

REPORTER'S PRIVILEGE: WEST VIRGINIA

The Reporters Committee for Freedom of the Press

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

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

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The Reporter's Privilege Compendium: An Introduction

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

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

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

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

Above the law?

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

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

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

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

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

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

The hows & whys of the reporter's privilege

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

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

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

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

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

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

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

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

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

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

The sources of the reporter's privilege

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

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

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

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

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

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

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

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

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

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

Do I have to respond to a subpoena?

In a word, yes.

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

What are my options?

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

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

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

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

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

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

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

This is a complicated question.

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

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

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

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

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

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

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

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

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

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

Does federal or state law apply to my case?

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

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

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

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

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

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

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

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

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

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

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

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

Do the news media have any protection against search warrants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORTER'S PRIVILEGE COMPENDIUM

WEST VIRGINIA

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I. Introduction: History & Background

Generally speaking, the status of the reporter's privilege in West Virginia is strong. Although the contours of the privilege are not as developed as they are through caselaw in other states, and there is no statutory shield law, the Supreme Court of Appeals of West Virginia has fashioned a strong privilege to protect reporters, especially in civil cases. Because of the strength of the privilege, incidences of reporters being jailed or fined over privilege issues have been exceedingly rare in West Virginia.

II. Authority for and source of the right

The Supreme Court of Appeals of West Virginia has held that a reporter is entitled to a qualified privilege when engaged in the news-gathering function. This qualified privilege was enunciated first in *State ex rel. Hudok v. Henry*, 182 W.Va. 500, 17 Media L.Rep. 1627, 389 S.E.2d 188 (W.Va. 1990). The state Supreme Court delineated a balancing test for application of the reporter's privilege. The source for the privilege was found in the United States Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), and in the First Amendment to the *United States Constitution*.

The West Virginia Legislature has not enacted a "shield" law, and none is provided for in the *West Virginia Constitution*.

A. Shield law statute

West Virginia has no statutory "shield" law. This likely is because there is a general acceptance of the state Supreme Court's articulation of the qualified reporter's privilege in *Hudok v. Henry*. In *Hudok*, the state Supreme Court explained the qualified privilege as follows:

"To protect the important public interest of reporters in their news-gathering functions under the First Amendment to the United States Constitution, disclosure of a reporter's confidential sources or news-gathering materials may not be compelled except 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 available sources."

In 2007, for the first time, a bill was introduced in the West Virginia Legislature that nominally was intended to articulate a qualified privilege against disclosure for the news media. The bill was poorly worded and actually was far weaker in its protection than the constitutionally based privilege stated by the state Supreme Court in the *Hudok* case. The impetus for the bill appears to have been a misguided attempt by state one television station that, after years of voluntarily providing copies of broadcast video in response to subpoenas, to push for a court procedure to discourage requests. The bill as drafted likely would have confused the existing law by juxtaposing a weak statutory privilege against the much stronger constitutional privilege already articulated in the *Hudok* case. The West Virginia Press Association strongly opposed this bill, and it never made it out of committee, thereby killing a very bad bill.

B. State constitutional provision

The *West Virginia Constitution* does not contain a specific "shield" law provision. However, in *Hudok v. Henry*, where the state Supreme Court of Appeals articulated the qualified privilege for reporters, the state Supreme Court cited Article III, § 7 of the *West Virginia Constitution*, in addition to the First Amendment to the *United States Constitution* and the *Branzburg* standard, as the bases for the qualified reporter's privilege. Article III, § 7 of the *West Virginia Constitution* states, in pertinent part:

"No law abridging the freedom of speech, or of the press, shall be passed."

C. Federal constitutional provision

The qualified reporter's privilege in West Virginia is based on the *Branzburg* standard and the state Supreme Court's application of the First Amendment to the *United States Constitution*, as explained in *Hudok v. Henry*. The state Supreme Court reaffirmed the *Hudok* holding in the later case of *State ex rel. Charleston Mail Ass'n v. Ranson*, 200 W.Va. 5, 25 Media L. Rep. 2166, 60 A.L.R.5th 827, 488 S.E.2d 5 (1997).

D. Other sources

The reported caselaw, *i.e.*, *Hudok v. Henry*, is the sole source of the qualified reporter's privilege in West Virginia. There are no court rules, state bar guidelines, or administrative procedures that articulate a reporter's privilege.

III. Scope of protection

A. Generally

The protection afforded reporters in West Virginia is good and fairly strong in civil cases, although the privilege is not absolute. As explained by the state Supreme Court in *Hudok v. Henry*, in civil cases where the reporter is not a defendant, the burden on a party seeking to compel information or testimony from a reporter is very heavy: the party seeking to compel must show "clearly and specifically" that the information sought from the reporter is (1) "highly material and relevant, necessary or critical to the maintenance of the case"; and (2) "not obtainable from other available sources." The privilege applies not just to confidential sources or information, but to any and all information acquired by the reporter who is in the news-gathering process. The application of the privilege is somewhat less strong in libel cases, especially where the reporter is a defendant, and also is less strong in criminal cases and grand jury investigations. In those latter instances, the reporters' protection by qualified privilege is still available, but can be characterized as average.

B. Absolute or qualified privilege

The reporters' privilege is a qualified one in West Virginia. However, West Virginia treats all information acquired by the reporter in the news-gathering process in the same, qualified manner. Thus, whether the information sought from a reporter is the identity of a confidential source, or unpublished, non-confidential notes or observations, the qualified privilege is the same. Unfortunately, although the qualified protection afforded such information in civil cases is quite good, there is at present no absolute privilege in West Virginia for confidential source identities.

The level of protection for a reporter's news-gathering information or confidential sources is somewhat less in civil cases where the reporter is a defendant and is alleged to have committed libel; the protection also is lower in a criminal proceeding where unpublished, nonconfidential information is sought. Reporters appear to have very little, if any, protection when subpoenaed to testify before a grand jury, at least in instances "where the reporter has personal knowledge or is aware of confidential sources that bear on the criminal investigation[.]" However, the state Supreme Court has never been presented that issue directly, so the level of protection afforded the media in West Virginia grand jury proceedings may be an open question.

C. Type of case

1. Civil

In most civil cases, the level of protection afforded the reporter in West Virginia is quite good. As stated by the state Supreme Court of Appeals in *Hudok v. Henry*, the party seeking to compel information from a reporter generally must show "clearly and specifically" that the information sought from the reporter is (1) "highly material and relevant, necessary or critical to the maintenance of the case"; and (2) "not obtainable from other available sources." Thus, the burden on a party in a civil case seeking information from a non-party reporter is very high.

