

## REPORTER'S PRIVILEGE COMPENDIUM

# TEXAS

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If there is no information for a particular section in your state, please say so, rather than leaving the section blank. Try to keep the wording uniform, such as "There is no statutory or case law addressing this issue."

*Federal practice.* In the final compendium, there will be separate sections addressing the law in each federal circuit, so the state outlines do not need to address federal practice specifically. Obviously, federal decisions may still be relevant in state court practice and can be addressed if the author feels it is appropriate.

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*Introduction to the whole work.* There will be a general introduction that gives journalists and lawyers unfamiliar with this area of the law a broad overview of the topic. This means that the basics will not have to be explained in each state outline.

*"Privilege."* In most instances, the use of the word "privilege" is intended to mean all aspects of the reporter's privilege developed through statutes, shield laws, court rules and case law.

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If you have any questions about this project, please contact Gregg Leslie at the Reporters Committee, either by phone (703-807-2100) or e-mail ([gleslie@rcfp.org](mailto:gleslie@rcfp.org)).

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## I. Introduction: History & Background +++ I +++ T +++

The protection Texas affords journalists subpoenaed to reveal information collected in the course of gathering news has eroded in recent years. Unlike the majority of states, Texas has no shield law. Any reporter's privilege in Texas, therefore, must be derived generally from the United States Constitution, the Texas Constitution or common law. The attention given the reporter's privilege by Texas courts is comparatively scant; less than twenty published cases mention the privilege by name. Of Texas's two highest courts, the Texas Supreme Court (which hears civil cases exclusively) and the Texas Court of Criminal Appeals, only the latter has addressed the availability of a constitutionally-based reporter's privilege, concluding that at least in the context of criminal cases. Lower Texas state courts and Texas federal courts in civil cases have historically found the privilege to exist, and generally require the balancing of interests favored by most jurisdictions before reporters may be forced to breach the confidences of their sources or turn over unpublished information collected in the course of their newsgathering efforts.

However, the tide against the privilege seems to be rising and recent events in Texas, including the Vanessa Leggett saga – where a writer served 168 days in jail for refusing to cooperate with a grand jury subpoena – have invigorated the call for a legislative mandate on the reporter's privilege. In the 2007 session, the Texas Legislature considered a much needed shield law. That bill, dubbed the "Texas Free Flow of Information Act," unfortunately died on a point of order in the Texas House of Representatives after passing in the Texas Senate and after passing out of the House Judicial Committee.

The current trend against recognition of some form of reporter's privilege runs counter to the strong journalism traditions of the state. *Davenport v. Garcia*, 834 S.W.2d 4, 7-10 (Tex. 1992) ("Texans chose from the beginning to assure the liberties for which they were struggling with a specific guarantee of an affirmative right to speak."). Many renowned reporters, editors, and broadcast journalists have called Texas home, including John Henry Faulk, Gordon Kent, Walter Cronkite, Willie Morris and Dan Rather, to name a few. But until the Texas Legislature passes a shield law, journalists must tread on uncertain ground.

## II. Authority for and source of the right +++ 2 +++ T +++

Since Texas has no shield law, Texas courts have looked to the First Amendment to the United States Constitution, and specifically the Supreme Court's decision in *Branzburg v. Hayes* and its progeny among the federal circuits, to find the basis of a reporter's privilege. *See, e.g., Holland v. Centennial Homes, Inc.*, 22 Med. L. Rptr. 2270 (N.D. Tex. 1993); *but see State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App 1994) (en banc). To a lesser extent some Texas court cases suggest the existence of a newsgathering privilege based on Article I, Section 8 of the Texas Constitution. *See Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987).

### A. Shield law statute +++ 2A +++ T +++

Although Texas has never adopted one, several bills have been introduced to the Texas Legislature over the years to enact a comprehensive shield law. All efforts have failed. In 1989, 1991, and 1993, a committed push was made to pass a shield law. In each of those three legislative sessions, a bill was proposed and killed because of a disharmony between the state broadcasters and print media. The broadcasters have generally been strongly in favor of a shield law in Texas, but the print media's support has wavered.

The arguments against a shield law are all based on two fundamental but flawed notions. The first is that the First Amendment provides all the protection that is necessary. This notion, while reliable in the 1980's and early 1990's, has proven unpredictable because the application of the First Amendment necessarily occurs in courts that are swayed by the prevailing notions of their times. In Texas, the reporter's privilege once flourished under a string of court decisions which found a strong First Amendment-based reporter's privilege. *See, e.g., Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App.—San Antonio 1991); *Lenhart v. Thomas*, 944 F. Supp. 525 (S.D. Tex. 1996) (relying on the First Amendment in granting, in part, a non-party reporter's motion to quash). But since as early as 1994, the trend has reversed itself in Texas and in the Fifth Circuit, where the First Amendment-based privilege has been extremely diminished in criminal cases and limited in civil cases. The second misconception is that a legislatively created privilege will lead to "licensing" of the journalists' trade. Some opponents from within the press also maintain that any shield law passed this term could be limited by amendment the next. The flaw in this reasoning is that a shield law somehow replaces whatever protections exist because of the First Amendment. A shield law offers protection in addition to that afforded by the First Amendment and not instead of it. Therefore, a shield law can only confer more protection than that offered by the First Amendment; it cannot dilute or detract from the scope of First Amendment protection, even if it is narrowed in scope and application by subsequent legislatures.

In 2007, these arguments in favor of a state shield law seemed to prevail and a new reporters' shield bill was introduced in the Texas Senate. Unfortunately, that bill, the Texas Free Flow of Information Act (SB 966), died in the Texas House of Representatives in the last days of the 80th regular session because of objections raised on a technical point of order. The bill, which had passed the Texas Senate on May 2, 2007 and had passed the House Judicial Committee would have given journalists limited protection against compelled court testimony or disclosure of confidential sources. Reporters' work products, such as notes and tapes, would also have been protected by this limited privilege. The intent of the bill was to protect significant journalistic investigations that often rely on confidential information from "whistleblowers" and other sensitive sources. Under the provisions of the bill, a judge considering ordering disclosure of confidential sources or work product from a journalist would have been required to weigh specific guidelines as to whether the disclosure would provide essential evidence to the case in question. In not passing a shield law, Texas remains in the minority.

