

# REPORTER'S PRIVILEGE: VERMONT

**The Reporters Committee for Freedom of the Press**

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

The complete project can be viewed at  
[www.rcfp.org/privilege](http://www.rcfp.org/privilege)

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## The Reporter's Privilege Compendium: An Introduction

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

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

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

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

### Above the law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The sources of the reporter's privilege

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

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

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

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

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

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

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

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

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

### What is a subpoena?

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

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

In a word, yes.

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

### What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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VERMONT

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## I. Introduction: History & Background

There is no statutory shield law in Vermont. Accordingly, the following consists of general guidelines for contesting news media subpoenas pursuant to Vermont's Rules of Civil Procedure and Vermont jurisprudence construing the United States and Vermont Constitutions, and Vermont common law.

In *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974), the Vermont Supreme Court recognized a qualified reporter's privilege under the First Amendment to refuse to give testimony in a criminal case absent a showing by the party seeking disclosure that there is no other adequately available source for the information and that the information sought is relevant and material on the issue of guilt or innocence. Recently, the Vermont Supreme Court held that no privilege exists under the First Amendment that would protect a journalist from "disclos[ing] evidence of a crime, or evidence that is relevant and material to a criminal investigation, when properly subpoenaed." *In re Inquest Subpoena (WCAX)*, 2005 VT 103, ¶¶ 20-21, 179 Vt. 12, 21, 890 A.2d 1240, 1247 (2005). In the *WCAX* case, however, the Court also reaffirmed its decision in *St. Peter*, confirming that a qualified reporter's privilege exists in all "cases in which a news reporter is 'legitimately entitled to First Amendment protection.'" *Id.* ¶¶ 12-14, 179 Vt. at 17-18, 890 A.2d at 1243-44.

There are only a handful of Vermont cases, many of which are unreported, which further describe the privilege.

## II. Authority for and source of the right

### A. Shield law statute

Vermont does not have a shield law statute.

### B. State constitutional provision

Vermont's Constitution provides in relevant part that: "That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained." Vermont Constitution, Chap. I, Art. 13 (July 9, 1793).

Thus, the language of and policy behind Article 13 supports the recognition of a reporter's privilege, especially where the journalist is reporting on the activities of elected government officials. However, Article 13 "has not been relied on by any court to provide a higher level of protection than is derived from the First Amendment." *Spooner v. Town of Topsham*, No. 129-7-04 OeCv, at 7 (Oran. Super. Ct. Mar. 14, 2006) (currently on appeal to the Vermont Supreme Court); *see also* *Grievance of Morrissey*, 149 Vt. 1, 18 (1987) (although Article 13 is more specific than the First Amendment, it does not provide greater protection to a disgruntled state officer).

### C. Federal constitutional provision

The First Amendment to the United States Constitution provides in relevant part as follows:

Congress shall make no law... abridging the freedom of speech, or of the press.... U.S. Const. Amend. I.

The United States Supreme Court has held that the unqualified prohibitions laid down by the framers of the Constitution were intended to give the liberty of the press the broadest scope that could be countenanced in an orderly society. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The Second Circuit Court of Appeals has recognized a qualified reporter's privilege arising out of the First Amendment. *See United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (noting that under the applicable test, "the First Amendment interests" of the reporter are balanced against the "evidentiary needs" of the party seeking the information). The federal courts generally weigh a reporter's claim to First Amendment protection from forced disclosure against the opposing party's claimed need to discover probative evidence on a case-by-case basis. *See Lipinski v. Skinner*, 781 F. Supp. 131 (N.D.N.Y. 1991).

In *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974), the Vermont Supreme Court recognized a qualified reporter's privilege under the First Amendment to refuse to give testimony in a criminal case absent a showing by the party seeking disclosure that there is no other adequately available source for the information and that the in-

formation sought is relevant and material on the issue of guilt or innocence. The Court recently reaffirmed this holding, confirming that a qualified reporter's privilege exists in all "cases in which a news reporter is 'legitimately entitled to First Amendment protection.'" *WCAX*, ¶¶ 12-14, 179 Vt. at 17-18, 890 A.2d at 1243-44.

