REPORTER'S PRIVILEGE: WASHINGTON

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

WASHINGTON

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I. Introduction: History & Background

Washington State's courts have recognized, under the state's common law, a qualified confidential source privilege in both criminal and civil actions. In the modern (post-*Branzburg* era) the state's appellate courts have issued only three published decisions regarding reporter's privilege: *Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982) ("*Senear*"); *Clampitt v. Thurston County*, 98 Wn.2d 638, 658 P.2d 641 (1983) ("*Clampitt*"); and *State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984) ("*Rinaldo*"). Only these three decisions have precedential authority in Washington courts. RCW 2.06.040; RAP 10.4(h).

The state has no published court decisions on the non-confidential journalist's privilege, but would likely follow federal decisions applying a First Amendment qualified privilege.

Like "the curious incident of the dog in the night-time" in Sir Arthur Conan Doyle's 1892 story *Silver Blaze*, observers may well wonder why the state's judicial dogs have not barked since 1984. Perhaps, as Sherlock Holmes deduced, there was nothing to bark at — and that, in effect, the reporter's privilege is so well-entrenched that there have been few efforts to breach it.

In April 2007, the State finally enacted a shield law. See Section II-A below.

II. Authority for and source of the right

A. Shield law statute

On April 27, 2007, Gov. Christine Gregoire signed HB 1366, the Washington reporter shield law ("Shield Law"), which provides the "news media" (as defined therein) with absolute protection for confidential sources and qualified protection for other journalistic materials and information, and will be a major transformation of the current scope of protection for reporters from compelled testimony and disclosure.

B. State constitutional provision

There is no state constitutional provision expressly providing shield law protections in Washington State.

It may be significant, however, that Article 1, Section 5, of the Washington Constitution, which recognizes that the state's residents have a right to speak, write, and publish on all subjects, was copied directly from California Constitution, which was itself copied from New York's constitutional provision. *See, e.g.*, Robert Utter, *The Right to Speak, Write, and Publish Freely*, 8 U. Puget Sound L. Rev. 157, 174-75 (1985); *Los Angeles Alliance v. City of Los Angeles*, 22 Cal.4th 352, 365-66, 93 Cal. Rptr.2d 1, 993 P.2d 334 (2000). Given this ancestry, one can argue that it creates a conditional privilege for journalists' non-confidential work product consistent with the protections that have been adopted in New York using the identical constitutional language. *See, e.g., O'Neill v. Oakgrove Constr., Inc.*, 71. N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S. 1 (1988).

Indeed, one Washington court has suggested that the state constitution's explicit protection of the right to "write" (which necessarily encompasses the gathering of news) in addition to the right to "publish" suggests an intention to create a broader right than is available under the First Amendment. *See State v. Rinaldo*, 36 Wn. App. 86, 91-102, 673 P.2d 614 (1983), *aff'd on other grounds*, 102 Wn.2d 749, 689 P.2d 392 (1984); Note, *Rethinking Civil Liberties Under the Washington Constitution*, 66 Wash. L. Rev. 1099, 1103 (1991).

C. Federal constitutional provision

The state's trial and appellate courts have generally recognized and abided by federal case law adopting a First Amendment privilege for journalists. There are no published Washington decisions, however, confirming this basic principle.

For example, when the Washington Court of Appeals issued an unpublished decision in February 2001, *In the matter of the request of: Plaintiffs Alfredo Azula et al.*, 29 Med. L. Rptr. 1414 (Wash. App. 2001), the court recognized, without discussion, that a journalist had a First Amendment privilege to resist disclosure of interview

notes pursuant to a subpoena *duces tecum*. The court held that *in camera* review was appropriate and that, because the notes "have no relevance" to the underlying case, a trial court committed error in ordering disclosure of the journalist's notes.