## **B. State constitutional provision** +++ 2B +++ T +++

Unlike California's constitution, for instance, which has a specific provision addressing a reporter's privilege, the Texas Constitution has no such language. The Texas Constitution does, however, contain a counterpart to the First Amendment, but that provision has been interpreted not to grant protections, at least in the libel context, greater than that embodied by the First Amendment. *See Bentley v. Bunton*, 2002 Tex. LEXIS 129, 45 Tex. Sup. Ct. J. 1172 (Tex. 2002). Article I, Section 8 of the Texas Constitution reads:

*Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.*

While some Texas courts in civil cases have interpreted this provision to construe a reporter's privilege as broad as that implied in cases interpreting the First Amendment, other Texas courts have found that there is no basis at all in the Texas Constitution for the existence of a reporter's privilege. *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 680 (Tex. App.—San Antonio 1991) (holding that Article I, Section 8 supports the existence of a reporter's privilege in defamation cases); *De La Paz v. Henry's Diner, Inc.*, 946 F. Supp. 484, 485 (N.D. Tex. 1996) (holding that the Texas Constitution did not support the existence of a reporter's privilege in the context of a subpoena for non-confidential information sought in a civil lawsuit). In the context of a libel case, the Texas Supreme Court held in *Bentley v. Bunton* that Article I, Section 8 did not contain any greater protection than its

federal counterpart. 2002 Tex. LEXIS 129, 45 Tex. Sup. Ct. J. 1172 (Tex. 2002). The Texas Court of Criminal Appeals — the state’s highest criminal court — has conclusively held that there is no constitutional support for the existence of a reporter’s privilege in criminal cases. *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994) (en banc), relying on, but greatly expanding, the court’s earlier decision in *Ex Parte Grothe*, 687 S.W.2d 736 (Tex. Crim. App. 1984), in which the court assumed, *arguendo*, that there *was* a reporter’s privilege.

### C. Federal constitutional provision      +++ 2C +++ T +++

The First Amendment to the United States Constitution is the primary source of any historical recognition of the reporter’s privilege in Texas, and often the reference supporting such a First Amendment interpretation was *Branzburg v. Hayes*, 408 U.S. 665 (1972). Until recently (because of the trend since 1994 in limiting the scope of the privilege rather than expanding it), virtually every Texas court decision dealing with the reporter’s privilege contained an examination of the *Branzburg* decision. However, with the Texas Court of Criminal Appeals decision in *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994) (en banc), and the Fifth Circuit’s opinion in *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998), the validity of any First Amended based privilege is questionable.

Currently, the protection offered by the First Amendment-based reporter’s privilege in Texas can be summarized generally as follows: the privilege is strongest in the context of subpoenas issued in civil cases involving the disclosure of confidential sources and information; weaker in civil cases involving the disclosure of non-confidential sources and information; and weakest in criminal cases. *In re Grand Jury Subpoenas*, No. 01-20745 (5th Cir. Aug. 17, 2001) (noting that the “reporter’s privilege is at its apex in the context of civil cases where the disclosure of confidential sources is at issue” but is “far weaker in criminal cases, reaching its nadir in grand jury proceedings”).

In those cases in which a balancing test has been applied, the test consists of three prongs: the information sought from the reporter should be (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other available sources. *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App.—San Antonio 1991); *Suede Originals v. Aetna Casualty*, 8 Med. L. Rptr. 2565 (Tex. Dist. Ct.—Dallas 1982); *Texas v. Lyon*, 19 Med. L. Rptr. 2153 (Tex. Crim. Dist. Ct.—Dallas 1991).

### D. Other sources      +++ 2D +++ T +++

The Texas rules of evidence do not recognize a testimonial privilege for reporters. Texas Rule of Evidence 501 states that certain privileges are not recognized unless they are based on a constitution, statute, or rule of evidence; therefore, Texas does not recognize a common law basis for a reporter’s privilege.

Because of the dilapidated state of the reporter’s privilege in Texas, media attorneys have been looking for alternative sources of protection in Texas law. The Texas Code of Criminal Procedure grants special protection to news organizations from evidentiary searches. Tex. Code. Crim. Proc. 18.01(e). An analogy can be made that obtain if the police cannot obtain the material by court order, then a prosecutor or a private litigant should not be able to by subpoena either. In fact, a Justice on the Texas Court of Criminal Appeals mentioned this argument in his concurrence in *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994) (en banc) (“The parties do not address the ramifications of article 18.01(e) of the Code of Criminal Procedure which precludes the issuance of an evidentiary search warrant for articles located in an office of a newspaper, news magazine, television station or radio ... We might ask if you can’t seize it by court order (search warrant), how can you subpoena it by clerk order?”). Also, attorneys have recently been arguing that confidential and unpublished information can be protected as “trade secrets” and therefore protected from disclosure. No Texas court has directly ruled on either of these alternative theories for protection.

In 1998, the Texas Court of Criminal Appeals ruled that reporters did not have to testify at a criminal proceeding unless the party seeking the testimony makes a showing that the testimony is both material and favorable to the defendant. *Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc). Although the court rejected the application of the reporter’s privilege, by relying on criteria similar to the first prong of the *Branzburg* test the case provides at least a toe-hold from which to argue in future cases that a party subpoenaing a reporter must make a showing of relevance and materiality.

### III. Scope of protection +++ 3 +++ H +++

#### A. Generally +++ 3A +++ T +++

There is no doubt that a reporter’s privilege has existed in Texas. However, the scope of its protections has been limited over the last decade. Compared to the scope of the privilege in other states which have shield laws or constitutional provisions providing a reporter’s privilege, the privilege in Texas is weak because it rests almost entirely on First Amendment grounds. Without a “Texas-bred” basis for the privilege, Texas courts are constrained by the narrow and inconsistent rulings of the higher federal courts. One argument is that as a matter of federal common law, a reporter’s privilege exists. However, this argument is vulnerable to the counter-argument that the federal common law is based on an erroneous interpretation of *Branzburg*, as well as the fact that Rule 501 of the Texas Rules of Evidence does not recognize “common law” privileges.

#### B. Absolute or qualified privilege +++ 3B +++ T +++

No Texas court has found an absolute privilege for journalists. The state and federal courts in Texas that have recognized a privilege based on the First Amendment and the Texas Constitution have invariably found that the privilege was qualified. *See, e.g., Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987); *Campbell v. Klevenhagen*, 760 F. Supp. 1206 (S.D. Tex. 1991).