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

The qualified privilege recognized in *St. Peter* has been applied in civil libel actions in several unreported trial court cases; in unreported criminal cases, *see State v. Peters*, Docket No. 97-01-01 WnCr (Vt. Dist. Ct. July 3, 2001); and in a small number of reported decisions, *see State v. Blais*, 6 Media L. Rep. 1537 (Vt. Dist. Ct. 1980) in which the court ruled that newspaper reporters did not have to disclose confidential sources because plaintiffs failed to establish that the information sought was necessary and otherwise unavailable; *see also In re Powers*, 4 Media L. Rep. 1600 (Vt. Dist. Ct. 1978). Moreover, a Vermont Superior Court recently quashed a subpoena issued to a newspaper reporter in an age discrimination case, finding that the plaintiff had failed to demonstrate that the information sought was not "reasonably obtainable from other available sources," and thus could not overcome the qualified privilege. *Spooner*, No. 129-7-04 OeCv, at 12.

Vermont courts have relied upon *United States v. Burke*, 700 F.2d 70, 78 (2d Cir. 1983) for the proposition that there is "no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence." In *Burke*, the Second Circuit held that "[d]isclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other sources." *Id.* at 77 (citing *Baker v. F & F Investment*, 470 F.2d 778, 783-85 (2d Cir. 1972)). Further, the Second Circuit has made clear that, in civil cases, "the qualified privilege for journalists applies to nonconfidential, as well as to confidential, information." *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999). Vermont lower courts have applied the standard established in *Gonzales* that a litigant can overcome the journalist's privilege only upon a showing that "the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Id.* at 36; *see also Spooner*, No. 129-7-04 OeCv, at 12.

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

#### **A. Generally**

Vermont's qualified reporter's privilege extends to information sought from "newsgatherers" or "newsreporters." The Vermont courts have not further defined that term or determined whether or when non-traditional news gatherers are protected by the qualified privilege.

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

Qualified.

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

The qualified privilege has been applied in both civil and criminal cases. *See sections II.C. and II.D. above.*

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

In *St. Peter*, the Vermont Supreme Court held that a television news reporter had a qualified privilege permitting him to refuse to identify the source of his foreknowledge of a drug raid when asked questions about that source in deposition. *St. Peter*, 132 Vt. at 270, 315 A.2d at 256.

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

Vermont courts have followed the Second Circuit's jurisprudence that "the qualified privilege for journalists applies to nonconfidential, as well as to confidential, information." *Gonzales*, 194 F.3d at 35; *see Spooner*, No. 129-7-04 OeCv, at 12; *State v. Peters*, Docket No. 97-01-01 WnCr (Vt. Dist. Ct. July 3, 2001) (concluding that "the general weight of authority holds that the qualified privilege is also applicable in a case where the reporter is asked to testify regarding non-confidential sources").

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

Vermont courts have not addressed the distinction, if any, between published and non-published material. In *Peters*, Docket No. 97-01-01 WnCr, the court quashed a subpoena issued by the state for reporter testimony regarding certain quotes from the criminal defendant which appeared in a published article. In *Spooner*, No. 129-7-04 OeCv, at 1-3, the court granted the reporter's motion to quash a subpoena which primarily, though not exclusively, called for his testimony regarding matters that had been published in a news article.

In *State v. Gundlach*, 160 Vt. 193, 624 A.2d 328 (1993), the Vermont Supreme Court refused on mootness grounds to review a lower court's refusal to recognize a reporter's privilege with regard to statements made in published articles which included an alleged prison escapee's confession. The reporter was held in contempt for refusing to testify at deposition after she claimed a reporter's privilege. The court did, however, find that the trial court erred in ordering the reporter to pay the State and the defendant's attorney's fees and in ordering that prospective fines of \$1,000 for the first day and \$2,000 per additional day of continued disregard for the court's order compelling her testimony.

## G. Reporter's personal observations

Vermont courts have not addressed whether a reporter's personal observations are covered by the qualified privilege. Presumably when a reporter is not furthering the freedom of the press but is merely a witness to a crime or an accident, those personal observations may not implicate First Amendment concerns and may be entitled to a lesser standard of protection.

## H. Media as a party

Vermont courts have not addressed whether a different standard applies when the media is a party to the action. Unreported decisions have recognized the qualified privilege in media libel suits.

