REPORTER'S PRIVILEGE: VIRGINIA

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

VIRGINIA

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I. Introduction: History & Background

Virginia does not have a shield law, but courts recognize a reporter's privilege based on the First Amendment to the U.S. Constitution. A court faced with a claim of privilege must perform a balancing test, taking into account (1) whether the information sought in the subpoena is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information.

II. Authority for and source of the right

Virginia does not have a shield law, but courts recognize a reporter's privilege based on the First Amendment to the U.S. Constitution.

A. Shield law statute

There is no shield law statute in Virginia.

B. State constitutional provision

The Constitution of Virginia does not contain an express shield law provision, nor has one been read into any provision.

C. Federal constitutional provision

The Virginia Supreme Court has recognized a reporter's privilege under the First Amendment of the United States Constitution. The privilege, which affords both confidentiality to the information obtained and protection to the identity of the source, was established in *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974). The holding of *Brown* has been applied to civil suits in *Clemente v. Clemente*, 56 Va. Cir. 530, 531 (Arlington 2001); *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1, 14 (Richmond 1994); *Hatfill v. New York Times Co.*, 459 F. Supp. 2d 462, 466-67 (E.D. Va. 2006); *Hatfill v. New York Times Co.*, No. CIV.A. 1:04CV807 CMHL, 2006 WL 4500031, at **3-4 (E.D. Va. Nov. 3, 2006).

D. Other sources

There are no other sources of a reporter's privilege in Virginia.

III. Scope of protection

A. Generally

The privilege is qualified. The scope of the privilege in criminal cases was clearly laid out in *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974). The Supreme Court of Virginia has not addressed the scope of the privilege for civil cases. Lower state and federal courts, however, have applied a 3-part test (see below).

B. Absolute or qualified privilege

The privilege is qualified. Courts have adopted a three-part test to determine when the qualified privilege attaches. The test balances (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information. *Clemente v. Clemente*, 56 Va. Cir. 530 (Arlington 2001); *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1, 18 (Richmond 1994); *Hatfill v. New York Times Co.*, 459 F. Supp. 2d 462, 466-67 (E.D. Va. 2006); *Hatfill v. New York Times Co.*, No. CIV.A. 1:04CV807 CMHL, 2006 WL 4500031, at **3-4 (E.D. Va. Nov. 3, 2006).

C. Type of case

1. Civil

The qualified privilege applies in civil and criminal suits. Each attempt to require the disclosure of confidential information is examined on a case-by-case basis. Two Virginia Circuit Court opinions have applied the privilege in civil suits. *See Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1994); *Clemente v. Clemente*, 56 Va. Cir. 530 (Arlington 2001). The Eastern District of Virginia likewise applied the privilege in a civil suit pursuant to Virginia law. *Hatfill v. New York Times Co.*, 459 F. Supp. 2d 462, 466-67 (E.D. Va. 2006) and *Hatfill v. New York Times Co.*, No. CIV.A. 1:04CV807 CMHL, 2006 WL 4500031, at **3-4 (E.D. Va. Nov. 3, 2006).

2. Criminal

The qualified privilege applies in civil and criminal suits. Each attempt to require the disclosure of confidential information is examined on a case-by-case basis. *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974), is the only reported case involving the privilege in the context of a criminal case.

3. Grand jury

The Virginia Supreme Court has not articulated a different standard for grand jury subpoenas.

D. Information and/or identity of source

The privilege protects the identity of a confidential source. *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E. 2d 429, 431 (1974). There is also a valid argument that the privilege protects information that could implicitly identify a confidential source. See *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1994) (extending privilege to subpoenas issued to third parties with the intent of indirectly learning identity of confidential sources).

E. Confidential and/or non-confidential information

Whether the information sought is confidential or non-confidential is a factor to consider in balancing the burden between an uninhibited press and a party's need for relevant information. *Clemente v. Clemente*, 56 Va. Cir. 530, 531 (Arlington 2001).

F. Published and/or non-published material

The case law does not directly discuss a distinction between published and non-published material.