#### C. Type of case +++ 3C +++ H +++

##### 1. Civil +++ 3C1 +++ T +++

The Texas Supreme Court has never addressed the reporter’s privilege. Therefore, it remains unclear to what extent the privilege applies in any given civil context. Lower Texas courts have attempted to discern the scope of the privilege, but the cases that address the privilege span some twenty-five years and are often contradictory. *See, e.g., In re Union Pacific Railroad Co.*, 6 S.W.3d 310, 312 (Tex. App.—Houston [14th Dist.] 1999) (holding that whether qualified reporter’s privilege still exists in Texas is still open to question, however, if it does apply, it only extends to protect the identity of confidential sources); *but see Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987) (holding that a qualified privilege based on the First Amendment and on the Texas Constitution exists and could be used to resist subpoenas for non-confidential sources and material).

In *Dallas Oil and Gas Inc. v. Mouer*, a Texas appellate court addressed the reporter’s privilege for the first time and held that disclosure in a civil case “will not be compelled in [the] absence of a concern so compelling as to override the rights of freedom of speech and press.” 533 S.W.2d 70 (Tex. App.—Dallas 1976, no writ).

The first Texas court to adopt the three part test outlined in Justice Powell's *Branzburg* concurrence was a district court in Dallas. *Suede Originals v. Aetna Casualty*, 8 Med. L. Rptr. 2565 (Tex. Dist. Ct. — Dallas 1982). In that unpublished case, the court sustained a nonparty newspaper's motion to quash a subpoena for unpublished photographs of a fire in downtown Dallas. The subpoena was served on the newspaper's director of photography and the photographer who actually took the pictures of the fire. Both moved to quash on the basis of a reporter's privilege found in the First Amendment and the Texas Constitution. The court held that "when a member of the press is subpoenaed in a case where the press is not a party, there is a qualified privilege which shifts the burden to the party seeking the information to establish all elements of a three-part test; that is (a) the reporter has information highly relevant to a claim or defense in the underlying litigation; (b) there is a compelling need for disclosure sufficient to override the reporter's First Amendment privilege; and (c) the party seeking the information has unsuccessfully attempted to obtain it from other sources less chilling of First Amendment freedoms." *Id.* at 2566. The court concluded its opinion with strong language regarding the primacy of the press:

The job of the newspaper is to gather as much information as it possibly can with respect to all facets of activity of interest and importance to readers. If it does its job well, it logically will be the repository of much information concerning controversial events which take place in the area which it serves. If the price of doing its job well, however, is to be a repeated role as the resource for those seeking information of only speculative value to themselves, coupled with a governmental command that they play that role, the effect will be severe.

To make the press, in effect, the investigative arm of every civil litigant throughout the State of Texas inevitably will constrict the flow of information to the press, and ultimately to us all.

*Suede Originals v. Aetna Casualty*, 8 Med. L. Rptr. 2565, 2566 (Tex. Dist. Ct. — Dallas 1982).

The first published case adopting the three-part balancing test came from the First Circuit Court of Appeals in Houston in 1987. *Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987). In that case, Channel Two in Houston was subpoenaed by the defendant in a civil case. The defendant wanted the television station's notes, tape, film, and other documents relating to the matter. Claiming that a qualified reporter's privilege shielded them, Channel Two moved to quash the subpoena. The appellate court found that a reporter's privilege existed based on the Texas Constitution. The court applied the three-part test, holding that a party seeking materials or testimony must show that it is:

- (1) highly material and relevant;
- (2) necessary or critical to the claim; and
- (3) not obtainable from other sources.

*Channel Two*, 725 S.W.2d at 472.

This is the most recent exposition of the balancing test in a civil case. While the decision was a strong one in favor of the privilege, it is uncertain today how much authority it still carries.

In 1995, Texas' First Circuit Court of Appeals revisited the reporter's privilege issue, narrowing its prior holding. *Dolcefino v. Ray*, 902 S.W.2d 163 (Tex. App.—Houston [1st Dist.] 1995). In that case, a defendant-reporter sought mandamus relief from a trial court order compelling him to testify about information imparted to him by a confidential informant. The court noted, and seemingly based a major portion of its decision on the fact, that the plaintiff had independently discovered the name of the confidential source and had already deposed him. The court rejected the reporter's claim that compelling his testimony on the subject violated the reporter's privilege, holding that because the confidential source had been revealed the purpose of the privilege had been waived. The court specifically narrowed its prior ruling, stating: "[W]e believe that the unqualified statement in *Channel Two* that the United States Supreme Court has created a qualified privilege for journalists is too broad." *Dolcefino v. Ray*, 902 S.W.2d at 164. The *Dolcefino* case was one of the first major blows in which a Texas court clearly distinguished between non-confidential and confidential sources. *Dolcefino*, 902 S.W.2d at 165. In doing so, the court took one more step in the process of narrowing the scope of the reporter's privilege in Texas.

Recent cases suggest that there is no privilege in criminal cases, but courts dealing thoroughly with the issue have only held specifically that there is no reporter's privilege covering non-confidential information in criminal cases.

In two cases, the Fifth Circuit Court of Appeals and the Texas Court of Criminal Appeals issued broad statements that make it difficult to argue that a reporter's privilege exists in criminal proceedings in Texas. In 1994, the Texas Court of Criminal Appeals specifically held that no constitutionally-based privilege exists in criminal cases. *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App 1994) (en banc). This reversed a trend in which attorneys representing the media had met with some degree of success in quashing subpoenas to the press in criminal cases. *See State v. Lyon*, 19 Med. L. Rptr. 2153 (Tex. Crim. Dist. Ct.—Dallas 1991).

Although the *McMeans* case concerned non-confidential information only, the court issued the broad proposition that “newsmen have no constitutional privilege, qualified or otherwise, to withhold evidence relevant to a pending criminal prosecution.” *Id.* at 775. Four years later the Fifth Circuit ruled unanimously that whether the privilege existed at all was questionable and held that it did not apply in the context of criminal cases where non-confidential information is sought. *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) (“[F]ears that non-confidential sources will shy away from the media because of its unholy alliance with the government are speculative at best.”). While some Texas courts and scholars had theorized that the *Branzburg* decision only applied in the grand jury context and that outside that context a broad qualified privilege applied in criminal cases, the Fifth Circuit flatly rejected that notion, holding that the *Branzburg* rejection of a privilege applied to all stages of the criminal prosecution.