## I. Defamation actions

In Vermont, a plaintiff seeking to establish defamation must prove the existence a statement made by the media that tends to lower him in the estimate of a "substantial respectable group" even though that group is associated with plaintiff or constitutes a minority sector of the community. *Ryan v. Herald Ass'n., Inc.*, 152 Vt. 275, 284, 566 A.2d 1316, 1321, 16 *Media L. Rep.* 2472, 2476 (1989).

In *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 9 *Media L. Rep.* 2547 (1983), the Vermont Supreme Court set forth the six *prima facie* elements of a defamation claim: (1) a false and defamatory statement concerning another; (2) negligence or greater fault, in publishing the statement; (3) publication to at least one third-person; (4) lack of privilege in the publication; (5) special damages or no damages if written or actionable *per se*; and (6) actual harm sufficient to warrant compensatory damages.

Vermont's Rules of Civil Procedure do not permit pre-judgment attachments for libel or slander actions. V.R.C.P. 4.1(a). Accordingly, a plaintiff may not obtain an order freezing the assets, real property or bank accounts of a reporter or a media entity prior to the issuance of a defendant's judgment or verdict in the plaintiff's favor.

## IV. Who is covered

### A. Statutory and case law definitions

Vermont does not have a statutory shield law. Vermont's qualified reporter's privilege extends to a "newsgatherer." *St. Peter*, 132 Vt. at 271, 315 A.2d at 256. The Vermont courts have not further defined the term "newsgatherer."

#### 1. Traditional news gatherers

Traditional news gatherers are likely to be included in Vermont's reporter's privilege. *St. Peter*, 132 Vt. at 271.

##### a. Reporter

In *St. Peter*, "a television news reporter" was deemed a "newsgatherer" who could assert a reporter's privilege. *St. Peter*, 132 Vt. at 268, 315 A.2d at 255; see also *In re Inquest Subpoena (WCAX)*, 2005 VT 103, ¶ 1, 179 Vt. 12, 13, 890 A.2d 1240, 1241 (2005). The qualified privilege has also been successfully invoked by newspaper reporters. See, e.g., *Spooner v. Town of Topsham*, No. 129-7-04 OeCv, at 7 (Oran. Super. Ct. Mar. 14, 2006).

#### **b. Editor**

There are no reported cases discussing whether an editor is a "newsgatherer." A Vermont court is likely to adopt a liberal view of who constitutes a "newsgatherer" when the person in question is an integral part of the press.

#### **c. News**

In *St. Peter*, "a television news reporter" was deemed to a "newsgatherer" for purposes of the qualified reporter's privilege. *St. Peter*, 132 Vt. at 268, 315 A.2d at 255.

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

There are no reported Vermont cases discussing whether a photo journalist is a "newsgatherer." A Vermont court is likely to adopt a liberal view of who constitutes a "newsgatherer" when the person in question is an integral part of the press.

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

There are no reported Vermont cases discussing whether a news organization or medium is a "newsgatherer." Because the qualified privilege recognized in *St. Peter* is testimonial in nature, it is unlikely that it would be asserted by a news organization or medium. Instead, the privilege would be asserted by the person or persons from whom testimony is sought. On the other hand, where the materials sought are recordings or notes that may be in the possession of the news organization, then the organization would probably be permitted to assert the privilege. Thus, in the *WCAX* case, the State issued a subpoena to a television station for unaired video footage, and the station asserted the privilege and moved to quash the subpoena. *WCAX*, at ¶ 2, 179 Vt. at 13, 890 A.2d at 1241.

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

There are no Vermont cases discussing whether non-traditional news gatherers are within the qualified privilege.

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

The Vermont courts have not specifically discussed who is the holder of the privilege. *St. Peter*, however, suggests that the privilege is to be asserted by the newsgatherer from whom testimony is sought. *St. Peter*, 132 Vt. at 271, 315 A.2d at 256.

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

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

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

A subpoena may be served by any person who is not a party to the lawsuit and who is not less than eighteen (18) years of age. Service of the subpoena is made by delivering a copy to the person named therein, along with the fees for one day's attendance plus mileage allowed by law. See V.R.C.P. 45(b), V.R.Cr.P. 17. Under Vermont law, that amount is \$30.00 per day and \$.0485 per mile for civil cases and \$10.00 per day plus \$.08 per mile for criminal proceedings. See 32 V.S.A. §§ 1551, 1552 (2005). There is no minimum time limit by which a subpoena must be served, but the trial court may quash or modify the subpoena if it fails to allow "reasonable time" for compliance. See V.R.C.P. 45(c)(3)(A)(i).