The principle that a First Amendment interest can trump the obligations imposed by the civil discovery process, however, is well-established in Washington. In one state court case, which did not involve a reporter's privilege but rather a political party's refusal to name members and donors, the Washington Supreme Court recognized that a First Amendment privilege may be interposed to resist civil discovery requests. This case, *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990), suggests that a journalist's privilege can be rooted in a broader First Amendment context in appropriate circumstances.

Finally, the state's courts, while resting their holdings on a common law privilege for reporters, have generally recognized that the common law privilege is bounded "'by an awareness of First Amendment values.'" *Clampitt*, 98 Wn.2d at 644 n. 3; *see also Senear*, 97 Wn.2d at 155, 641 P.2d 1180. ("While these cases are all concerned with whether there is First Amendment qualified privilege, their statements as to the balancing of interests and the need for a qualified privilege are germane to questions of common law privilege for reporters.").

D. Other sources

The Washington Supreme Court has recognized a qualified common law privilege against compelled disclosure of confidential source information in civil and criminal cases. *See Senear*, 97 Wn.2d at 152-57 (civil); *Rinaldo*, 102 Wn.2d at 754-55 (criminal).

Also, please see Section II-A above, discussing the Shield Law.

III. Scope of protection

A. Generally

In the three published cases that have specifically acknowledged a common law confidential source privilege, Washington courts have adopted a qualified privilege. *See Senear*, 97 Wn.2d at 155-56 (civil); *Rinaldo*, 102 Wn.2d at 755 (criminal); *Clampitt*, 98 Wn.2d at 642-43 (civil).

Also, please see Section II-A above, discussing the Shield Law.

B. Absolute or qualified privilege

In Washington State, under the common law, a party seeking to compel discovery of confidential information from a journalist in a civil action must show that (1) the claim is meritorious; (2) the information sought is necessary or critical to the cause of action or defense pleaded; and (3) he or she made a reasonable effort to obtain the information by other means. *Senear*, 97 Wn.2d at 155; *Clampitt*, 98 Wn.2d at 642. A similar test pertained to criminal cases. *Rinaldo*, 102 Wn.2d at 755.

Trial courts in Washington, at least one unpublished decision by the Court of Appeals, and a federal district court have recognized a similar, conditional privilege for a journalist's non-confidential materials, consistent with the Ninth Circuit's tests as articulated in *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), and *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995). Citing *Shoen*, a court in the Western District of Washington denied a motion to compel production of communications between a newspaper and the plaintiffs, despite the defendants' assertion that the reporter had "overstepped the bounds of journalism" when he provided information to the plaintiffs, finding that the privilege still applied and the defendants failed to fully pursue information from alternative sources. *Wright v. Fred Hutchinson Cancer Research Ctr.*, 206 F.R.D. 679, 680-82 (W.D. Wash. 2002).

Section 1(a) of the Shield Law provides for absolute protection for confidential source information, and Section 1(b) provides for a qualified privilege for other "news or information obtained or prepared by the news media."

C. Type of case

1. Civil

Washington's courts generally apply the same confidential source test in criminal and civil actions. *Rinaldo*, 102 Wn.2d at 755. There are no published Washington decisions regarding reporter's privilege for non-confidential information.

Section 1 of the Shield Law, by its terms, applies to civil matters.

2. Criminal

In the only published Washington case that applies a common law journalist's privilege in a criminal context, the court adopted a qualified privilege identical to the test applied in civil litigation. In doing so, however, the court noted that a judicial balancing test may present "more difficulties in criminal prosecutions than in civil actions," because "the defendant's right to a fair trial presents a more compelling interest in favor of disclosure than a civil litigant." *Rinaldo*, 102 Wn.2d at 754.

Given the language in *Rinaldo*, it is likely that a Washington court would place greater weight on the interests of a criminal defendant than those of a prosecutor.

Also, Section 1 of the Shield Law, by its terms, applies to criminal matters.

3. Grand jury

Washington rarely uses grand juries and there is no case authority regarding grand jury subpoenas.

D. Information and/or identity of source

Washington's case law has not yet squarely addressed this issue.

Also, Sections 1(a) and 3 of the Shield Law specifically protect from disclosure information that would identify a confidential source.