In an earlier case, the Southern District of Texas found that a state court's order compelling four reporters to appear at a criminal trial and identify possible witnesses to a crime violated the First Amendment more than it enforced the criminal defendants Sixth Amendment right to compel witness testimony. *Campbell v. Klevenhagen*, 760 F. Supp. 1206 (S.D. Tex. 1991). The court reasoned that forcing the reporters, under threat of contempt, to remain on call throughout the trial and attempt to identify witnesses called to testify for the purposes of impeachment of those witnesses' credibility, was not one of the scenarios in which the reporter's qualified privilege to preserve confidential sources must yield to a defendant's rights to compulsory process and a fair trial. *Id.* at 1216.

In 1998, the media may have gained back slight ground when the Texas Court of Criminal Appeals ruled that reporters did not have to testify at a criminal proceeding. However, the court's ruling was not because of any application of the reporter's privilege; rather the court held that in seeking the testimony of witnesses, a defendant in a criminal case must make a showing that the witness's testimony is both material and favorable to the defendant. *Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc). Because the defendant in the case at issue had not made such a showing, the court ruled that the reporters did not have to testify. The case stands out because the prosecutors for the state wanted to prevent the reporters from testifying; they argued that the defendant had the burden of proving relevance and materiality. *Id.* Although the court rejected the application of the reporter's privilege, by relying on criteria similar to the first prong of the *Branzburg* test the court may have given a glimmer of hope that in future cases, a party subpoenaing a reporter must make a showing of relevance and materiality. Whether the court would have ruled the same way had it been the state subpoenaing the reporter is anyone's guess.

In *Gohring v. State*, a Beaumont Court of Appeals upheld the *Coleman* relevancy test in a matter involving criminal subpoenas. 976 S.W.2d 459 (Tex. App.—Beaumont 1998, no writ). The court granted a motion to quash a subpoena for the reporter's notes when the party issuing the subpoena made no plausible showing to the court that the reporters' testimony would actually be material and favorable to his theories.

The only sure First Amendment protection afforded reporters in the context of criminal proceedings is protection from “bad faith” governmental subpoenas. Unfortunately, what type of conduct constitutes “bad faith” is not at all clear. One argument, based on language from Justice Powell's concurrence in *Branzburg*, is that bad faith governmental subpoenas would include those subpoenas with only a remote and tenuous relationship to the subject of the investigation and subpoenas issued solely to disrupt the reporter's relationship with his confidential sources. The application of this theory would at least require a First Amendment “glance” at the nature of the subpoena issued to the press. Unfortunately, no recent Texas case has accepted these interpretations of *Branzburg*. As it stands now, it appears that any governmental subpoena or any criminal defendant's subpoena to the press is

valid as long as it withstands the basic relevance and materiality standard applied to subpoenas issued to everyone else.

### 3. Grand jury +++ 3C3 +++ T +++

The privilege is by far the weakest in the context of a grand jury subpoena. Writer Vanessa Leggett went to jail for 168 days for refusing to comply with a grand jury subpoena. In the hearing on her motion to quash the subpoena and subsequent appeal, the court relied on 5th Circuit precedent that cited *Branzburg* for the proposition that reporters have the same obligation to testify before a grand jury as any other citizen. *United States v. Smith*, 135 F.3d 963, 696 (5th Cir. 1998). The only untested avenue of argument would be if the facts of the subpoena indicated that the government was using it in bad faith simply to interfere with a reporter's confidential source relationships.

The federal Department of Justice has issued guidelines suggesting basically that the government should perform a balancing test before a reporter is forced to reveal her confidential sources. See 28 C.F.R. 50.10. Whether these guidelines have the force of law has been questioned, and their application is discretionary. *Id.* (the guidelines themselves state they are not intended to create or recognize any legally enforceable rights); *but see United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla 1982) (holding that because a federal prosecutor did not follow the guidelines, the reporter's privilege applied). For this reason, the guidelines offer just nominal protection from grand jury subpoenas, though it may be argued that a violation of the guidelines is evidence of bad faith of the type Justice Powell cautioned against in his *Branzburg* concurrence.

#### D. Information and/or identity of source +++ 3D +++ T +++

Several Texas courts have noted that the highest purpose of the reporter's privilege is the protection of the identity of confidential sources. *Dolcefino v. Ray*, 902 S.W.2d 163 (Tex. App.—Houston [1st Dist.] 1995). In *Dolcefino*, the court rejected the reporter's claim that compelling his testimony on the subject violated the reporter's privilege, but in so doing noted that any First Amendment protection for confidential sources had been waived because the confidential source had been independently identified. The Fifth Circuit in *Smith* held that confidentiality is "critical to the establishment of a privilege." *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998). However, in an earlier case, the Fifth Circuit compelled the disclosure of a source's identity in a libel action. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980) (compelling disclosure but issuing a protective order so that the source's identity would not be revealed to the general public). In *Lernhart v. Thomas*, a Houston federal district court set aside a court's order that would have jailed a reporter for refusing to identify her confidential source in an investigation of grand jury misconduct. 944 F. Supp. 525 (S.D. Tex. 1996) (the court held that revealing the source would obviate the reporter's investigation into the grand jury misconduct, an investigation which had obvious importance to the public).

While the particular facts of any given case will dictate the outcome, it is clear that in civil cases, where a reporter is attempting to protect the identity of a confidential source, the First Amendment-based reporter's privilege carries the greatest weight. On the other hand, in the context of criminal cases, the First Amendment-based privilege even when a confidential source is implicated is uncertain.

#### E. Confidential and/or non-confidential information +++ 3E +++ T +++

Courts have paid considerable attention to the privilege's merits where confidential versus non-confidential sources and information is at issue. In fact, it is in this area that the Texas and federal courts have most narrowed the privilege. Where confidential source information is subpoenaed in a criminal proceeding, the case law suggests that the reporter's privilege likewise will not apply. In civil cases, it is unclear whether non-confidential information will be protected, while confidential information enjoys greater protection.