G. Reporter's personal observations

The assertion of the privilege to protect a reporter's personal observations is an issue not yet addressed by the case law.

H. Media as a party

The case law does not differentiate between situations in which the media is not a party and cases in which the media is a party. *See Clemente v. Clemente*, 56 Va. Cir. 530 (Arlington 2001); *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1994).

I. Defamation actions

The privilege is treated no differently in defamation cases than it is treated in any other type of case. *See Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1994).

IV. Who is covered

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

The case law does not define a "reporter."

b. Editor

The case law does not define an "editor."

c. News

The case law does not define "news."

d. Photo journalist

The case law does not define "photojournalist."

e. News organization / medium

The case law does not define "media."

2. Others, including non-traditional news gatherers

There is no case law determining whether the reporter's privilege applies to non-traditional news gatherers, such as authors, freelancers, students, unpaid news gatherers, academic researchers, or newspaper librarians.

B. Whose privilege is it?

The case law only directly discusses the media's qualified privilege as belonging to the reporter. There is no case law addressing whether the privilege also belongs to the source or the employer.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

For rules relating to the timing and service of subpoenas, *see* Va. Code §§ 8.01-293, 8.01-271.1, 8.01-407; Rule 4:9 of the Rules of the Supreme Court of Virginia.

2. Deposit of security

There is no requirement that the subpoenaing party deposit any security in order to have a subpoena served.

3. Filing of affidavit

There is no affidavit requirement for serving a subpoena on a reporter.

4. Judicial approval

A judge or magistrate does not need to approve a subpoena before it may be served on a reporter.

5. Service of police or other administrative subpoenas

Generally, administrative agencies have the power to, at the request of a party, issue subpoenas. *See* Va. Code §§ 9-6:14:13, 18.2-456(5), 19.2-267.1, 36-139.2.

B. How to Quash

1. Contact other party first

Making contact with the subpoenaing party, through its counsel where possible, is recommended but not required.

2. Filing an objection or a notice of intent

Virginia practice does not require filing a notice of intent to quash.

3. File a motion to quash

a. Which court?

The motion to quash should be filed in the court from which the subpoena was issued or in which the underlying case is pending.

b. Motion to compel

The media party should not wait for the subpoenaing party to file a motion to compel before filing a motion to quash.

c. Timing

Generally, the motion should be filed as soon as practicable, to avoid surprise to the court.

d. Language

There is no stock language or preferred text that should be included in a motion.

e. Additional material

The Reporters Committee for Freedom of the Press often recommends that a copy of "Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media," its biennial survey of the incidence of news media subpoenas, be attached to a motion to quash.

4. In camera review

a. Necessity

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

b. Consequences of consent

There are no consequences to consenting to an in camera review.

c. Consequences of refusing

It is likely that a reporter or publisher that does not consent to an in camera review would be held in contempt of court.

5. Briefing schedule

Briefing schedules vary locally.

6. Amicus briefs

For rules relating to amicus participation, *see* Rules 5A:23 and 5:30 of the Rules of the Supreme Court of Virginia.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

When a member of the news media validly asserts the reporter's privilege, the burden then shifts to the subpoenaing party to demonstrate that the privilege should be overcome.

B. Elements

1. Relevance of material to case at bar

The first prong of the three-part test is that the information sought must be relevant to the case at issue.

2. Material unavailable from other sources

The second prong of the three-part test is that the material sought must be unobtainable by alternative means. *See Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1994).

a. How exhaustive must search be?

The case law does not discuss what constitutes an exhaustive search, although at least one court found compelling disclosure to be premature at the outset of discovery. *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1994).

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

The subpoenaing party should demonstrate that it has attempted to locate the information from sources other than the news media member claiming the privilege. *See Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1 (Richmond 1994).

c. Source is an eyewitness to a crime

There is no case law on this issue.