E. Confidential and/or non-confidential information

Washington's case law has not yet squarely addressed this issue.

Section 1 of the Shield Law, however, specifically covers both categories.

F. Published and/or non-published material

Washington's case law has not yet squarely addressed this issue.

Section 4 of the Shield Law provides that publication or dissemination of information does not constitute a waiver of the privilege.

G. Reporter's personal observations

Washington's case law has not yet squarely addressed this issue.

Section 1(b) of the Shield Law provides for a qualified privilege for "[a]ny news or information obtained or prepared by the news media" when it is "gathering, receiving, or processing news or information."

H. Media as a party

Washington courts recognize application of a confidential source privilege even where the media is a party. In *Senear*, 97 Wn.2d at 150-51, the newspaper was a defendant in a libel action and the Washington Supreme Court reversed a trial court order directing the newspaper to answer an interrogatory seeking the identity of a confidential source.

A year later, the same court stated that "reporters who are themselves plaintiffs have little or no privilege" but reporters "who are defendants and reporters who are not involved in the action at all . . . are significantly protected by *Senear*" and "reporters who are not parties (and whose reporters are not parties) receive still greater protection." *Clampitt*, 98 Wn.2d at 644. One year later, in a criminal case, the Washington Supreme Court stated, in passing: "Although journalists who are parties have little or no privilege, a news reporter, as here, who is not a party to the underlying action, should receive greater protections." *Rinaldo*, 102 Wn.2d at 754.

There are no state court decisions regarding non-confidential materials. It is possible that, in those circumstances, the Washington courts would evolve a different test for civil discovery from media parties.

Section 1 of the Shield Law, by its terms, applies to any proceeding in which there is a "body with the power to compel the news media to testify, produce, or otherwise disclose" the information covered by the statute.

I. Defamation actions

Senear, discussed in Section H above, was a civil defamation action.

Section 1 of the Shield Law, by its terms, applies to any proceeding in which there is a "body with the power to compel the news media to testify, produce, or otherwise disclose" the information covered by the statute.

IV. Who is covered

A. Statutory and case law definitions

In *Senear* and *Rinaldo*, the "newspaper" successfully claimed the confidential source privilege. *Clampitt* involved a reporter's confidential source privilege.

Section 5 of the Shield Law defines the "news media" as: "(a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution; (b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or (c) Any parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection."

1. Traditional news gatherers

a. Reporter

In adopting a confidential source privilege, the Washington Supreme Court held that the privilege "applies to both working reporters and the organizations by whom they are employed." *Senear*, 97 Wn.2d at 157. Cases recognizing a First Amendment privilege to resist civil discovery, such as *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990), would suggest that recognition of any First Amendment privilege would turn on the interests involved rather than the particular definitions of reporter, editor, or photographer.

Also, regarding the Shield Law definition, please see Section IV-A above.

b. Editor

Washington's case law has not yet squarely addressed this issue. The state courts would likely apply a First Amendment privilege that is based on broader considerations than newsgathering interests. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990).

Also, regarding the Shield Law definition, please see Section IV-A above.

c. News

Washington's case law has not yet squarely addressed this issue. The state courts would likely apply a First Amendment privilege that is based on broader considerations than newsgathering interests. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990).

Also, regarding the Shield Law definition, please see Section IV-A above.

d. Photo journalist

Washington's case law has not yet squarely addressed this issue. The state courts would likely apply a First Amendment privilege that is based on broader considerations than newsgathering interests. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990).

Also, regarding the Shield Law definition, please see Section IV-A above.

e. News organization / medium

The Washington Supreme Court has stated that the confidential source privilege extends to "organizations" that employ "working reporters." *Senear*, 97 Wn.2d at 157. The cases have not further refined any distinctions.

Also, regarding the Shield Law definition, please see Section IV-A above.

2. Others, including non-traditional news gatherers

There are no reporter's privilege cases specifically embracing or refusing to embrace a privilege for non-traditional news gatherers. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990), explicitly adopts an extended privilege for First Amendment activities, generally.