There are no cases directly on point in West Virginia concerning the reporters' privilege where the reporter is a party and has been sued for libel. The *Hudok* court suggested a lower level of protection would be available to a reporter in a civil case where the reporter is a defendant, such as a libel case. The *Hudok* court cited to *Zerelli v. Smith*, 211 U.S.App.D.C. 116, 125, 656 F.2d 705, 714 (1981), stating that "Where the reporter is a party, and particularly in a libel action, 'the equities weigh somewhat more heavily in favor of disclosure.'" The *Hudok* court

specifically noted the *Zerelli* court's holding that this weighing would be "particularly true in libel cases involving public officials or public figures where the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), applies."

The *Hudok* court explained the difference between the application of the reporters' privilege as being part of a balancing between the constitutional interests of a free press ("a robust, unfettered, and creative press is indispensable to government by free discussion and to the intelligent operation of a democratic society," *Hudok, supra*, 182 W.Va. at 504, 389 S.E.2d at 188, citing *State ex rel. Daily Mail Publishing Co. v. Smith*, 161 W.Va. 684, 690, 248 S.E.2d 269, 272 (1978), *aff'd*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979)), and "a vital societal need for information." The *Hudok* court acknowledged that a reporter's privilege may have to "yield in proceedings before a grand jury where the reporter has personal knowledge or is aware of confidential sources that bear on the criminal investigation," but confirmed that in civil cases, the protections afforded reporters by the qualified privilege "will be more vigorously applied, except those in the libel area."

2. Criminal

In the only West Virginia criminal case discussing a reporter's privilege, *State ex rel. Charleston Mail Ass'n v. Ranson*, 200 W.Va. 5, 488 S.E.2d 5 (1997), the court held that a subpoena to a reporter in a criminal case is treated differently than a subpoena to a reporter in a civil case, at least when the subpoena comes from a criminal defendant. The court agreed that a qualified privilege still exists for reporters in criminal cases, but slightly lowered the standard for breaching the privilege because of the criminal defendants' Sixth Amendment rights. The court stated: "On the one hand, the First Amendment to the United States Constitution and Section 7 of Article III of the West Virginia Constitution guarantee freedom of speech and press. On the other hand, the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution ensure that a criminal defendant will have a fair trial." *State ex rel. Charleston Mail Ass'n v. Ranson, supra*, 488 S.E.2d at 10.

In the *Ranson* case, a criminal defendant accused of murder and arson served subpoenas duces tecum requesting unpublished photographs of the crime scene taken by two newspapers' photographers. The newspapers both moved to quash the subpoenas, and their motions were denied. The state Supreme Court of Appeals reversed, and created a specific standard applicable only to criminal cases where "Unpublished, nonconfidential information" is sought from a reporter. Specifically, the court recognized the reporter's qualified privilege, and explained that the privilege could be breached only as follows:

"When a criminal defendant seeks from a news source unpublished, nonconfidential information, he/she must show with particularity that: (1) the requested information is highly material and relevant to the defendant's articulated theory or theories of his/her defense; (2) the requested information is necessary or critical to the defendant's assertion of his/her articulated theory or theories of defense; and (3) the requested information is not obtainable from other available sources. The 'particularity' with which the defendant must satisfy this balancing test contemplates some explanation by the defendant as to what information he/she expects the media material to contain. A mere bald assertion, standing alone, that the allegedly privileged information satisfies the requisite criteria will not suffice."

The court did not explain the rather vague standard of particularity, requiring only "some explanation by the defendant as to what information he/she expects the media material to contain." One Justice on the Court dissented, and stated that he would hold that the reporter's information to be absolutely privileged: "I strongly believe the First Amendment of the United States Constitution and Article III, Section 7 of the West Virginia Constitution absolutely bar this type of intrusion by the government into the files of a private company." *State ex rel. Charleston Mail Ass'n v. Ranson, supra*, 488 S.E.2d at 13 (Maynard, J., dissenting).

The majority of the court went on to explain that "[o]nce a criminal defendant has shown with particularity that the unpublished, nonconfidential information requested from a news source satisfies the three-part threshold balancing test, the circuit court shall conduct an in camera review of the requested material and release to the defendant only that information which the court deems to be relevant to the defendant's articulated theory or theories of defense." The court specifically rejected the idea that a criminal defendant could embark on a "fishing expedition" to obtain information from a reporter, but appears to have left to the trial judge the task of determining whether the reporter's information is "relevant to the defendant's articulated theory or theories of defense." The

court did not articulate a standard for determining whether the reporter's information is "relevant" to the defense theories.

Thus, although it appears the standard in West Virginia for breaching a reporter's qualified privilege in a criminal case is slightly lower than in a civil case, the burden still is on the subpoenaing party to prove the facts and circumstances for breaching the privilege, rather than on the reporter to prove the privilege applies.

3. Grand jury

Although there are no West Virginia cases directly on point addressing a reporter's privilege in the grand jury context, nevertheless, the *Hudok* court acknowledged that a reporter's privilege "will yield in proceedings before a grand jury where the reporter has personal knowledge or is aware of confidential sources that bear on the criminal investigation[.]" The *Hudok* court cited with approval the United States Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), and particularly, that court's explanation of "the obvious public importance of effective criminal investigation and the duty of citizens to furnish to a grand jury relevant information regarding criminal activity of which they are knowledgeable." *Hudok, supra* at 191. Although there are no West Virginia cases directly addressing subpoenas to reporters in the grand jury context, it appears that the privilege will give way much more readily in the context of a grand jury than in any other.

Nevertheless, the *Hudok* court did quote from Justice Powell's concurrence in *Branzburg*, where Justice Powell spoke to the "limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with regard to the gathering of news or in safeguarding their sources." 408 U.S. at 709, 92 S.Ct. at 2671, 33 L.Ed.2d at 656. He outlined a balancing test and concluded that if a newsperson 'is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation,' he would be entitled to First Amendment protection. 408 U.S. at 710, 92 S.Ct. at 2671, 33 L.Ed.2d at 656." The foregoing quotation by the *Hudok* court suggests that, if called upon to address the issue of a reporters' privilege in the face of a grand jury subpoena, the West Virginia courts will give a greater amount of deference to a grand jury subpoena than to other types of subpoenas, but such deference will not eviscerate the reporters' privilege in cases where the reporters' information has a remote or tenuous relationship to the grand jury investigation.

D. Information and/or identity of source

No reported West Virginia case has addressed the use of the reporters' privilege to protect the identity of a source. However, the *Hudok* court concluded that the qualified privilege articulated therein applied equally to both confidential and non-confidential information obtained by the reporter in his/her newsgathering role. Thus, although there is no absolute or specific privilege given to reporters to protect the identity of a source, or even to information that implicitly would identify a source, the *Hudok* test applies to the identity of a source, and the party seeking to compel the identity of a source in a civil case, like any other information learned by a reporter, generally must show "clearly and specifically" that the identity of the source sought from the reporter is (1) "highly material and relevant, necessary or critical to the maintenance of the case"; and (2) "not obtainable from other available sources." Thus, the burden on a party in a civil case seeking the identity of a source from a non-party reporter still is very high, and the protection for the reporter is quite good.