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

Vermont law does not require a subpoenaing party to deposit any security in order to procure the testimony or materials of a member of the media.

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

There is no requirement under Vermont law for the subpoenaing party to attach an affidavit to the service of a subpoena on a member of the media.

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

A subpoenaing party need not obtain judicial approval before serving a subpoena in civil proceedings and in felony criminal cases. No subpoenas seeking depositions in criminal misdemeanor cases may be issued except by agreement of the parties or after approval of the court for good cause shown. *See* V.R.Cr.P. 15(e)(4). The court may consider, among other things, "the consequences to the defendant, the importance of the witness's testimony, the complexity of the issues involved, the complexity of the witness's expected testimony (e.g., experts), and any other opportunities available to the defendant to discover the information sought by the deposition." *Id.* Discovery may only be obtained in any probate court proceeding upon order of the judge after notice and hearing. *See* V.R.P.P. 26. Discovery may only be ordered upon a finding that it "would not be unduly burdensome or expensive, taking into account such factors as 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." *Id.*

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

The chair of an administrative board, commission or panel, a hearing officer appointed by an administrative board, commission, or panel, or a licensed attorney representing a party appearing before an administrative board, commission, or panel may subpoena the attendance and testimony of any witness, including members of the media, and may subpoena the production of books and records. 3 V.S.A. § 809(h) (2003). Administrative subpoenas are enforceable by the superior court in the county where the administrative proceeding is or will be held. *Id.* § 809a. Motions to modify or vacate the administrative subpoena must be brought in that same court. *Id.* § 809b.

### **B. How to Quash**

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

Under Vermont law, "[c]ounsel have the obligation to make good faith efforts among themselves to resolve or reduce all differences relating to discovery procedures and to avoid filing unnecessary motions." V.R.C.P. 26(h). While it is not clear that this obligation applies to subpoenas issued to nonparties under Rule 45, it is good practice for counsel for the reporter or publisher to contact counsel for the subpoenaing party to attempt to eliminate or reduce areas of controversy in the contents of the subpoena. If the issues cannot be resolved, the motion to quash should be accompanied by an affidavit of the filing party's attorney documenting the date of the consultation and the participants.

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

If the subpoena requires the inspection or production of documents or things, the person named in the subpoena may, within fourteen (14) days of the service date of the subpoena, serve upon the subpoenaing party written notice of his or her objection to the inspection or production. If an objection is made, the party serving the subpoena must then move for an order compelling the inspection or production from the trial court. Under an order issued compelling their production, the subpoenaing party may not access the materials. *See* V.R.C.P. 45(c)(2)(B).

If the subpoena requires appearance at deposition or trial, the person named in the subpoena must file a motion to quash or modify the subpoena. *See* V.R.C.P. 45(c)(3)(A). In this case, there is no provision for filing an objection or a notice of intent prior to filing the motion.

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

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

The motion should be filed in the same court that is hearing the underlying case.

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

If the subpoena is commanding attendance at deposition or trial, the reporter or publisher being subpoenaed should not wait for the subpoenaing party to file a motion to compel. The person being subpoenaed should file a motion to quash under V.R.C.P. 45(c)(3)(A). If the subpoena requires the production or inspection of written

records or other materials, the person being subpoenaed need only serve written objection on the subpoenaing party, which then triggers the subpoenaing party's duty to file a motion to compel. *See* V.R.C.P. 45(c)(2)(B).

### **c. Timing**

The written objection or motion to quash must be filed within fourteen (14) days of the service of the subpoena, or before the time specified for compliance if such time is less than fourteen (14) days after service. V.R.C.P. 45(c)(2)(B).

### **d. Language**

A motion to quash should include a memorandum of law that references the rights a reporter has under the First Amendment to the United States Constitution and Chapter I, Article 13 of the Vermont Constitution. *See supra*, Sections I.B. and I.C. The motion should also reference the qualified reporter's recognized by the Vermont Supreme Court in *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974) and *In re Inquest Subpoena (WCAX)*, 2005 VT 103, 890 A.2d 1240 (2005), *see supra*, Section II.C, as well as the standard for overcoming the privilege as established by the Second Circuit in *United States v. Burke*, 700 F.2d 70, 76-78 (2d Cir. 1983) and *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999).