The most recent published opinion in a civil case is *In re Union Pacific Railroad Co.*, 6 S.W.3d 310 (Tex. App.—Houston [14th Dist.] 1999). In that case, a television reporter was subpoenaed for his notes and unedited videotapes. The judge quashed the subpoena after an in camera inspection of the materials holding that the defendant had not complied with the three-prong test outlined in *Channel Two*. The Fourteenth District Court of Appeals in Houston reversed the trial court's decision drawing a sharp distinction between the need for a reporter's privilege in confidential versus non-confidential cases. The court held that "even if a qualified reporter's privilege exists" it did not apply to non-confidential materials. *In re Union Pacific Railroad Co.*, 6 S.W.3d at 312. The court went even further and made the broad pronouncement that "case law recognizing a qualified reporter's privilege in civil cases do so only with respect to the identity of confidential sources." *Id.* That statement is historically incorrect, although it may be an accurate statement of where the reporter's privilege is trending. In *Channel Two*, the court readily applied the privilege to non-confidential materials. 725 S.W.2d 470, 472 (Tex. App.—Houston [1st Dist.] 1987); *see also Holland v. Centennial Homes, Inc.*, 22 Med. L. Rptr. 2270 (N.D. Tex. 1993) (motion to quash granted in suit where defendants subpoenaed a non-party reporter's non-confidential taped interviews with the plaintiffs.).

#### **F. Published and/or non-published material**     +++ 3F +++ T +++

Texas courts have not really parsed a bright line difference between the privilege's protection of published versus non-published materials. Conventional wisdom dictates that non-published material should be afforded greater protection than published material because published material has already been "disclosed." However, courts have both required and prevented the disclosure of non-published information. *See, e.g., United States v. Smalley*, 9 Med. L. Rptr. 1252 (N.D. Tex. 1983) (granting television station's motion to quash subpoena seeking outtakes); *but see In re Grand Jury Subpoenas*, No. 01-20745 (5th Cir. Aug. 17, 2001) (affirming contempt order jailing Vanessa Leggett for refusing to turn over unpublished information). If the non-published information is confidential, the court will generally give more consideration to an assertion of privilege. However, a reporter has been jailed in Texas for not producing unpublished materials pursuant to a criminal subpoena. *State v. Berryhill*, News Media Update, Vol. 6, No. 15, August 12, 1985 at 4. As noted before, some practitioners are now urging that non-publishing material should be privileged as a trade secret. No Texas court has yet address this argument.

#### **G. Reporter's personal observations**     +++ 3G +++ T +++

There is no First Amendment protection provided to reporters who witness criminal acts. *Branzburg v. Hayes*, 408 U.S. 665 (1972). A reporter who is subpoenaed to testify about criminal acts personally witnessed cannot invoke the reporter's privilege to avoid testifying at a trial or before a grand jury. *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994) (en banc) ("[N]ewsmen have no constitutional privilege, qualified or otherwise, to withhold evidence relevant to a pending criminal prosecution."). *See also Ex parte Grothe*, 687 S.W.2d 736 (Tex. Crim. App. 1984) (Texas Court of Criminal Appeals upholding contempt order of photographer who was a witness to a crime, even in an era where the court showed some sensitivity to First Amendment concerns). However, it is less certain what disclosure or compliance is required in civil cases. In one Texas civil case, a reporter who promised confidentiality in exchange for an interview with a mother who kept her child hidden from the child's father during a custody dispute was held to have no duty to reveal the child's whereabouts. *A.H. Belo Corp. v. Corcoran*, 2001 LEXIS 4656 (Tex. App. 2001).

## H. Media as a party +++ 3H +++ T +++

In a case in which the media was a party to a libel action, the 5th Circuit held that the identity of a confidential source may be so intertwined with the heart of the plaintiff's case that disclosure of the source's name can be compelled. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980). In *In re Selcraig*, the Fifth Circuit rejected a reporter's assertion that a non-party reporter should have more extensive protection than a party media defendant defending a libel suit, but the court nonetheless held that a qualified privilege required a showing of relevance and overturned the district court's contempt citation. 705 F.2d 789 (5th Cir. 1983) (where a discharged school official suing the school district subpoenaed a newspaper reporter who wrote about the dismissal).

## I. Defamation actions +++ 3I +++ T +++

In defamation cases, the Fifth Circuit Court of Appeals adopted a special test for the application of the reporter's privilege. *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). That test has been applied by a Texas intermediate appellate court. *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App.—San Antonio 1991). These early libel cases suggest that the privilege, once established, could be overcome only if a plaintiff proves by substantial evidence that: (1) the statements were false and defamatory; (2) all reasonable alternative means of learning the confidential source's identity had been exhausted; and (3) the information was necessary and critical to the case. *Id.* A more recent Texas First Court of Appeals decision, however, did not even reach the *Selcraig* test, finding instead that a media defendant in a defamation case has no confidentiality left to protect, assuming the existence of a reporter's privilege (which it doubted), where the plaintiff discovers the identity of the confidential source independently. *Dolcefino v. Ray*, 902 S.W.2d 163 (Tex. App.—Houston [1st Dist.] 1995).

## IV. Who is covered +++ 4 +++ T +++

Texas case law has not directly addressed the issue of who is covered under the qualified privilege that exists in this state. A shield law would go far in providing needed guidance.

In *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), the Second Circuit Court of Appeals held that any person who intends to distribute information to the public through activities commonly associated with the dissemination of news was a journalist and could claim the reporter's privilege. The key is the intent of the reporter at the time of gathering the information. In Vanessa Leggett's Fifth Circuit appeal, the government argued that a First Amendment-based privilege did not exist in the context of a grand jury subpoena and that even if it did exist, it did not apply to Vanessa Leggett because she was not a "reporter." *In re Grand Jury Subpoenas*, No. 01-20745 (5th Cir. Aug. 17, 2001). The Fifth Circuit addressed the latter argument in a footnote by noting that the test articulated by the Second Circuit was the operative test and assumed that Leggett would meet it. *Id.*

### A. Statutory and case law definitions +++ 4A +++ T +++

Definitions of who is covered have not been addressed by the courts.

**1. Traditional news gatherers** +++ 4A1 +++ S +++

**a. Reporter** +++ 4A1a +++ S +++

**b. Editor** +++ 4A1b +++ S +++

**c. News** +++ 4A1c +++ S +++

**d. Photo journalist** +++ 4A1d +++ S +++

**e. News organization / medium** +++ 4A1e +++ S +++

**2. Others, including non-traditional news gatherers** +++ 4A2 +++ S +++

**B. Whose privilege is it?** +++ 4B +++ T +++

Although not specifically addressing the issue of whether the privilege applies only to natural persons, employees of news organizations or the organizations themselves, Texas courts in the past have indeed applied the privilege in all of these contexts. *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App—San Antonio 1991) (privilege applied to newspaper); *Campbell v. Klevenhagen*, 760 F. Supp. 1206 (S.D. Tex. 1991) (privilege applied to reporters, individually).