E. Confidential and/or non-confidential information

The *Hudok* court concluded that the reporters' qualified privilege applied equally to both confidential and non-confidential information obtained by the reporter in his/her newsgathering role. Thus, although there is no absolute or specific privilege given to reporters to protect confidential information, the *Hudok* test applies to confidential information, and the party seeking to compel the confidential information in a civil case generally must show "clearly and specifically" that the confidential information sought from the reporter is (1) "highly material and relevant, necessary or critical to the maintenance of the case"; and (2) "not obtainable from other available sources." Thus, the burden on a party in a civil case seeking confidential information from a non-party reporter, although not absolute, still is quite high.

F. Published and/or non-published material

The *Hudok* court concluded that the qualified privilege articulated therein applied equally to both confidential and non-confidential information obtained by the reporter in his/her newsgathering role. The court also held that the privilege applies equally to published and unpublished information. Thus, whether or not the material sought by subpoena has been published, the *Hudok* test applies with equal force, and the party seeking to compel the information in a civil case generally must show "clearly and specifically" that the confidential information sought from the reporter is (1) "highly material and relevant, necessary or critical to the maintenance of the case"; and (2) "not obtainable from other available sources." The burden on a party in a civil case seeking information from a non-party reporter, whether the information is published or unpublished, although not absolute, is equally strong and protective.

G. Reporter's personal observations

In general, the law in West Virginia does not differ in its treatment of the privilege on the basis of whether the information was obtained by the reporter as an eyewitness. However, it should be remembered that the likelihood of breaching the privilege is much higher if the party issuing the subpoena can show the reporter is an eyewitness to crucial information, and the reporter is the *only* source of that crucial information the party is seeking. In this regard, the *Hudok* court explained:

"We recognize that there may be those occasions when a newsperson is the only individual with credible evidence that bears upon an important issue in civil litigation. In this situation, there may be no alternative under principles of due process other than to require such testimony. This narrow rule is justified by the fact that the media is given broad access to accident scenes as well as to the inner offices of government buildings and other places where they may be the only witnesses to a crucial statement or event."

The corollary to the foregoing is that, if the information sought by the party issuing the subpoena can be obtained from any other source, the privilege will protect the reporter from being forced to testify or disclose information.

It also should be noted that the mere fact of an individual's occupation as a reporter does not protect information obtained unless the individual is performing a journalistic function. As the *Hudok* court stated: "where the reporter is not engaged in the news-gathering function, he is subject to giving testimony as to what he observed to the same extent as any other witness." So if the reporter is simply a bystander to an event—and not acting as a reporter, presumably no privilege or protection from disclosure would apply.

H. Media as a party

In West Virginia, the privilege is applied differently to libel cases (especially where a media entity is a party), and non-libel cases. The important distinction does not appear to be based solely on the reporter or media entity's status as a party-defendant, but is based on whether the claim made is one for libel. Presumably, where a reporter's published work has led to a libel claim, even where the reporter is not made a party-defendant to the lawsuit, a lower level of protection is applied. In distinguishing libel cases, the *Hudok* court compared the application of the qualified privilege in different types of proceedings, holding that the reporter's privilege "will yield in proceedings before a grand jury where the reporter has personal knowledge or is aware of confidential sources that bear on the criminal investigation," but in civil cases, the privilege will be "more vigorously applied . . . except [to] those in the libel area." The basis for the foregoing was the *Hudok* court's reliance on the case of *Zerilli v. Smith*, 211 U.S.App.D.C. 116, 123, 656 F.2d 705, 712 (1981), where the court "recognized the distinction between civil actions in which the reporter is a party and those in which he is not. Where the reporter is a party, and particularly in a libel action, 'the equities weigh somewhat more heavily in favor of disclosure.' 211 U.S.App.D.C. at 125, 656 F.2d at 714." Thus, it appears that although the reporter's qualified privilege still applies in libel cases, resisting a subpoena in such cases is more difficult than in cases where the media is not a party to the case, because "the equities weigh somewhat more heavily in favor of disclosure."

I. Defamation actions

In West Virginia, there have been no cases addressing penalties for noncompliance in a libel case. From the *Hudok* case, it is known that a qualified privilege does exist in West Virginia, even in libel cases. Nevertheless, the privilege is not as strong as in other civil claims. Stated another way, the burden a litigant must meet to breach the reporter's privilege is less in cases where defamation or libel is alleged. Although the *Hudok* court did not deline-

ate the boundaries of the privilege in the defamation context, it did cite to *Zerilli v. Smith, supra*, where it was held that "in a libel action, 'the equities weigh somewhat more heavily in favor of disclosure.'" In a footnote, the *Hudok* court observed the *Zerilli* court's additional discussion of the weight toward disclosure to be, "particularly true in libel cases involving public officials or public figures where the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), applies."

The *Hudok* case further noted the observation that "the United States Supreme Court in *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), considered at some length the related question of the extent to which the plaintiff, a public figure, could, through discovery in a libel action, explore the motives and the editorial process of the press persons who had produced an alleged defamatory article." Indeed, in *Herbert v. Lando, supra*, the United States Supreme Court rejected the argument that the media was protected from privilege in cases where public figure had alleged malice. Nevertheless, the *Herbert* Court recognized that its holding was "not to say that the editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed."

The vague nature of the discussion of the reporters' privilege in *Hudok* is perhaps understandable since *Hudok* was not a libel case, but it nevertheless leaves the exact parameters of the qualified privilege in libel cases undefined. We can say for certain only that the amount of protection afforded the reporter is less than in other claims, because the "equities weigh more heavily in favor of disclosure."

IV. Who is covered

No West Virginia case directly addresses to whom the reporter's privilege applies. In the *Hudok* case, however, the court observed in a footnote that "The question of what type of activities make a person a journalist and what type of material is covered as news gathering is discussed in *Von Bulow by Auersperg v. Von Bulow*, 811 F.2d 136 (2d Cir.), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987)." The *Von Bulow* court explained the foregoing criteria for determining who is covered by a reporter's privilege:

"We discern certain principles which we must use in determining whether, in the first instance, one is a member of the class entitled to claim the privilege. First, the process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public. Second, whether a person is a journalist, and thus protected by the privilege, must be determined by the person's intent at the inception of the information-gathering process. Third, an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press. Fourth, the relationship between the journalist and his source may be confidential or nonconfidential for purposes of the privilege. Fifth, unpublished resource material likewise may be protected."

Id., 811 F.2d at 142.