### **e. Additional material**

There is no prohibition against filing additional material attached to a motion to quash provided that material is relevant and admissible. An explanation as to why production is burdensome is, however, required. An affidavit of compliance with V.R.C.P. 26(h) may be attached to a motion to quash. *See supra*, Section V.B.I.

## **4. In camera review**

### **a. Necessity**

Although there is no statute or rule of civil or criminal procedure requiring in camera review before ruling on a motion to compel or a motion to quash, the Vermont Supreme Court has indicated such review is necessary to a determination of whether good cause exists for ordering the subpoenaed testimony or document production. *See In re B.S.*, 163 Vt. 445, 452, 659 A.2d 1137, 1141-42 (1995) ("Indeed, we are uncertain how a court can make a good cause determination without first examining the records to see what they contain").

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

Consenting to an in camera review does not automatically result in a stay pending appeal in the event of an adverse ruling. If the trial court, after an in camera review, orders that a reporter must give testimony or that his or her written material must be turned over to the subpoenaing party, the reporter can file a motion with that court for permission to file an interlocutory appeal within ten (10) days of that order. *See* V.R.A.P. 5.1(a). In his or her motion, the reporter can request that the testimony or production of documents be stayed pending the appeal. If the trial court denies the motion for interlocutory appeal or denies a stay pending the taking of such an appeal, the court must allow the moving party an opportunity to contact a single justice of the Vermont Supreme Court for a stay. *See id.* This contact may be in writing, or by telephone.

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

If a reporter or publisher refuses to consent to an in camera review ordered by the trial court judge or the Vermont Supreme Court, he or she could be held in contempt of court. 12 V.S.A. §§ 121-22 (2003). Judgments of contempt lie within the discretion of the trial court judge. *Vermont Women's Health Ctr. v. Operation Rescue*, 159 Vt. 141, 147, 617 A.2d 411, 414 (1992). The Vermont Supreme Court has held that requiring a person held in contempt to pay the attorney's fees of the other party is not usually warranted, because a "defendant's right to compel a news-reporter's testimony has not been clearly defined." *State v. Gundlah*, 160 Vt. 193, 197, 624 A.2d 328, 370 (1993). Additionally, the use of prospective fines by trial court judges against reporters or publishers is not favored in Vermont. *Id.*

## **5. Briefing schedule**

A brief in opposition to a motion to quash must be served within fifteen (15) days of service of the motion. Vermont allows an additional three days for a response time if the motion is served by mail, regardless of when it was actually received. V.R.C.P. 6(e). To calculate the deadline, begin counting the day after the motion was filed and include holidays and weekends. V.R.C.P. 6. If the deadline falls on a Saturday, Sunday or a state or federal legal holiday, the deadline is extended until the following day. V.R.C.P. 6(a). Under V.R.C.P. 78, any reply brief must be served within ten days of the opposition.

## **6. Amicus briefs**

Trial courts (including superior court and district court) do not routinely accept amicus briefs. An amicus brief in the Vermont Supreme Court may be filed only if accompanied by the written consent of all parties, or by leave of the trial court granted on motion, or at the request of the Supreme Court. *See* V.R.A.P. 29. The motion for leave to file the amicus brief must identify the interest of the applicant and state the reasons why the brief would be desirable. *See id.*

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

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

Once a motion to quash is filed and a qualified reporter's privilege has been asserted, the party seeking the information bears the burden of demonstrating to the court that there is no other adequately available source for the information and the information sought is relevant and material to a significant issue, such as guilt or innocence. *See, e.g., St. Peter*, 132 Vt. at 271, 315 A.2d at 256. In *St. Peter*, the Vermont Supreme Court stated that if the necessary showing "cannot be made to a measure consistent with the overriding of any First Amendment concern, the deponent cannot properly be compelled to answer the question." *Id.* The Second Circuit has described the standard of proof as requiring a "clear and specific showing." *Burke*, 700 F.2d at 77.