Also, regarding the Shield Law definition, please see Section IV-A above.

B. Whose privilege is it?

To the extent that Washington has considered this issue at all, it recognizes that a qualified reporter's privilege to refuse to disclose confidential sources extends to both working reporters and the organizations by whom they are employed. *Senear*, 97 Wn.2d at 157.

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

There are no specific requirements for when a subpoena must be served on a member of the new media. Under CR 45(d)(1) proof of service of notice to take a deposition "constitutes a sufficient authorization for the issuance by the attorney of record or the officer taking the deposition of subpoenas for the persons named or described therein." The usual notice period for depositions in civil actions is "not less than five days (exclusive of the day of service, Saturdays, Sundays and holidays) to every other party to the action and to the deponent, if not a party or managing agent of a party. . . . Failure to give five days' notice to a deponent who is not a party or a managing agent of a party may be grounds for the imposition of sanctions in favor of the deponent, but shall not constitute grounds for quashing the subpoena." CR 30(b)(1). Similar procedures are applicable in criminal cases. CrR 4.6(c), 4.8.

Subpoenas for civil and criminal trials are governed by statute. RCW 5.56.010; RCW 10.52.040.

2. Deposit of security

There are no specific requirements regarding deposit of security in support of the issuance of a subpoena against a reporter or news organization. Generally, a witness fee is required in connection with the issuance of any civil subpoena. *See, e.g.*, RCW 5.56.010 ("No such person shall be compelled to attend as a witness in any civil action or proceeding unless the fees be paid or tendered him which are allowed by law for one day's attendance as a witness and for traveling to and returning from the place where he is required to attend, together with any allowance for meals and lodging theretofore fixed as specified herein."). A different rule prevails for criminal trial subpoenas. RCW 10.52.040.

3. Filing of affidavit

Washington court rules do not require that a subpoenaing party make any sworn statement in order to procure the reporter's testimony or materials. Of course, proof of service of a subpoena must be made by affidavit under CR 45(c).

4. Judicial approval

Generally, in Washington State, an attorney of record can issue a subpoena without prior judicial approval, with the exception that leave of court must be obtained "if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant . . . ." CR 30(a).

5. Service of police or other administrative subpoenas

Washington's courts of limited jurisdiction have adopted rules that are similar to its Superior Court rules. *See* CRLJ 45 (civil subpoenas); CrRLJ 4.6(c), 4.8 (criminal discovery, subpoenas).

B. How to Quash

Washington practice generally determines issues of privilege by a motion to quash (or, as they may also be styled, by a motion for protective order). A motion to quash may also be appropriate with regard to a subpoena *duces tecum*, but it is not necessary. This is because CR 45(d)(1) allows the recipient of a subpoena, "within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued."

Also, please see Section II-A above.

1. Contact other party first

Washington courts will not entertain a motion to compel or a motion for protective order in a civil action unless "counsel have conferred with respect to the motion or objection." CR 26(h). The burden of setting the conference of counsel is on the moving or objecting party.

2. Filing an objection or a notice of intent

Washington law does not impose any such requirement. Under CR 45(d)(1), written objections to a subpoena must be served on the party issuing the subpoena.

3. File a motion to quash

a. Which court?

In civil actions, a motion for protective order may be filed in the court in which the action is pending or, in the case of depositions, in the county where the deposition is to be taken. CR 26(c). Similar provisions would likely apply in criminal actions. CrR 4.8.

b. Motion to compel

The party issuing the subpoena may — and indeed, if he or she is seeking documents and the witness has timely objected under CR 45(d)(1), must — file a motion to compel.

c. Timing

Any motion should be filed before the due date for the discovery request or the subpoena.

d. Language

There is no particular language necessary; Washington has notice pleading. *See* CR 1.

e. Additional material

There is no specific requirement of additional material.

