continues to develop, the court should consider other factors found to influence the open and free flow of information to news reporters." <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Evid. 509 advisory committee notes. Additionally, the rule does not contain exceptions to the privilege, "recognizing that in most cases those issues will be resolved by applying the balancing test[.]" <o:p></o:p><p class="MsoNormal"><o:p></o:p>Even before Rule 509 was enacted, several state trial courts engaged in a balancing of interests in attempting to determine whether to quash a subpoena seeking a reporter's testimony. Among the interests that have been considered in such a balancing inquiry is "the interest of protecting First Amendment and common law privileges and interests of the journalists and reporters and not subjecting them to inappropriate or unnecessary inquiry as to their reporting inquiries." *Bottomly v. Leucadia Nat'l Corp.*, 24 Med. L. Rep. 2118, 1996 <st1:country-region w:st="on"><st1:place w:st="on">U.S.</st1:place></st1:country-region> Dist. LEXIS 14760, at *6 (D. Utah July 2, 1996). <o:p></o:p>

In connection with this balancing of interests, state trial courts have followed the U.S. Court of Appeals for the Tenth Circuit in examining the type of controversy involved in the underlying cases when reporters are subpoenaed. In civil and minor criminal cases, the reporter's privilege will be stronger than in serious criminal cases: "Some events, while constituting a minor crime or civil wrong, may not be so significant or serious that the reporter should be required to appear and testify." *State v. Halvorson*, No. 001500343 (<st1:state w:st="on">Utah</st1:state> 5th Dist. <st1:state w:st="on"><st1:place w:st="on">Ct.</st1:place></st1:state> Oct. 13, 2000). <o:p></o:p>

Even in case of serious criminal charges such as capital homicide, however, <st1:state w:st="on"><st1:place w:st="on">Utah</st1:place></st1:state> trial courts have quashed subpoenas seeking reporters' testimony when the information was available through alternative sources. <st1:place w:st="on"><st1:placename w:st="on">*See*</st1:placename> <st1:placetype w:st="on">*State*</st1:placetype></st1:place> v. *Koolmo*, No. 981905396 (Utah 3d Dist. Ct. March 29, 1999). <o:p></o:p>

In one capital homicide case, however, a <st1:state w:st="on"><st1:place w:st="on">Utah</st1:place></st1:state> trial court refused to quash a subpoena seeking a reporter's testimony in part because the state's interest in prosecuting the crime and putting on its evidence as it saw fit outweighed the reporter's privilege. *State v. <st1:city w:st="on">Martinez</st1:city>*, No. 011501042 (<st1:state w:st="on">Utah</st1:state> 5th Dist. <st1:state w:st="on"><st1:place w:st="on">Ct.</st1:place></st1:state> April 29, 2002). In that case, the trial court was not persuaded by the newspaper's argument that the First Amendment interest in preventing a chilling effect on press freedoms justified quashing the subpoena. The newspaper also correctly predicted that forcing the reporter to testify would turn journalists into subpoena magnets. Soon after the preliminary hearing at which the reporter testified, the newspaper's publisher and editor were both subpoenaed by defense counsel for trial. The subpoenas were withdrawn, however, when the defendant pleaded guilty. <o:p></o:p>

4. Subpoena not overbroad or unduly burdensome

There is no statutory or case law specific to this issue with respect to subpoenas of news media outlets or reporters. However, rules of civil and criminal procedure relating to subpoenas generally require parties or attorneys who serve subpoenas to “take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.” Utah R. Civ. P. 45(e); *see also* Utah R. Civ. P. 26(b)(2) and 26(c); Utah R. Crim. P. 14(b) (“The court may quash or modify the subpoena if compliance would be unreasonable.”). The court is required to quash or modify a subpoena in a civil case if the court is presented with a motion requesting that the subpoena be quashed or modified and if the court determines that the subpoena “fails to allow reasonable time for compliance,” “requires disclosure of privileged or other protected matter and no exception or waiver applies,” or “subjects a person to undue burden.” <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Civ. P. 45(c)(3)(A).<o:p></o:p>

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5. Threat to human life

In determining whether the reporter's privilege can be overcome in the case of subpoenas seeking confidential sources, Rule 509 requires that “the person seeking the information demonstrate[] by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.” <o:p></o:p>

6. Material is not cumulative

See Section IV.B.2. above.