### **B. Elements**

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

Vermont law requires the information sought in a criminal case to be "relevant" and "material on the issue of guilt or innocence." *St. Peter*, 132 Vt. at 271, 315 A.2d at 256. In a civil case, Vermont courts have followed the test articulated in *Gonzales* for nonconfidential information, by which the litigant must show that "the materials at issue are of likely relevance to a significant issue in the case," or the *Burke* standard, which requires that the information sought to be "highly material and relevant, necessary or critical to the maintenance of the claim." *Gonzales*, 194 F.3d at 36; *Burke*, 700 F.2d at 77; *see also Spooner v. Town of Topsham*, No. 129-7-04 OeCv, at 12 (Oran. Super. Ct. Mar. 14, 2006).

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

Vermont law requires that the party seeking information to demonstrate that "there is no other adequately available source for the information," or that it is "not reasonably obtainable from other available sources." *St. Peter*, 132 Vt. at 271, 315 A.2d at 256; *Gonzales*, 194 F.3d at 36.

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

There are no reported Vermont cases articulating how exhaustive a search for other information must be before it is found that the information is not "adequately available." If the information sought is duplicative of other testimony or duplicative evidence on the same issue, it is unlikely that the standard will be satisfied. In *Spooner*, No. 129-7-04 OeCv, at 12, the court quashed the subpoena as "only one of several witnesses" to a public event.

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

There are no reported Vermont cases regarding what proof of search the subpoenaing party needs to make.

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

The Vermont Supreme Court has found that no privilege exists under the First Amendment that would protect a journalist from "disclos[ing] evidence of a crime, or evidence that is relevant and material to a criminal investigation, when properly subpoenaed." *In re Inquest Subpoena (WCAX)*, 2005 VT 103, ¶¶ 20-21, 890 A.2d 1240, 1247 (2005) (noting that "a reporter's investigation of criminal activity is exactly the kind of information *Branzburg* [v. Hayes, 408 U.S. 665, 708 (1972),] does not allow reporters to shield, absent proof that the investigation is motivated by an illegitimate purpose").

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

Vermont law reflects "a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct." *St. Peter*, 132 Vt. at 270, 315 A.2d at 255-56.

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

The standards for quashing a subpoena on these grounds are the same as those for quashing a subpoena in any civil or criminal case.

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

There are no reported Vermont cases addressing this issue in the context of determining whether a subpoena should be quashed. *See* discussion of this factor in the context of prospective coercive fines.

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

There are no reported Vermont cases on this issue, however, as noted above, if the information sought is duplicative of other testimony or duplicative evidence on the same issue, it is unlikely that the standard of "no other information adequately available" will be satisfied. *See Spooner*, No. 129-7-04 OeCv, at 12.

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

No rules or reported cases.

### **8. Other elements**

The Vermont courts consider motions to quash on a case by case basis and have the discretion to consider any information relevant to their determination.

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

There are no reported Vermont cases discussing when the qualified reporter's privilege may be waived or how it may be limited. However, in *Spooner*, No. 129-7-04 OeCv, at 9, the court held that the reporter did not waive the privilege by publishing a news article or by having conversations with the plaintiff after the article was published.

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

There are no reported Vermont cases identifying what constitutes compliance with a subpoena for information from a newsgatherer.

### **A. Newspaper articles**

Not addressed.

### **B. Broadcast materials**

Not addressed.

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

Not addressed.

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

## 1. Civil contempt

In *St. Peter*, the Vermont Supreme Court cautioned that "legitimate objections to disclosure based on First Amendment grounds require careful evaluation by the judicial officer before answers are compelled, or the sanctions of fine or imprisonment involved." *St. Peter*, 132 Vt. at 271, 315 A.2d at 256. The Reporter's Notes to the Vermont Rules of Civil Procedure likewise note that because subpoenas do not issue from judicial officers in civil proceedings, "contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney." V.R.C.P. 45, Reporter's Notes -1995 Amendment. Vermont law nonetheless provides an array of sanctions for civil and criminal contempt.

V.R.C.P. 45 states that "[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court for which the subpoena was issued." Adequate excuse is not defined by the rule but exists when a nonparty is asked to travel more than 50 miles from the place of service to the location of the deposition. V.R.C.P. 45(e).