4. In camera review

a. Necessity

In at least one unpublished decision, the Washington Court of Appeals has shown itself receptive to in camera review in connection with claims of reporter's privilege. *See In the matter of the request of: Plaintiffs Alfredo Azula et al.*, 29 Med. L. Rptr. 1414 (Wash. App. 2001).

Section 6 of the Shield Law provides that courts have "inherent powers to conduct all appropriate proceedings required in order to make necessary findings of fact and enter conclusions of law."

b. Consequences of consent

Washington's case law has not yet squarely addressed this issue.

c. Consequences of refusing

Washington's case law has not yet squarely addressed this issue.

5. Briefing schedule

Briefing schedules are generally determined by reference to the Local Rules in the County in which the motion is to be filed.

6. Amicus briefs

Washington appellate courts provide expressly for amicus briefs. RAP 10.6. The trial courts have no comparable provisions, but in the author's experience the state's trial judges have often permitted amicus briefs.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

In civil actions at least, "good cause" is required for the issuance of a protective order under CR 26(c); *Rhinehart v. Seattle Times Co.*, 98 Wn. 2d 226, 654 P.2d 673 (1982).

Section 2 of the Shield Law requires "clear and convincing evidence" before requiring the news media to produce journalist work product.

B. Elements

1. Relevance of material to case at bar

Under the common law, the party seeking to compel compliance with the subpoena must show that "the information sought [is] necessary or critical to the cause of action or the defense pleaded." *Senear*, 97 Wn. 2d at 155 (confidential source case).

Section 2(b)(1) of the Shield Law, which involves the conditional privilege for non-confidential journalist work product, requires the proponent of disclosure to prove that the "news or information is highly material and relavant" and "critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto," and finally that, in a civil action, "there is a prima facie cause of action" and, in a criminal action, "there are reasonable grounds to believe that a crime has occurred."

2. Material unavailable from other sources

Under the common law case law concerning confidential sources: "Even when the information is critical and necessary to plaintiff's case, the plaintiff must exhaust reasonably available alternative sources before a reporter is compelled to disclose." *Senear*, 97 Wn.2d at 155 (confidential source case).

Section 1(a) of the Shield Law provides for an absolute privilege regarding confidential sources. Section 2(b)(1) of the Shield Law, which involves the conditional privilege for non-confidential journalist work product, requires the proponent of disclosure to prove that he or she "has exhausted all reasonable and available means to obtain it from other sources."

a. How exhaustive must search be?

For common law privilege claims, Washington's case law has not yet squarely addressed this issue, other than to note that "the test we adopt here is one of reasonableness, keeping in mind the competing values to be served and balanced." *Senear*, 97 Wn.2d at 156 (confidential source case).

Also, please see Section VI-2 above.

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

Washington's case law has not yet squarely addressed this issue.

c. Source is an eyewitness to a crime

Washington's case law has not yet squarely addressed this issue, but Section 1(a) of the Shield Law provides for an absolute privilege regarding confidential source information.

3. Balancing of interests

Washington's case law has not yet squarely addressed this issue.

Section 2(b) of the Shield Law requires the proponent of any disclosure by the news media of non-confidential source information to prove that there "is a compelling interest in the disclosure."

4. Subpoena not overbroad or unduly burdensome

Washington's case law has not yet squarely addressed this issue.

Also, please see Section II-A above.

5. Threat to human life

Washington's case law has not yet squarely addressed this issue.

Also, please see Section II-A above.

6. Material is not cumulative

Washington's case law has not yet squarely addressed this issue.

Also, please see Section II-A above.

7. Civil/criminal rules of procedure

The civil and criminal rules of procedure do not differ significantly in this regard.

8. Other elements

There are no other elements.

Also, please see Section II-A above.

C. Waiver or limits to testimony

1. Is the privilege waivable at all?

Washington's case law has not yet squarely addressed this issue.

2. Elements of waiver

a. Disclosure of confidential source's name

Washington's case law has not yet squarely addressed this issue.