7. Civil/criminal rules of procedure

A person who is subpoenaed to produce documents may serve a written objection on the attorney or party designated in the subpoena. <st1:place w:st="on"><st1:state w:st="on">Utah</st1:state></st1:place> R. Civ. P. 45(e)(4)(e). In that case, the party that served the subpoena may not inspect the documents absent a court order obtained after the requesting party files a motion to compel production. <st1:state w:st="on"><st1:place w:st="on">*Id.*</st1:place></st1:state> A person who is subpoenaed may file a motion to quash with the court from which a subpoena was issued if the person believes the subpoena is unreasonable or unduly burdensome, or the information sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. *See* <st1:state w:st="on">Utah</st1:state> R. Crim. P. 14(b); <st1:state w:st="on">Utah</st1:state> R. Civ. P. 45(e); Utah R. Civ. P. 26(b)(2) and 26(c).<o:p></o:p>

8. Other elements

There is no statutory or case law addressing this issue.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There is no statutory or case law addressing this issue.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no statutory or case law addressing this issue.

b. Disclosure of non-confidential source's name

There is no statutory or case law addressing this issue.

c. Partial disclosure of information

There is no statutory or case law addressing this issue.

d. Other elements

There is no statutory or case law addressing this issue.

3. Agreement to partially testify act as waiver?

There is no statutory or case law addressing this issue.

VII. What constitutes compliance?

In a civil case, non-parties who are subpoenaed to produce documents must be given at least fourteen (14) days to comply. Utah R. Civ. P. 45(e)(2). Such a non-party need not appear personally at the site at which the documents are to be inspected. Utah R. Civ. P. 45(e)(2).

A. Newspaper articles

There is no statutory or case law addressing this issue, although the Utah Rules of Evidence provide that newspaper articles and periodical articles are self-authenticating. Utah R. Evid. 902(6).

B. Broadcast materials

There is no statutory or case law addressing this issue.

C. Testimony vs. affidavits

Although there is no statutory or case law on this issue, state trial courts have allowed journalists to submit affidavits to verify statements made by news sources as reported in newspaper articles and thus avoid testifying in person. *See In re: Inquiry of the State Ballot Law Commission of the State of* *Massachusetts*, No. 020905264 (3d Dist. Ct. June 25, 2002); *State v. Koolmo*, No. 981905396 (Utah 3d Dist. Ct. March 29, 1999).

D. Non-compliance remedies

There is no statutory or case law addressing this issue.

1. Civil contempt

"Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Utah R. Civ. P. 45(e).

a. Fines

There is no statutory or case law addressing this issue.

b. Jail

There is no statutory or case law addressing this issue.

2. Criminal contempt

There is no statutory or case law addressing this issue.

3. Other remedies

There is no statutory or case law addressing this issue.

VIII. Appealing

A. Timing

1. Interlocutory appeals

There is no statutory or case law addressing this issue with regard to the reporter's privilege. For questions about interlocutory appeals generally, see Rule 5 of the Utah Rules of Appellate Procedure.

2. Expedited appeals

There is no statutory or case law addressing this issue with regard to the reporter's privilege. For questions about expedited appeals generally, see Rule 31 of the Utah Rules of Appellate Procedure.

B. Procedure

1. To whom is the appeal made?

There is no statutory or case law addressing this issue with regard to the reporter's privilege. Generally, the Utah Supreme Court has jurisdiction over all cases except those over which the Utah Court of Appeals has original jurisdiction, and cases may be transferred between these two courts subject to Utah law. *See* Utah Code Ann. §§ 78-2-2 and 78-2a-3.

2. Stays pending appeal

There is no statutory or case law addressing this issue with regard to the reporter's privilege. For information about stays pending appeal generally, see Rule 17 of the Utah Rules of Appellate Procedure.

3. Nature of appeal

There is no statutory or case law addressing this issue.

4. Standard of review

There is no statutory or case law addressing this issue with respect to the reporter's privilege.

5. Addressing mootness questions

There is no statutory or case law addressing this issue.

6. Relief

There is no statutory or case law addressing this issue.

IX. Other issues

A. Newsroom searches

There is no statutory or case law addressing this issue.

B. Separation orders

There is no statutory or case law addressing this issue.

C. Third-party subpoenas

There is no statutory or case law addressing this issue.

D. The source's rights and interests

There is no statutory or case law addressing this issue.