A. Statutory and case law definitions

1. Traditional news gatherers

a. Reporter

Beyond the *Hudok* court's citation to the *Von Bulow* case, and the *Von Bulow* court's elaboration on the criteria used to determine whether one is a member of the class entitled to claim the reporter's privilege, there is no caselaw or statute that formally defines who qualifies as a "reporter."

b. Editor

Beyond the *Hudok* court's citation to the *Von Bulow* case and the *Von Bulow* court's elaboration on the criteria used to determine whether one is a member of the class entitled to claim the reporter's privilege, there is no law or statute that formally defines who qualifies as a "editor."

c. News

The *Hudok* court stated only that "the general rule is that a qualified First Amendment privilege is available to the news-gathering material whether confidential, published, or not published." It seems self-evident that, to be protected, the information must be part of the news-gathering process; however, no further definition of "news" is found in a statute or the caselaw.

d. Photo journalist

Beyond the *Hudok* court's citation to the *Von Bulow* case and the *Von Bulow* court's elaboration on the general criteria used to determine whether one is a member of the class entitled to claim the reporter's privilege, there is no law or statute that formally defines who qualifies as a "photojournalist." However, from the *Charleston Mail Ass'n v. Ranson* case it is clear that news photographers and their photographs are covered by the privilege.

e. News organization / medium

In West Virginia, the reporter's privilege is not distinguished in its application to different types of media (i.e., newspaper, magazine, broadcast outlet, or Internet Web site). Beyond the *Hudok* court's citation to the *Von Bulow* case and the *Von Bulow* court's elaboration on the general criteria used to determine whether one is a member of the class entitled to claim the reporter's privilege, there is no law or statute that formally defines the individuals or entities who are entitled to assert the reporters' privilege.

2. Others, including non-traditional news gatherers

In West Virginia, the reporter's privilege laws do not distinguish — either by statutory language or by decisional law — between traditional and so-called "non-traditional" news gatherers. There is no statute or case law addressing such non-traditional news gatherers as authors, freelancers, students, unpaid news gatherers, or academic researchers are entitled to the privilege, nor is there any statute or case law addressing whether others connected to the news process, such as newspaper librarians, may assert the privilege. Beyond the *Hudok* court's citation to the *Von Bulow* case and the *Von Bulow* court's elaboration on the general criteria used to determine whether one is a member of the class entitled to claim the reporter's privilege, there is no law or statute that formally defines the individuals or entities who are entitled to assert the reporters' privilege.

B. Whose privilege is it?

No case or statute in West Virginia addresses whether the privilege belongs to the source, the reporter, or both, and no case or statute addresses whether the privilege belongs to the reporter, the employer, or both. On the other hand, both reporters and their employers (i.e., media organizations) have successfully asserted the privilege in West Virginia.

V. Procedures for issuing and contesting subpoenas

In West Virginia, there are no special legal procedures required to serve a subpoena on a member of the news media unique from the general requirements of service of such subpoenas on any other party.

A. What subpoena server must do

1. Service of subpoena, time

In West Virginia, service of subpoenas in civil cases is governed by Rule 45 of the West Virginia Rules of Civil Procedure, and in criminal cases service of subpoenas is governed by Rule 17 of the Rules of Criminal Procedure. There are no special requirements that must be met to serve a subpoena on a member of the news media. Rule 45 states that a subpoena can be quashed or modified if it "fails to allow reasonable time for compliance[.]" Although the rules do not specify a number of days in advance of the appearance requested in the subpoena that the subpoena must be served, the amount of time is somewhat discretionary with the court. It should be noted that the

West Virginia Supreme Court has quashed a subpoena served only four (4) days or so prior to trial on the basis that the service was not "diligent." *Blankenship v. Mingo County Economic Opportunity Com'n, Inc.*, 187 W.Va. 157, 416 S.E.2d 471, 476 (1992). Rule 45 allows a party fourteen (14) days to object to a subpoena *duces tecum*, but allows less time to object if the subpoena specifies less time to respond.

2. Deposit of security

West Virginia law does not require that the subpoenaing party deposit any security in order to procure the testimony or materials sought from the reporter. For a deposition or in-court testimony, Rule 45(b)(1) of the *West Virginia Rules of Civil Procedure* requires that a subpoenaing party must tender "fees for one days attendance and the mileage allowed by law" if the subpoenaed party so demands. If request for such payment is made, but the payment is not presented, the subpoena is ineffective.

3. Filing of affidavit

In West Virginia, the reporters' privilege does not require the subpoenaing party to make a sworn statement in order to procure the reporter's testimony or materials. Practically speaking, however, the subpoenaing party is required to prove the elements outlined in the *Hudok* case if a motion to quash the subpoena is made by the reporter. The subpoenaing party responding to a motion to quash would have to meet the standard set forth in *Hudok v. Henry*: therein it was held that the party seeking to compel information from a reporter generally must show "clearly and specifically" that the information sought from the reporter is (1) "highly material and relevant, necessary or critical to the maintenance of the case"; and (2) "not obtainable from other available sources."

4. Judicial approval

In West Virginia, a lawyer may issue and sign a subpoena as an officer of the court. Rule 45(a)(3) of the *W.Va.R.Civ.P.* A judge or magistrate need not approve a subpoena before a party can serve it.

5. Service of police or other administrative subpoenas

Although there are no cases directly discussing special criteria for issuance of an administrative subpoena to a journalist, generally speaking, there are special rules regarding the use and service of other administrative subpoenas. Regarding the use of such subpoenas, the subject or target of an administrative subpoena has an opportunity to challenge the subpoena before yielding that information. In the course of that resistance, privileges, privacy rights and the unreasonableness of an administrative subpoena are available defenses against enforcement of the subpoena. *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12, 17-18 (1996).

The requirements for the enforcement of an administrative subpoena are "tightly drawn." Generally, in order to obtain judicial enforcement of an administrative subpoena, the burden is on the agency to prove that (1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena. When the subpoena is issued to a member of the news media, the *Hudok* protections also would apply.

B. How to Quash

1. Contact other party first

If a subpoena is issued during the discovery phase of a civil case, it is governed by Rule 26(c) of the West Virginia Rules of Civil Procedure. That Rule requires a party seeking a protective order, *i.e.*, an order that the discovery sought by the subpoenaing party not be allowed, must "confer with other affected parties in an effort to resolve the dispute without court action[.]" Before a motion is filed to stop or quash a discovery subpoena, the party seeking to stop the subpoena must certify to the court that a good faith effort to confer has been made.