### a. Fines

Only compensatory fines or coercive sanctions may be imposed in a civil contempt proceeding. *State v. Pownal Tanning Co.*, 142 Vt. 601, 603, 459 A.2d 989, 990 (1983) (requiring proof of loss for compensatory fines or proof that a fine was "purgeable" for coercive fines). "In the context of contempt proceedings, purely prospective fines are not favored in Vermont." *State v. Gundlach*, 160 Vt. at 197, 624 A.2d at 370. However, "civil contempt fines may be imposed in an appropriate circumstance either to compensate complainants or as a coercive sanction. When a prospective fine is imposed as a coercive sanction, the fine must be purgeable – that is, capable of being avoided through adherence to the court's order. Further, the situation must be such that it is easy to gauge the compliance or noncompliance with an order." *Mann v. Levin*, 2004 VT 100, ¶ 32, 177 Vt. 261, 273, 861 A.2d 1138, 1149 (2004) (quoting *Vermont Women's Health Ctr. v. Operation Rescue*, 159 Vt. 141, 151, 617 A.2d 411, 417 (1992)).

### b. Jail

Vermont law authorizes a jail sentence for a "party" who violates an order made against him or her in a case pending in a Vermont superior or district court. 12 V.S.A. § 122 (2002). The Vermont Supreme Court has held that the statute's reference to "party" does not preclude a court from punishing for contempt persons who are not actually parties to the case. *Horton v. Chamberlain*, 152 Vt. 351, 566 A.2d 953 (1989). Imprisonment must be in a correctional facility maintained by or for the state, 12 V.S.A. § 123(a), and any person so imprisoned, in addition to any other legal right and remedies available to them, is entitled to annual review of the contempt proceedings. 12 V.S.A. § 123(b).

## 2. Criminal contempt

V.R.Cr.P. 17(g) provides that: "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued." Contempt proceedings may be brought under 12 V.S.A. §§ 122-23, discussed above. "Criminal contempt proceedings are governed by Vermont Rule of Criminal Procedure 42, which is 'virtually identical to Federal Rule 42.' . . . Rule 42(b) provides for notice and hearing, trial by jury, and trial before a different judge if the charge involves disrespect to or criticism of a judge." *In re Duckman*, 2006 VT 23, ¶ 24, 898 A.2d 734, 746 (2006) (quoting V.R.Cr.P. 42 – Reporter's Notes). These proceedings are in addition to the statutory criminal penalty of 13 V.S.A. § 6603 which provides that "[a] person legally summoned to attend a court in this state to testify in a criminal case, who willfully or wrongfully refused to attend and testify, shall be fined not less than \$10.00 nor more than \$100.00 or imprisoned not more than six months, or both." 13 V.S.A. § 6603 (2005).

Vermont also has an aiding and abetting statute which provides that "[a] person who knowingly and wrongfully counsels, aids or assists a person so summoned to testify, to absent himself from attendance before such court, shall be fined not more than \$50.00 nor less than \$10.00." 13 V.S.A. § 6604 (2005).

## 3. Other remedies

Vermont law does not authorize any additional penalties for civil or criminal contempt.

## VIII. Appealing

### A. Timing

A notice of appeal from an order or decision of a Vermont court must be filed within 30 days of the date the judgment or order was entered, except an appeal by the state in a criminal case must be taken within seven days of the entry of the judgment or ordered appealed from. V.R.A.P. 4. The notice of appeal is filed with the clerk of the superior or district court which issued the judgment or order which is being appealed.

#### 1. Interlocutory appeals

Interlocutory appeals are permissible under Vermont law when a controlling question of law is presented, there is a substantial ground for a difference of opinion, and an immediate appeal may materially advance the resolution of the litigation. *State v. Pelican*, 154 Vt. 496, 580 A.2d 942 (1990); V.R.A.P. 5 and 5.1. The Vermont Supreme Court recently granted interlocutory review of the superior court's decision to quash a subpoena to a reporter in *Spooner v. Town of Topsham*, No. 129-7-04 OeCv (Oran. Super. Ct. Mar. 14, 2006). Argument was heard in January 2007, and the case is currently awaiting decision.