**V. Procedures for issuing and contesting subpoenas** +++ 5 +++ T +++

In Texas, serving a subpoena on a reporter or media organization is no different than serving a subpoena on anyone else. There is no special proceeding or showing that needs to be made before a subpoena is served. However, subpoenas should not be lightly served on the media. Private litigants wishing to acquire information about their case should attempt to exhaust all non-media sources before burdening the press with a subpoena. Irrelevant subpoenas will, justifiably, provoke strong responses, costing both parties additional legal expenses and time.

A subpoena is, in essence, a court order commanding the subpoenaed person or entity to appear to testify or to permit inspection of documents or items. The issuance of subpoenas in civil cases is governed by the Texas Rules of Civil Procedure. In criminal cases, the issuance of a subpoena is governed by the Texas Code of Criminal Procedure.

**A. What subpoena server must do** +++ 5A +++ H +++

**1. Service of subpoena, time** +++ 5A1 +++ T +++

In a civil case, either party may issue a subpoena that commands a person to either (1) attend and give testimony at a deposition, hearing, or trial [Tex. R. Civ. Proc. 176.2]; or (2) produce and permit inspection and copying of designated documents or tangible things in the possession, custody or control of that person. A court can unilaterally compel a party to summon witnesses and compel their attendance at a trial, even in the absence of an application by a party. *Vondy v. Commissioners Court of Uvalde County*, 620 S.W.2d 395, 399 (Tex. 1979). A civil subpoena may be issued at any time after the suit is filed; however, a person may not be required by subpoena to appear or produce documents in a county that is more than 150 miles from where the person resides or is served. Tex. R. Civ. Proc. 176.2(a). A civil subpoena may be issued by the clerk of the court in which the case is pending or by any attorney authorized to practice law in Texas. Tex. R. Civ. Proc. 176.4. Every subpoena must be issued in the name of the “The State of Texas” and state (1) the style of the case, (2) the court in which the suit is pending, (3) the date on which the subpoena is issued, (4) the identity of the person being subpoenaed, (5) the time and place and nature of the action required by the person to whom the subpoena is directed, (6) the identity of the person at whose request the subpoena is being issued, (7) it must be signed by the person issuing it, and (8) state that “Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.” Tex. R. Civ. Proc. 176. The subpoena may be served by a law enforcement officer or any non-party over the age of eighteen. Once subpoenaed to appear, the subpoenaed party must remain at the trial or hearing until discharged by the court.

Under Article 24 of the Texas Code of Criminal Procedure, a criminal defendant or the state may obtain a subpoena by making application to the clerk or his deputy in writing. Tex. Code Crim. Proc., art. 24.03. The application must indicate that the testimony of the subpoenaed witness is material to the state or defense.

A grand jury has a broad subpoena power. Tex. Code Crim. Proc., art. 20.10. Either the foreman or the attorney representing the state may issue a subpoena (erroneously referred to by the Legislature as a summons) for any witness located within the county, to appear and testify before the grand jury. Furthermore, a grand jury can issue a subpoena under the general authority of Article 24.02 of the Code of Criminal Procedure for the production of documents and things in his or her possession. A subpoena to produce documents is somewhat weaker than a subpoena to testify before a grand jury because a subpoena to produce documents cannot be punished under Article 20.15; that article covers only refusals to “testify.”

## **2. Deposit of security**      +++ 5A2 +++ T +++

Not addressed.

## **3. Filing of affidavit**      +++ 5A3 +++ T +++

Not addressed.

## **4. Judicial approval**      +++ 5A4 +++ T +++

Judicial approval of a subpoena is rarely needed in civil cases and somewhat less rarely in criminal ones. Subpoenas are generally issued by the clerk of court, court reporter or an attorney licensed in the state. Where a grand jury wishes to subpoena an out-of-county witness, it must ask the district court to grant an application for the subpoena. Tex. Code Crim. Proc., art. 20.11.

## **5. Service of police or other administrative subpoenas** +++ 5A5 +++ T +++

There are no special subpoena rules in Texas applicable to the press.

### **B. How to Quash** +++ 5B +++ T +++

If served with a subpoena, the first duty is to determine whether or not the subpoena is worth fighting. With the current state of the law in Texas, it is undeniable that quashing a subpoena on the basis of a reporter's privilege is challenging.

#### **1. Contact other party first** +++ 5B1 +++ T +++

The law does not require that the subpoenaing party be contacted prior to moving to quash. But some courts will require a certificate of conference before considering the motion or setting it for hearing. Practically, though it may help to reach some accord and perhaps limit the scope or limit the inconvenience to the reporter — e.g. a business records affidavit in a civil case.

#### **2. Filing an objection or a notice of intent** +++ 5B2 +++ T +++

In the case of civil subpoenas, a person must comply with a subpoena unless discharged by the court or by the party summoning the witness. Tex. R. Civ. Proc. 176.6(a). A witness is allowed to raise objections or seek protection from an oppressive subpoena. If required to produce documents and items, a person may serve upon the subpoenaing party, at any time before compliance is due, written objections to producing any or all of the designated materials. Tex. R. Civ. Proc. 176.6(d). Where objection has been made or a privilege asserted, the subpoenaed person need not comply with that portion of the subpoena to which she has objected or asserted privilege, unless ordered to do so by the court. A subpoenaed person who is commanded to appear for a hearing, deposition, or trial may move for protection under Tex. R. Civ. Proc. 192.6, as long as a motion is filed with the court before compliance is due. Tex. R. Civ. Proc. 176.6(e). If the subpoenaed person objects to the time and place for a deposition, filing the motion to quash or motion for protection within three days after receiving the subpoena entitles the person to an automatic stay of the deposition until the motion can be determined. Tex. R. Civ. Proc. 199.4.

In the case of criminal or grand jury subpoenas, a person subpoenaed must comply on the same terms and grounds as civil litigant. However, criminal and grand jury subpoenas have, arguably, more weight because of the defendant's Sixth Amendment right to compulsory process and a fair trial and a grand jury's broad evidentiary function. The appropriate manner in which to object to a criminal or grand jury subpoena is a motion to quash.

#### **3. File a motion to quash** +++ 5B3 +++ H +++

##### **a. Which court?** +++ 5B3a +++ T +++

The motion to quash should be filed in the same court as the court that is hearing the case at issue. However, any person affected by a subpoena may file a motion for a protective order pursuant to Tex. R. Civ. Proc. 192.6(b), which may be filed either in the court in which the action is pending or in a district court in the county where the subpoena was served. Tex. R. Civ. Proc. 176.6(e).