Pragmatically, it is a good idea to contact the counsel for the subpoenaing party prior to filing a motion for a number of reasons. First, it is not unusual for the subpoenaing party to accept a short affidavit simply authenticating a specific published news story in lieu of compliance with the subpoena. It also allows for an opportunity to educate the subpoenaing party's counsel on the broad parameters of the protections of West Virginia's reporters' privilege. Finally, even if the subpoenaing party's lawyer refuses to withdraw the subpoena, it is helpful to try to

learn exactly what the lawyer is seeking from the reporter (it is not uncommon for the opposing lawyer to give you as much information as you ask for in an effort to persuade the media target to comply with the subpoena) so that, if a motion to quash is necessary, it can be more easily explained to the court why it should be quashed. It is not unusual to discern from such discussions that counsel for the subpoenaing party is attempting to use the reporter to do his discovery for him, or is simply undertaking an impermissible "fishing expedition."

2. Filing an objection or a notice of intent

In West Virginia, there is no requirement that a notice of intent to quash be filed before the motion to quash. Beyond certifying that you have in good faith conferred or are attempting to confer with the counsel for the subpoenaing party, there are no further procedural steps required prior to moving to quash the subpoena to the reporter.

Where only documents are sought by the subpoena, service of an objection (as opposed to a motion to quash) is sufficient. Rule 45(d)(2)(B) of the Rules of Civil Procedure states that when documents are sought by a subpoena, the subpoenaed party "may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises." The act of serving the objection prohibits the party serving the subpoena from inspecting or copying the materials "except pursuant to an order of the court by which the subpoena was issued." To overcome the objection, the party serving the subpoena must first move to the court to compel compliance with the subpoena; of course, notice of the motion to the person subpoenaed, and of the time and place of any hearing must be given.

3. File a motion to quash

a. Which court?

If the subpoena is issued under the auspices of a West Virginia state court, the motion to quash the subpoena usually must be filed in the court hearing the case at issue. However, if the subpoena is for attendance at a discovery deposition, the motion can be brought either in the county where the case at issue is pending, or in the county where the deposition is to be taken, pursuant to Rule 26(c) of the *West Virginia Rules of Civil Procedure*. It should be remembered that a subpoena can compel the attendance of a witness at a discovery deposition only if the deposition is to take place in the county where the deponent resides. Thus, it could be of benefit to file a motion to quash in the reporter's home county.

b. Motion to compel

In West Virginia, it is advisable that the media party who resists or intends to resist a subpoena should not wait for the subpoenaing party to file a motion to compel before filing a motion to quash. Such a tactic could turn the court against the reporter, and could result in sanctions, such as costs and attorney fees. The better strategy is to move to quash the subpoena as soon as practicable after the subpoena is served.

c. Timing

The filing of a motion to quash effectively stays the requirements of the subpoena. Although there is no specific time frame within which a motion to quash must be filed, in the case of a discovery subpoena, it is preferable to file the motion far enough in advance of the time of compliance directed by the subpoena so that the subpoenaing party does not suffer undue expense as a result. Pragmatically, this can usually be accomplished simply by contacting the subpoenaing party's lawyer and explaining that you will be filing the motion to quash, and therefore the subpoena will not be complied with unless or until a court so orders. If for some reason the opposing counsel is unreachable, the motion to quash a discovery subpoena should be filed, and served on opposing counsel at least a full day before a discovery deposition. In the case of a trial or hearing subpoena requiring the reporter to appear in court, it is important to file the motion far enough in advance so that the court has sufficient time to review it, and so that you can schedule a hearing on the motion. If possible, the motion and the hearing on the motion should be noticed at least ten days prior to the hearing. If that is not possible, filing the motion quickly is all the more important.

d. Language

For the purposes of filing the motion to quash, there is no stock language necessary. Indeed, the motion itself can be quite brief, although it is often preferable to file a memorandum going into some detail about the contours of the privilege. It should be remembered that in West Virginia, trial judges are not accustomed to regularly addressing issues concerning the reporters' privilege and its First Amendment implication, and often a detailed but concise explanation of the application of the privilege will be helpful to the success of the motion.

e. Additional material

The trial court rules in West Virginia actually require that copies of any case decided by a court other than the West Virginia Supreme Court or the United States Supreme Court, and cited in support of a motion, such as a motion to quash, must be attached to the motion. Because of its importance, it often is helpful to attach a copy of the *Hudok* case for easy access by the trial court. Additionally, when the imposition of an "undue burden" on the media member is an issue, it may be helpful to attach a copy of The Reporters Committee for Freedom of the Press biennial survey of the incidence of news media subpoenas: "*Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media.*"

4. In camera review

a. Necessity

The only requirement for an *in camera* review of a reporter's materials is in the context of a criminal proceeding. *Charleston Mail Ass'n. v. Ranson*. In that case, two newspapers filed motions to quash subpoenas *ducus tecum* served on them by a criminal defendant who sought unpublished photographs of the crime scene. The court held, as a threshold matter, that the criminal defendant must show, with particularity, that unpublished, nonconfidential material is "highly material and relevant" to the defendant's theory of defense, "necessary or critical" to the defendant's theory of defense, and not obtainable from other available sources. The criminal defendant further is required to offer more than a "bald assertion" that "the allegedly privileged information satisfies the requisite criteria," but rather, must explain what information he expects the media material to contain.

Only after the criminal defendant satisfies the threshold balancing test with regard to the unpublished, nonconfidential material, "the circuit court shall conduct an *in camera* review of the requested material and release to the defendant only that information which the court deems to be relevant to the defendant's articulated theory of defense." Following the *in camera* review, the circuit court is then required to make specific written findings of fact.

The Supreme Court of Appeals of West Virginia was specific in addressing only the requirement of an *in camera* review in the case of non-confidential, unpublished material subpoenaed by a criminal defendant. At present there is no requirement for an *in camera* review in any other type of situation.

b. Consequences of consent

West Virginia courts have not been confronted with the issue of whether a stay pending appeal should be granted *automatically* where the reporter consents to an *in camera* review and, following the review, is ordered to comply with the subpoena or other request for information.

c. Consequences of refusing

West Virginia courts have not addressed the consequences of a reporter who refuses to consent to an *in camera* review of requested material. Pragmatically speaking, however, if an interlocutory appeal from an order mandating an *in camera* review is taken, acceptance of a Petition for Writ of prohibition by the state Supreme Court effectively operates to stay the order.

5. Briefing schedule

In West Virginia, there is no briefing schedule specific to a motion to quash. The Rules of Civil Procedure require that all motions must be filed at least 7 days prior to a hearing, if the motion is served by hand delivery or by fax, or 9 days prior to the hearing if it is served by mail. Any response to a motion must be served at least 4 days prior to a hearing, if the response is served by mail, or 2 days before a hearing if served by hand delivery or fax. The rules do not make reference to the time period allowed for the service of a reply to a response to a motion, although replies are very commonly filed. The rules allow the foregoing time periods may be modified by the court.

6. Amicus briefs

Briefs of amicus curiae often are accepted by the West Virginia Supreme Court of Appeals.