Section 4 of the Shield Law provides that publication or dissemination does not waive the privilege.

b. Disclosure of non-confidential source's name

Washington's case law has not yet squarely addressed this issue.

Section 4 of the Shield Law provides that publication or dissemination does not waive the privilege.

c. Partial disclosure of information

Washington's case law has not yet squarely addressed this issue.

Section 4 of the Shield Law provides that publication or dissemination does not waive the privilege.

d. Other elements

Washington's case law has not yet squarely addressed this issue.

Also, please see Section II-A above.

3. Agreement to partially testify act as waiver?

Washington's case law has not yet squarely addressed this issue.

VII. What constitutes compliance?

A. Newspaper articles

Washington's case law has not yet squarely addressed this issue.

B. Broadcast materials

Washington's case law has not yet squarely addressed this issue.

C. Testimony vs. affidavits

Washington's case law has not yet squarely addressed this issue.

D. Non-compliance remedies

1. Civil contempt

The usual enforcement mechanism for civil subpoenas is contempt. CR 45(f).

a. Fines

Washington's case law has not yet squarely addressed this issue.

b. Jail

Washington's case law has not yet squarely addressed this issue.

2. Criminal contempt

Washington's case law has not yet squarely addressed this issue.

3. Other remedies

Not applicable.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Washington allows for discretionary review under certain circumstances. RAP 2.3. Review is commenced by a notice filed within 30 days of the trial court decision. RAP 5.2(b). The content of the notice is described in RAP 5.3. A party seeking review must file a motion for discretionary review within 15 days after filing the notice of discretionary review. RAP 6.2(b).

2. Expedited appeals

Washington's appellate courts will entertain and if appropriate grant motions for expedited review. Washington's case law has not yet squarely addressed this issue. For an (unpublished) Commissioner's order explaining the procedure and granting accelerated review in connection with a claim of reporter's privilege, *see In re Azula*, 28 Med. L. Rptr. 2180 (Wash. App. 2000).

B. Procedure

1. To whom is the appeal made?

Washington has three courts of appeal: Division I sits in Seattle, Division II in Tacoma, and Division III in Spokane. The appropriate appellate court is determined based upon the county in which the matter arose. RAP 4.1. In addition, the State Supreme Court may entertain direct review in certain cases. RAP 4.2.

2. Stays pending appeal

Washington courts will grant a stay in accordance with RAP 8.1(b)(3). For an (unpublished) Commissioner's order granting a stay in connection with a claim of reporter's privilege, *see In re Azula*, 28 Med. L. Rptr. 2180 (Wash. App. 2000).

3. Nature of appeal

If review is accepted by the filing and granting of a motion for discretionary review, the case is treated as an appeal. RAP 6.2(a), 7.2.

4. Standard of review

Washington's case law has not yet squarely addressed this issue.

5. Addressing mootness questions

Washington courts will ordinarily not entertain moot questions.

6. Relief

Under RAP 12.2, an appellate court "may affirm, reverse, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require."

IX. Other issues

A. Newsroom searches

Washington's case law has not yet squarely addressed the issue of newsroom searches, or how the federal Privacy Protection Act or a similar state law apply. The state statute provides that "if the evidence is sought to be secured from any radio or television station or from any regularly published newspaper, magazine or wire service, or from any employee of such station, wire service or publication, the evidence shall be secured only through a subpoena duces tecum unless: (a) There is probable cause to believe that the person or persons in possession of the evidence may be involved in the crime under investigation; or (b) there is probable cause to believe that the evidence sought to be seized will be destroyed or hidden if subpoena duces tecum procedures are followed." Rev. Code Wash. s. 10.79.015(3).

The procedure for obtaining any such search warrant is governed by criminal court rule CrR 2.3(f).

B. Separation orders

Washington's case law has not yet squarely addressed this issue.

C. Third-party subpoenas

Washington's case law has not yet squarely addressed this issue.

Also, please see Section II-A above.

D. The source's rights and interests

Washington's case law has not yet squarely addressed this issue.