For criminal or grand jury subpoenas, the motion to quash must be filed in the same court as the pending criminal prosecution.

#### **b. Motion to compel**   +++ 5B3b +++ T +++

The media party should not wait for the subpoenaing party to file a motion to compel before filing a motion to quash. If a motion to compel is filed, the subpoenaed party must respond to the motion to compel.

#### **c. Timing**   +++ 5B3c +++ T +++

The motion to quash should be filed as soon after receiving the subpoena as practicable, but in any event must be filed before the time for compliance with the subpoena passes. Keep in mind that if the motion to quash is denied, you need time to respond or take further action with an appellate court.

#### **d. Language**   +++ 5B3d +++ T +++

The motion to quash should recite applicable legal authority and clearly assert the reporter's privilege, the argument that compelling disclosure will chill speech and include any other grounds upon which the motion is based.

#### **e. Additional material**   +++ 5B3e +++ S +++

### **4. In camera review**   +++ 5B4 +++ H +++

#### **a. Necessity**   +++ 5B4a +++ T +++

Texas law does not direct a court to conduct an *in camera* review of materials or interview with the reporter prior to deciding a motion to quash, but this may be suggested as an alternative step.

#### **b. Consequences of consent**   +++ 5B4b +++ T +++

There is no automatic stay ordered if a court determines that the information is not subject to the privilege or a reporter agrees to comply with the *in camera* review.

### **c. Consequences of refusing** +++ 5B4c +++ T +++

If a court orders an *in camera* review and the reporter does not consent, there is a possibility that the motion to quash will be denied and the reporter will be held in contempt.

## **5. Briefing schedule** +++ 5B5 +++ T +++

There is no set briefing schedule procedure for a motion to quash in Texas.

## **6. Amicus briefs** +++ 5B6 +++ T +++

Texas courts will accept amicus briefs from interested media organizations. For a list of Texas media contacts, please see *Appendix A*.

# **VI. Substantive law on contesting subpoenas** +++ 6 +++ H +++

## **A. Burden, standard of proof** +++ 6A +++ T +++

Practically every case suggests that the burden is on the party issuing the subpoena to prove the materiality of the information sought and overcome any privilege asserted. However, the midlevel appellate court in *Coleman v. State* surprisingly held that the burden was on the movant to show that his motion to quash had a proper basis. 915 S.W.2d 80 (Tex. App.-Waco 1996). The default position should be that the privilege must be overcome by the party seeking the material or information.

If you can convince a court that the reporter is covered under the reporter's privilege, the subpoenaing party must meet a three-pronged test outlined in Justice Powell's *Branzburg* concurrence as adopted by several Fifth Circuit Court of Appeals and Texas courts. *See, e.g., Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Campbell v. Klevenhagen*, 760 F. Supp. 1206 (S.D. Tex. 1991); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App.—San Antonio 1991); *Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987). A party seeking materials or testimony must show that it is (1) highly material and relevant; (2) necessary or critical to the claim; and (3) not obtainable from other sources.

However if the court finds that the reporter's privilege is inapplicable, a criminal subpoena must still be "material and favorable" pursuant to the Texas Court of Criminal Appeals holding in *Coleman v. State*. 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc) ("To exercise the federal constitutional compulsory process right, the defendant must make a plausible showing to the trial court, by sworn evidence or agreed facts, that the witness' testimony would be both material and favorable to the defense.").

## B. Elements +++ 6B +++ H +++

### 1. Relevance of material to case at bar +++ 6B1 +++ T +++

Relevance is certainly the most important criteria. It is applicable whether or not the court agrees with the assertion of reporter's privilege.

The first prong of the Powell three-prong reporter's privilege test as adopted by Texas courts requires a showing that the information sought is "highly material and relevant." *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App.—San Antonio 1991). When addressing the dimension of relevance in applying the reporter's privilege, the courts look at the nexus between what the material or information sought is likely to contain and what the material issues in the case are for the party seeking the information. If the material or information sought is not likely to pertain to the issues of that party, then it is not highly material and relevant.

There is also a non-constitutional dimension to the relevance requirement. *Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc). The Texas Code of Criminal Procedure requires that any subpoena issued in a criminal case must constitute or contain evidence material to any matter involved in the action. Tex. Code of Crim. Proc. 39.14. In addition, article 24.03 states that when applying for a subpoena one must state that the information sought is material to the case. Furthermore, article 39.04 requires that the Texas Rules of Civil Procedure will apply to certain aspects of discovery in criminal cases, as long as the civil rules are not in conflict with the criminal code. Under the Texas Rules of Civil Procedure, a party is entitled to conduct discovery only to the extent "reasonably calculated to lead to the discovery of admissible evidence." Tex. R. Civ. Proc. 192.3. The Texas Court of Criminal Appeals has confirmed that general rules concerning subpoenas apply when a reporter or materials are subpoenaed in a criminal case. *Coleman v. State*, 966 S.W.2d 525. The Court in *Coleman* applied a relevance and materiality test — similar to the relevance and materiality test applied under a reporter's privilege analysis — to determine whether the reporter's testimony should be compelled. In *Coleman*, the reporter's were not eye-witnesses to a crime and therefore the relevance and importance of their testimony could not be shown, mandating the quashing of the subpoena. *Id.* at 528. There has been no case in Texas that offered any useful distinction between the "highly relevant and material" standard of *Dallas Morning News v. Garcia*, if there is a privilege, and the "relevant and material" standard of *Coleman v. State*, if there is no privilege.

*Compelling need.* The requirement that a compelling need must be established before the press is required to testify or produce materials is an issue only when arguing for the applicability of the reporter's privilege. Whether the information or material is unavailable from other sources is the second prong of the test outlined by Justice Powell in *Branzburg*. See, e.g.; *Channel Two Television v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987). However, no Texas case has focused its decision on the element of compelling need. Once the privilege has been asserted, at a minimum the party seeking the information should be required to at least articulate what their need for the information is.

### 2. Material unavailable from other sources +++ 6B2 +++ T +++

The requirement that any material sought from a press organization be sought in non-media channels before the press is required to produce is an element only when arguing that the reporter's privilege applies. Whether the information or material is unavailable from other sources is the third prong of test outlined by Justice Powell in *Branzburg*.