VI. Substantive law on contesting subpoenas

A. Burden, standard of proof

In civil and administrative proceedings, a subpoenaing party may overcome the qualified reporter's privilege only if it can make "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 available sources." *State ex rel. Hudok v. Henry, supra*. In criminal proceedings, a criminal defendant must make a similar showing, "with particularity," as it relates to his theory or theories of defense, meaning, he must explain "what information he/she expects the media material to contain. A mere bald assertion, standing alone, that the allegedly privileged information satisfies the requisite criteria will not suffice. *State ex rel. Charleston Mail Ass'n v. Ranson*."

B. Elements

1. Relevance of material to case at bar

The subpoenaing party must meet the very high and difficult burden of proving that the information subpoenaed is "highly material and relevant" and "necessary or critical" to the maintenance of the subpoenaing party's claim or defense. *State ex rel. Charleston Mail Ass'n v. Ranson, supra*, and *State ex rel. Hudok v. Henry*.

2. Material unavailable from other sources

The requested material must not be obtainable from other available sources. *State ex rel. Charleston Mail Ass'n v. Ranson*, and *State ex rel. Hudok v. Henry*. The court in *State ex rel. Hudok v. Henry, supra*, recognized there may be a situation where a newsperson is the only individual with credible evidence bearing upon an important issue in a civil case. Consequently, "there may be no alternative under principles of due process other than to require such testimony." The court explained that "[t]his narrow rule is justified by the fact that the media is given broad access to accident scenes as well as to the inner offices of government buildings and other places where they may be the only witnesses to a crucial statement or event."

a. How exhaustive must search be?

West Virginia courts have not addressed how exhaustive a subpoenaing party's search for other available sources must be, and thus have not formulated any standards for what constitutes "exhaustion."

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

West Virginia courts have not addressed specifically the standard of proof a subpoenaing party must meet to demonstrate it has conducted a sufficient search outside of subpoenaing the news media member. Implicit in the West Virginia Supreme Court's decision in *Hudok v. Henry*, however, is a requirement of a most comprehensive search—that is, a party seeking to compel information from a reporter generally must show "clearly and specifically" that the information sought from the reporter is (1) "highly material and relevant, necessary or critical to the maintenance of the case"; and (2) "not obtainable from other available sources." The requirement that the unavailability of the information from other available sources must be shown "clearly and specifically" suggests all other potential sources for the information must be canvassed before a court will allow a subpoena to a reporter to stand.

In the context of a subpoena to produce unpublished, non-confidential information (photographs of a crime scene) in a criminal case, the West Virginia Supreme Court also stated that the "particularity" with which the defendant must satisfy the balancing test contemplates "some explanation by the defendant as to what information he/she expects the media material to contain. A mere bald assertion, standing alone, that the allegedly privileged information satisfies the requisite criteria will not suffice." As part of the foregoing "explanation," it seems obvious that the defendant will have to explain the factual basis for asserting that the requested breach of the reporter's privilege will lead to material and relevant material not available from other sources. In a revealing footnote,

however, the majority of the court cited only to cases where a motion to quash a subpoena for media photographs in a criminal case was *denied* — suggesting that under such circumstances the burden of proof on the subpoenaing party is light. Nevertheless, it must be remembered that the court in that case specifically refused to define the contours of the reporters' privilege in other types of factual circumstances, so that holding can be viewed as limited to the specific facts of that case.

c. Source is an eyewitness to a crime

The situation where a member of the media has a source who is an eyewitness or participant in a crime, and the source's information is unobtainable from other available sources, is not a circumstance that has been addressed specifically by West Virginia courts. However, in *Hudok v. Henry*, the West Virginia Supreme Court did analyze the United States Supreme Court's holding in *Branzburg*, stating that the identity of such sources generally could be compelled in grand jury proceedings:

"*Branzburg* involved a reporter who had been subpoenaed to testify before a grand jury investigating drug dealing based on two articles written by the reporter from personal observation. The reporter refused to identify the persons who were involved in the drug episodes that he had witnessed and who formed the basis of his articles. *Branzburg*'s underpinning was the obvious public importance of effective criminal investigation and the duty of citizens to furnish to a grand jury relevant information regarding criminal activity of which they are knowledgeable."

The *Hudok* court went on to explain its understanding of when the identity of such sources and other information may be compelled over the assertion of the reporter's privilege:

"it is recognized that this qualified privilege will yield in proceedings before a grand jury where the reporter has personal knowledge or is aware of confidential sources that bear on the criminal investigation, but will be more vigorously applied with regard to civil cases, except those in the libel area. . . . We recognize that there may be those occasions when a newsperson is the only individual with credible evidence that bears upon an important issue in civil litigation. In this situation, there may be no alternative under principles of due process other than to require such testimony. This narrow rule is justified by the fact that the media is given broad access to accident scenes as well as to the inner offices of government buildings and other places where they may be the only witnesses to a crucial statement or event."

Thus, although the West Virginia court has not given specific guidance on the issue of whether information concerning the identity of a witness or participant to a crime is *per se* "unavailable," it appears that in the most obvious venue that the issue could arise, *i.e.*, the grand jury context, such information may be compelled much more easily than in other contexts.

3. Balancing of interests

The essence of the reporter's privilege in West Virginia is the balancing of interests. In some contexts, such as civil cases not involving libel claims, the reporter interest is given the most weight. In other contexts, namely the grand jury context, the "public interest" in solving crimes and bringing criminals to justice is given more weight. And in a third context, such as criminal proceedings implicating a defendant's Fifth Amendment rights, or libel cases, the weight given to the reporter versus the weight given the defendant is more equal.

In *Hudok v. Henry*, the West Virginia Supreme Court explained the balancing test as follows:

"Courts have been more reluctant to enforce subpoenas against reporters in civil or administrative proceedings. As the court stated in *Zerilli v. Smith*, 211 U.S.App.D.C. 116, 123, 656 F.2d 705, 712 (1981): 'Every other circuit that has considered the question has also ruled that a privilege should be readily available in civil cases, and that a balancing approach should be applied.' *Zerilli* also recognized the distinction between civil actions in which the reporter is a party and those in which he is not. Where the reporter is a party, and particularly in a libel action, 'the equities weigh somewhat more heavily in favor of disclosure.' 211 U.S.App.D.C. at 125, 656 F.2d at 714."