3. Balancing of interests

The reporter's privilege requires the court to balance the interests between the freedom of the press and the right of a defendant to compel disclosure. *Clemente v. Clemente*, 56 Va. Cir. 530, 531 (Arlington 2001); *Philip Morris Co. v. American Broadcasting Co.*, 36 Va. Cir. 1, 18 (Richmond 1994).

4. Subpoena not overbroad or unduly burdensome

A court may make a protective order to protect a person from "annoyance, embarrassment, oppression, or undue burden or expense." *See* Rules of the Supreme Court of Virginia, Rule 4:1(c).

Rule 4:1(b)(1) of the Rules of the Supreme Court of Virginia states that the frequency or extent of use of discovery in civil cases may be limited by the court if "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."

Rule 3A:12(b) of the Rules of the Supreme Court of Virginia states that when "subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including limiting disclosure, removal, and copying."

5. Threat to human life

The court is not required to weigh whether the information subpoenaed involves a threat to human life.

6. Material is not cumulative

Rule 4:1(b)(1) of the Rules of the Supreme Court of Virginia states that the frequency or extent of use of civil discovery may be limited by the court if "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."

7. Civil/criminal rules of procedure

A motion to quash should be directed to a frivolous subpoena, and either a motion to quash or modify the subpoena or a motion for protective order directed to a burdensome one.

8. Other elements

Rule 4:1(b)(6) of the Rules of the Supreme Court of Virginia states that when a party withholds information otherwise discoverable in a civil suit "by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

There is no case law addressing whether the privilege is waivable by the reporter.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no case law addressing whether the privilege is waivable.

b. Disclosure of non-confidential source's name

There is no case law addressing whether the privilege is waivable.

c. Partial disclosure of information

There is no case law addressing whether the privilege is waivable.

d. Other elements

There is no case law addressing whether the privilege is waivable.

3. Agreement to partially testify act as waiver?

There is no case law addressing whether a reporter's agreement to partially testify serves to waive the privilege.

VII. What constitutes compliance?

A. Newspaper articles

Newspapers are generally not treated as self authenticating.

B. Broadcast materials

Broadcast materials are generally not treated as self authenticating.

C. Testimony vs. affidavits

Some courts have accepted affidavits authenticating a published item, but testimony is preferable. A court will typically accept the parties' stipulation as to the authenticity of a published item.

D. Non-compliance remedies

A court may utilize either civil or criminal contempt proceeding to impose fines or a jail sentence to compel a reporter to comply with a valid subpoena.

1. Civil contempt

The purpose of civil contempt is to coerce the contemnor into doing what he had previously refused to do. *International Union, UMW v. Covenant Coal Corp.*, 12 Va. App. 135, 402 S.E.2d 906 (1991). Thus, the reporter holds the keys to his jail cell in his pocket because the contemnor will be released from jail when he purges himself of the contempt.

a. Fines

When a reporter is summarily held in civil contempt in the circuit court, there is no cap on the fine that may be imposed by the court to compel compliance. When a reporter is summarily held in contempt in the district court, the fine shall not exceed $250. Virginia Code § 18.2-458.

b. Jail

When a reporter is summarily held in civil contempt in the circuit court, there is no limit to the amount of time a reporter may remain in jail. When a reporter is summarily held in contempt in the district court, the term of imprisonment shall not exceed 10 days. Virginia Code § 18.2-458.

2. Criminal contempt

Virginia Code § 18.2-456(5) states that a circuit court judge may summarily punish contempt when then there is disobedience or resistance to any lawful process, judgment, decree, or order of the court by, among others, a wit-

ness before the court. This section includes subpoenas directed to a witness. *See Bellis v. Commonwealth*, 241 Va. 257, 402 S.E.2d 211 (1991).

3. Other remedies

There are no reported cases discussing other remedies, such as default judgments against the media, with respect to the reporter's privilege. In *Hatfill v. New York Times Co.*, 459 F. Supp. 2d 462, 466-67 (E.D. Va. 2006) and *Hatfill v. New York Times Co.*, No. CIV.A. 1:04CV807 CMHL, 2006 WL 4500031, at **3-4 (E.D. Va. Nov. 3, 2006), however, the court ruled that the New York Times could not rely on any information received from its confidential sources as a sanction for failing to disclose the sources after the court ordered disclosure.