#### 2. Expedited appeals

A party may request an expedited appeal by filing a motion with the Vermont Supreme Court (an original and five copies of the motion must be filed) explaining why an expedited appeal is warranted. The opposing party must be sent a copy of the motion when it is filed. Examples of possible grounds for an expedited appeal include a pending contempt order, a pending criminal trial and a pending discovery request such as a subpoena with regard to which a protective order has been sought and denied.

### B. Procedure

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

All appeals in Vermont are made to the Vermont Supreme Court.

#### 2. Stays pending appeal

A stay pending appeal is automatic in Vermont except for certain family law proceedings, for final injunctions, for felony convictions, and for criminal convictions for misdemeanors involving an act of violence against another person. A request for a discretionary stay of a judgment, sentence or order pending appeal must ordinarily first be made to the lower court. If that is not practicable or the lower court has already denied a request for a stay, a request for a stay may be filed with the Supreme Court or to a single justice of that court. V.R.A.P. 8(a). The motion for a stay must state why application was not made to the lower court or if it was, why relief was denied. V.R.A.P. 8(a). The motion must also show the reasons for the relief requested and the facts relied upon, and if such facts are subject to dispute, the motion must be supported by affidavits or other sworn statements. V.R.A.P. 8(a).

With regard to a civil or criminal contempt order against a reporter, a stay will be automatic pending appeal. An order or decision compelling the attendance of a reporter at trial is likely to be deemed injunctive in nature and an interlocutory appeal will be necessary. A stay is not automatic for an interlocutory appeal from an order suspending, modifying, restoring or granting an injunction, V.R.A.P. 8(a), and thus a motion for a stay, pursuant to the procedures set forth above, must be filed. In such instances, a bond or other security may be required to be posted as a condition of the stay. V.R.A.P. 8(b).

#### 3. Nature of appeal

Appeals to the Vermont Supreme Court of questions of law, such as the existence and scope of the reporter's privilege, are reviewed *de novo*. However, factual issues are not, and the appellate court will examine the record and proceedings below and determine whether the court's findings below are "clearly erroneous" or constitute an "abuse of discretion."

#### 4. Standard of review

The Vermont Supreme Court has not articulated a special standard of review for media cases. Accordingly, the general standard of appellate review will apply. Issues of law are reviewed *de novo*. In a non-jury case, findings of fact will be overturned only if "clearly erroneous." A court's exercise of discretion will be set aside only if it rises to the level of an "abuse of discretion."

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

Under the mootness doctrine, an individual's stake in the litigation must continue throughout the entirety of the proceedings including during the pendency of an appeal. *In re J.S.*, 139 Vt. 6, 14, 420 A.2d 870, 874 (1980). This is because the Vermont Supreme Court may not issue advisory opinions. *Id.*

In *State v. Tallman*, 148 Vt. 465, 469, 537 A.2d 422, 424 (1987), the Vermont Supreme Court recognized an exception to the mootness doctrine for a narrow class of cases that are "capable of repetition, yet evading review." The applicability of this exception is dependent upon the satisfaction of a two-part test established by the U.S. Supreme Court in *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). First, the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration; and second, there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *In re PCB File No. 92.27*, 167 Vt. 379, 381, 708 A.2d 568, 570 (1998). Accordingly, if a reporter's testimony is no longer sought, the mootness doctrine would preclude appellate review unless the reporter was able to show that he or she reasonably expected to be subpoenaed again with regard to the same issue. This could occur when there are concurrent state and federal proceedings and the reporter's testimony is sought in both.

In *State v. Gundlah*, 160 Vt. 193, 196, 624 A.2d 328, 370 (1993), the Vermont Supreme Court refused to consider whether a trial court improperly rejected a reporter's qualified privilege because the criminal trial at which she refused to testify was no longer pending as the defendant had pled no contest to the charges against him. The court found that "[a] repetition to the fact pattern presented seems highly unlikely and certainly does not rise to a reasonable expectation." *Id.*

### **6. Relief**

The Vermont Supreme Court may affirm, reverse or remand the decision of the lower court.

## **IX. Other issues**

### **A. Newsroom searches**

Vermont has no reported cases involving newsroom searches.

### **B. Separation orders**

Vermont has no reported cases involving separation orders.

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

There are no reported cases involving subpoenas to a third party holding a journalist's records.

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

There are no reported Vermont cases discussing the source's rights and interests.