In *Charleston Mail Ass'n v. Ranson*, the Supreme Court held as follows:

"When a criminal defendant seeks from a news source unpublished, nonconfidential information, he/she must show with particularity that: (1) the requested information is highly material and relevant to the defendant's articulated theory or theories of his/her defense; (2) the requested information is necessary or critical to the defendant's assertion of his/her articulated theory or theories of defense; and (3) the requested information is not obtainable from other available sources. The "particularity" with which the defendant must satisfy this balancing test contemplates some explanation by the defendant as to what information he/she expects the media material to contain. A mere bald assertion, standing alone, that the allegedly privileged information satisfies the requisite criteria will not suffice. . . . Once a criminal defendant has shown with particularity that the unpublished, nonconfidential information requested from a news source satisfies the three-part threshold balancing test, the circuit court shall conduct an *in camera* review of the requested material and release to the defendant only that information which the court deems to be relevant to the defendant's articulated theory or theories of defense."

4. Subpoena not overbroad or unduly burdensome

In West Virginia, a motion for a protective order may be made to the trial court if the subpoenaed party believes the subpoena is over-broad or unduly burdensome, and the determination of the motion is governed by the procedural rules. For example, in a civil case, the state Supreme Court has held that Rule 26(b)(1)(iii) of the *West Virginia Rules of Civil Procedure* allows a trial court to limit discovery if it finds that the discovery sought is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. *State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 460 S.E.2d 54 (1995); *State ex rel. W. Va. Fire & Cas. v. Karl*, 202 W.Va. 471, 505 S.E.2d 210 (1998). The trial court should consider several factors: first, the court should weigh the requesting party's need to obtain the information against the burden that producing the information places on the opposing party—this requires an analysis of the issues of the case, the amount in controversy, and the resources of the parties; second, the opposing party has the obligation to show why the discovery is burdensome unless, in light of the issues, the discovery request is oppressive on its face; last, the court must consider the relevancy and materiality of the information sought. However, when the privacy rights of non-litigant third parties (such as reporters who are not parties to the case) are concerned, those privacy rights must be balanced with the interests of the requesting litigants. A discovery request also may be denied where the breadth of the information sought would result in the production of material so cumulative as to be inadmissible at trial. *State Farm v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992). Also, pursuant to Rule 45(d),

"the court by which a subpoena was issued shall quash or modify the subpoena if it . . . subjects a person to undue burden."

Rule 16(d) of the *West Virginia Rules of Criminal Procedure* allows a court to regulate discovery in criminal cases as follows:

"Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal."

5. Threat to human life

There are no cases in West Virginia where the courts have discussed the issue of a matter subpoenaed involving a threat to human life.

6. Material is not cumulative

A discovery request may be denied where the breadth of the information sought would result in the production of material so cumulative as to be inadmissible at trial. *State Farm v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992). Whether or not the cumulativeness of the material sought would be inadmissible at trial is in turn gov-

erned by Rule 403 of the *West Virginia Rules of Evidence*. Such determinations are usually left to the discretion of the trial court.

7. Civil/criminal rules of procedure

In a civil case, a subpoenaed party may make a motion to quash the subpoena pursuant to Rule 45 of the *West Virginia Rules of Civil Procedure* if the subpoena is frivolous or unduly burdensome. The subpoenaed party also may make a motion for a protective order pursuant to Rule 26.

In a criminal case, a subpoenaed party may make a motion to quash the subpoena pursuant to Rule 17(c) of the *West Virginia Rules of Criminal Procedure* if compliance with the subpoena would be unreasonable or oppressive. The subpoenaed party also may make a motion for a protective order pursuant to Rule 16(d).

8. Other elements

No other elements.

C. Waiver or limits to testimony

There is no West Virginia caselaw or statute addressing whether a journalist may be deemed to have waived the privilege. Because the privilege is constitutional in nature, it is likely the privilege may never be deemed to have been waived.

1. Is the privilege waivable at all?

There is no West Virginia caselaw or statute addressing whether a journalist may be deemed to have waived the privilege. Because the privilege is constitutional in nature, it is likely the privilege may never be deemed to have been waived.

2. Elements of waiver

a. Disclosure of confidential source's name

There is no West Virginia caselaw or statute addressing whether a journalist may be deemed to have waived the privilege. Because the privilege is constitutional in nature, it is likely the privilege may never be deemed to have been waived.

b. Disclosure of non-confidential source's name

There is no West Virginia caselaw or statute addressing whether a journalist may be deemed to have waived the privilege. Because the privilege is constitutional in nature, it is likely the privilege may never be deemed to have been waived.

c. Partial disclosure of information

There is no West Virginia caselaw or statute addressing whether a journalist may be deemed to have waived the privilege. Because the privilege is constitutional in nature, it is likely the privilege may never be deemed to have been waived.

d. Other elements

There is no West Virginia caselaw or statute addressing whether a journalist may be deemed to have waived the privilege. Because the privilege is constitutional in nature, it is likely the privilege may never be deemed to have been waived.

3. Agreement to partially testify act as waiver?

There is no West Virginia caselaw or statute addressing whether a journalist may be deemed to have waived the privilege. Because the privilege is constitutional in nature, it is likely the privilege may never be deemed to have been waived.

VII. What constitutes compliance?

A. Newspaper articles

A newsperson is not required to testify in court that a particular article actually appeared in the newspaper in order to authenticate the article. Pursuant to Rule 902(6) of the *West Virginia Rules of Evidence*, newspapers are self-authenticating and therefore, testimony by the author/reporter is unnecessary to authenticate the article for admissibility purposes. Therefore, if a reporter is subpoenaed for that purpose, the subpoena should be quashed easily.

B. Broadcast materials

Ordinarily, when broadcast materials are subpoenaed, no personal appearance is necessary in West Virginia.

C. Testimony vs. affidavits

Although the rules in West Virginia do not specify whether a sworn affidavit may take the place of in-court testimony, litigants have been known to accept such affidavits in return for dropping the personal appearance requirement of the subpoena, especially when the subpoena was issued simply confirm that an article was true and accurate as published. Thus, it usually is helpful to inquire of the subpoenaing party's counsel whether they will accept an affidavit in lieu of a personal appearance, as oftentimes such an offer will be accepted.

D. Non-compliance remedies

In West Virginia, there is no special exemption for reporters to protect them from contempt holdings for failing to testify. Thus, if a court finds a reporter in contempt of an order compelling the reporter to testify or produce information, the court has available to it the full range of penalties or remedies to impose on the reporter that it could impose on any other person who fail to comply with a valid, upheld subpoena.