VIII. Appealing

A. Timing

1. Interlocutory appeals

The jurisdiction of the Supreme Court to hear interlocutory appeals is purely statutory. *Lancaster v. Lancaster*, 86 Va. 201, 204, 9 S.E. 988, 989 (1889). Section 8.01-670(B)(1) permits interlocutory appeals only in certain chancery cases.

2. Expedited appeals

There are no provisions in the Virginia Code that allow for an expedited appeal for news media subpoenas.

B. Procedure

1. To whom is the appeal made?

The circuit court hears appeals from the district court. Based upon the nature of the action, appeals from a final judgment of a circuit court may be made to the Court of Appeals or directly to the Supreme Court. Virginia Code §§ 8.01-670 and 672. The appellate jurisdiction of the Court of Appeals includes all criminal cases not involving imposition of the death penalty. Virginia Code § 17.1-406. In most civil cases, appeals must go directly to the Supreme Court of Virginia.

2. Stays pending appeal

Virginia Code § 8.01-676.1(D) states that the court from which an appeal is sought may refuse to suspend the execution of a decree in cases involving support, custody, or when a judgment refuses, grants, modifies, or dissolves an injunction. In all other cases, an appellant may have the execution of a decree suspended during the appeal if adequate security is provided and the appeal is timely prosecuted. Virginia Code § 8.01-676.1(C).

3. Nature of appeal

There is an appeal of right from the district court to the circuit court. There is an appeal of right from the circuit court to the Court of Appeals in most cases falling within their civil appellate jurisdiction. Appeals of criminal convictions to the Court of Appeals is by petition. There is an appeal of right from the circuit court to the Supreme Court for death penalty convictions, writs of habeas corpus, from the final decision of the State Corporation Commission, or from proceedings filed under Virginia Code §§ 54.1-3935 or 54.1-3937. Virginia Code § 17.1-406(B). All other cases within the appellate jurisdiction of the Supreme Court are to be made via petitions for discretionary review. Virginia Code § 8.01-670. A mandamus action "lies to compel, not to revise or correct action, however erroneous it may have been, and is not like a writ of error or appeal, [which is] a remedy for erroneous decisions." *Board of Supervisors v. Combs*, 160 Va. 487, 498, 169 S.E. 589, 593 (1933).

4. Standard of review

The general standard of review is that the judgment of a trial court will not be set aside unless it appears from the evidence that the judgment is either plainly wrong or that there is no evidence to support it. Virginia Code §8.01-680.

5. Addressing mootness questions

The case law has not addressed the mootness issue that arises when the trial or grand jury for which a reporter was subpoenaed has concluded. However, Virginia appellate courts do recognize that a court may adjudicate a controversy under the capable of repetition but evading review exception to the requirement of standing or justiciability. *Commonwealth ex rel. State Water Control Board v. APCO*, 12 Va. App. 73, 402 S.E.2d 703 (1991).

6. Relief

Generally speaking, an appellate court may either vacate the contempt citation or remand the case to the trial court to reconsider the issue in light of the appellate decision.

IX. Other issues

A. Newsroom searches

There are no reported cases in Virginia addressing the federal Privacy Protection Act. Virginia has no act similar to the federal Privacy Protection Act. In several unreported cases, circuit courts have quashed search warrants upon motions filed by the media. Experience suggests that neither prosecutors, magistrates, or judges are familiar with the Act. It is essential to get the issue to a court as soon as possible.

B. Separation orders

This issue has not been litigated in a reported Virginia case.

C. Third-party subpoenas

Philip Morris Co. v. American Broadcasting Co., 36 Va. Cir. 1 (Richmond 1994), extended the privilege to protect third party records that could be used to determine the identity of a confidential source, such as credit card records, telephone billing records, and airline records of the reporter.

D. The source's rights and interests

There is no case law addressing the rights and interests of the source of the information.