1. Civil contempt

In West Virginia, there is very little, if any history of reporters being fined or jailed for failure to comply with a subpoena. There is no statute or caselaw specifically addressing contempt proceedings where a reporter refuses to comply with a subpoena. Generally speaking however, although Rules 11, 16, and 37 of the *West Virginia Rules of Civil Procedure* do not formally require any particular procedure, before issuing a contempt sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct. In formulating the appropriate sanction, the court must be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case. *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

a. Fines

In West Virginia, there is very little, if any history of reporters being fined for failure to comply with a subpoena. There is no specific cap on such fines, and there is no statute or caselaw specifically addressing contempt proceedings where a reporter refuses to comply with a subpoena.

b. Jail

In West Virginia, there is very little, if any history of reporters being jailed for failure to comply with a subpoena. There are no recent examples of reporters who have gone to jail for failure to disclose confidential sources or information. There is no statute or caselaw specifically addressing contempt proceedings where a reporter refuses to comply with a subpoena. However, *West Virginia Code* § 57-5-6 allows a court to sentence a person to remain in jail until "he shall give such evidence or produce such writing or document" as he was summoned and ordered to give. However, before such a remedy may be invoked by the court, the court must inform the person they are in

contempt. The person is entitled to be present with counsel and to be heard as to why they have not complied, and the court must base any decision to jail the person for civil contempt on competent evidence. *In re Yoho*, 171 W.Va. 625, 301 S.E.2d 581 (1983).

2. Criminal contempt

There are no known instances of a court sentencing a reporter to a fixed sentence for criminal contempt in failing to comply with a court order to provide information. Such a remedy is highly unusual and unlikely. Nevertheless, conviction for criminal contempt is provided for in *West Virginia Code* § 61-5-26(d), that allows a court to sentence and/or fine an individual for disobedience to an order of the court. The putative contemnor is permitted a jury trial, but there is no statutory limitation on the amount of the potential fine or the period of incarceration.

3. Other remedies

In West Virginia, there have been no cases addressing penalties for noncompliance in a libel case. Potentially, in a civil case where the journalist is a party and he refuses to comply with an order compelling disclosure of a source or other information, a remedy such as default judgment may be imposed by the court against the media defendant. There is no statute or caselaw, however, that allows a court to instruct a jury that there is a "presumption of actual malice" or a presumption that there is no actual source.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Although technically there is no right to an interlocutory appeal, if a motion to quash a subpoena is denied, the reporter may file a Petition for Writ of Prohibition or a Petition for Writ of Mandamus directly in the West Virginia Supreme Court of Appeals. Although such Petitions are deemed "extraordinary" procedures for relief, the state Supreme Court historically has allowed such Petitions in cases involving a reporter's privilege because of the First Amendment constitutional implications. The acceptance of such a Petition acts as an automatic stay of the lower court's ruling. Another procedural mechanism that may be utilized, especially considering the dearth of caselaw in West Virginia concerning the reporter's privilege, is a request to the trial court to "certify" the issue to the state Supreme Court.

2. Expedited appeals

There is no specific procedure for requesting an expedited appeal. Rule 2 of the *Rules of Appellate Procedure* allows the state Supreme Court to suspend its usual rules "[i]n the interest of expediting decision, or for other good cause shown[.]" There are no special considerations that affect news media subpoenas, other than the fact that Petitions for a Writ of Prohibition or a Writ of Mandamus are more favorably looked upon because of their First Amendment considerations than such Petitions that address other issues. Rule 6 of the *Rules of Appellate Procedure* allows a party petitioning for appeal make an application for a stay of the lower court's order to the circuit court. Rule 6(c) allows a party to then make such an application for a stay to the state Supreme Court if the lower court refuses to grant the stay.

B. Procedure

1. To whom is the appeal made?

Appeals are made from the circuit court level directly to the state Supreme Court. There is no intermediate court of appeals in West Virginia. Although it is unlikely that a reporter subpoena would be issued in a magistrate court proceeding in West Virginia, appeals from Magistrate Court go first to the circuit court, and then to the state Supreme Court, with the circuit court acting as an intermediate appellate court.

2. Stays pending appeal

A motion for a stay of the proceedings during an appeal must first be made to the circuit court where the judgment or order desired to be appealed from was entered. If the circuit court refuses to grant a stay, the moving party may,

upon written notice to the opposite party, apply to the Supreme Court for a stay. As noted above, the most immediate and effective route of challenging a circuit court's adverse ruling in a reporter's privilege case is by filing an extraordinary writ, such as a Petition for Writ of Prohibition, or a Petition for a Writ of Mandamus, directly with the state Supreme Court. Historically, because of the constitutional issue involved, the state Supreme Court has docketed and agreed to address such petitions in order to vindicate or protect a reporter's privilege or First Amendment rights. The acceptance of the Petition automatically stays the underlying Order being appealed from.

3. Nature of appeal

There is no "appeal by right" to the West Virginia Supreme Court of Appeals; the acceptance of an appeal by that court is entirely discretionary. A party may seek extraordinary relief in the Supreme Court by filing a Petition for Writ of Prohibition or for Writ of mandamus to preclude enforcement of the circuit court's ruling or to compel the court to rule in the correct manner. Like a Petition for Appeal, Petitions for extraordinary writs, such as Prohibition or Mandamus are discretionary. Ordinarily, such extraordinary writs are rarely allowed; however, historically, in First Amendment cases, the state Supreme Court has been much more receptive to accepting and docketing the writ than in other types of cases. Therefore, pragmatically speaking, it is almost always beneficial to attempt the route of an extraordinary writ in reporters privilege cases in West Virginia, and if the court refuses to docket the writ, a direct appeal still can be made thereafter.

4. Standard of review

All questions or interpretations of law are subject to a *de novo* standard of review. Findings of fact made by a jury, or by a judge sitting as the finder of fact at trial, are reviewed under a "clearly erroneous" standard; however, factual findings made by a lower court (if any) in matters concerning the assertion of a reporters' privilege typically are derived from affidavits or pleadings, a *de novo* standard would apply to any such findings made by the lower court.

5. Addressing mootness questions

West Virginia courts have not had occasion to address "mootness" as an issue when a trial or grand jury session for which a reporter was subpoenaed has concluded.

6. Relief

A reporter's attorney should seek an order from the appellate court ordering the lower court to either grant the reporter's motion to quash and/or prohibiting the lower court from enforcing the subpoena or contempt citation. It is possible that the appellate court will order the trial judge to reconsider the issues at stake in light of the appellate decision, but there is nothing preventing the appellate court from making the decision itself.

IX. Other issues

A. Newsroom searches

At present, the federal Privacy Protection Act (42 U.S.C. 2000aa) has not been used in West Virginia. There are no similar provisions under West Virginia state law.

B. Separation orders

West Virginia case law and statutes do not address separation orders issued against reporters who are both trying to cover the trial and are on a witness list. Anecdotally, this problem has occurred in federal cases in West Virginia, although reporters have resolved the issue by informally persuading the party who named them to remove them from the list.

C. Third-party subpoenas

West Virginia courts have not had occasion to address the circumstance where a media entity has an interest in fighting subpoenas issued to third parties in an effort to discover the media's source.

D. The source's rights and interests

West Virginia courts have not had occasion to address the circumstance where a source seeks to intervene anonymously to halt disclosure of their identity.