In *Campbell*, the Southern District of Dallas held that a court could not compel reporters to wait in the courtroom during a criminal trial so that the defendants could have them try and identify witnesses to the crime, ostensibly holding that just because a reporter's source witnessed a crime does not mean that disclosure of the

identity of that source overcomes the press protections contained in the First Amendment. 760 F. Supp. at 1211-1214.

Texas courts have not readily addressed the issue of how exhaustive the search must be when a subpoenaing party must first try to obtain information and material from non-press sources pursuant to reporter's privilege. However, the *Dolcefino v. Ray* case presented the interesting scenario of whether the reporter can be required to confirm the identity of a confidential source that a party believes it has discovered.

**a. How exhaustive must search be?** +++ 6B2a +++ S +++

**b. What proof of search does subpoenaing party need to make?** +++ 6B2b +++ S +++

**c. Source is an eyewitness to a crime** +++ 6B2c +++ S +++

**3. Balancing of interests** +++ 6B3 +++ T +++

There will always be a balancing of interests where a case concerns constitutional issues. With regard to the balancing of law enforcement concerns with the balancing of free press concerns, the *Branzburg* court cautioned that the government should not be allowed to annex the media as an investigative arm of law enforcement. *See Branzburg*, 408 U.S. at 709. It is the press's mission to inform the public and the public's right to know that are the public policy concerns mediating against enforcing the subpoena. While these and other cogent arguments have been accepted by courts in other jurisdictions, *see, e.g., O'Neil v. Oak Grove Cond. Ins.*, 71 N.J.2d 521, 527 (1988), they have not received wide acceptance in Texas.

**4. Subpoena not overbroad or unduly burdensome** +++ 6B4 +++ T +++

Texas Rules of Civil Procedure require that where compliance with a subpoena will cause an undue burden or expense, the subpoenaed witness may quash the subpoena. Tex. R. Civ. Proc. 176.6(e), (f), 176.7. The factors to consider are (1) the quantity of materials subpoenaed; (2) the ease or difficulty of collecting and transporting the materials; (3) the length of time before trial that the subpoena was issued; (4) the availability of the information from other sources; and (5) the relevance and materiality of the material subpoenaed to issues in the suit. *See Robertson v. Southwestern Bell Telephone Co.*, 403 S.W.2d 459, 470 (Civ. App.—Tyler 1966, no writ).

A court must provide the person subpoenaed with adequate time for compliance, protection from disclosure of privileged material or information and protection from undue burden or expense. Tex. R. Civ. Proc. 176.7.

**5. Threat to human life** +++ 6B5 +++ T +++

This issue has not been addressed by Texas courts.

**6. Material is not cumulative** +++ 6B6 +++ T +++

There is no specific requirement in any Texas case law suggesting that the issuance of cumulative requests would be analyzed any differently than the issue of relevance and materiality.

## **7. Civil/criminal rules of procedure**      +++ 6B7 +++ T +++

The Texas Rules of Civil Procedure allow a subpoenaed party to file either a motion to quash or a motion for protection. Tex. R. Civ. Proc. 192. In criminal cases or in response to a grand jury subpoena a motion to quash is the appropriate pleading to file.

## **8. Other elements**      +++ 6B8 +++ T +++

None.

## **C. Waiver or limits to testimony**      +++ 6C +++ H +++

### **1. Is the privilege waivable at all?**      +++ 6C1 +++ T +++

Because the case law is not very well developed in Texas, no Texas court has determined under what conditions a reporter will waive the privilege. However, one recent Texas First Court of Appeals decision held that a media defendant in a defamation case has no confidentiality left to protect once the plaintiff discovers the identity of the confidential source independently. *Dolcefino v. Ray*, 902 S.W.2d 163 (Tex. App.—Houston [1st Dist.] 1995). That court assumed that the only protection afforded by any applicable reporter’s privilege would be protection from disclosing the name of a confidential source. *Id.*

### **2. Elements of waiver**      +++ 6C2 +++ T +++

Because the case law is not very well developed in Texas, no Texas court has determined under what conditions a reporter will waive the privilege.

#### **a. Disclosure of confidential source’s name**      +++ 6C2a +++ S +++

#### **b. Disclosure of non-confidential source’s name**      +++ 6C2b +++ S +++

#### **c. Partial disclosure of information**      +++ 6C2c +++ S +++

#### **d. Other elements**      +++ 6C2d +++ S +++

### 3. Agreement to partially testify act as waiver? +++ 6C3 +++ T +++

There is no published case in Texas where partial compliance was deemed to constitute a waiver of the privilege; however, where a reporter reveals some information, but not all, it could subject the reporter to continued subpoenas and harassment from law enforcement. In one case, the state prosecutors and the United States Department of Justice issued her a total of five subpoenas. Early on, the target of the subpoena complied with the state prosecutors, but later decided that she might lose control over her material and decided to refuse to comply by invoking the protections of the reporter's privilege. *See Daniel Scardino, Extra! Extra! Vanessa Leggett Serves Maximum Jail Time; First Amendment-based Reporter's Privilege Under Siege, Communications Lawyer*, Volume 19, Number 4, Winter 2002.

## VII. What constitutes compliance? +++ 7 +++ H +++

### A. Newspaper articles +++ 7A +++ T +++

If the subpoenaed person is a party to the action the documents they produce are self-authenticating for use against them. Tex. R. Civ. Proc. 193.7. Where a non-party media organization or reporter is subpoenaed, the proper method of authenticating the documents is a business records affidavit.

### B. Broadcast materials +++ 7B +++ T +++

If the subpoenaed person is a party to the action the documents they produce are self-authenticating for use against them. Tex. R. Civ. Proc. 193.7. Where a non-party media organization or reporter is subpoenaed, the proper method of authenticating the documents is a business records affidavit.

### C. Testimony vs. affidavits +++ 7C +++ T +++

Authentication could be in the form of an affidavit or in the form of a deposition on written questions to the organization's custodian of records, usually the librarian or archivist; a business records deposition should not be addressed to the individual reporter.

### D. Non-compliance remedies +++ 7D +++ T +++

In Texas, the press is subject to the same punishment for refusing to comply with a subpoena as anyone else would be; however, the press does have whatever protection the reporter's privilege provides. Therefore, a reporter subpoenaed in Texas, like everyone else, faces both civil and criminal contempt.

The purpose of civil contempt is remedial and coercive in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and therefore the civil contemnor

carries the keys of his prison in his own pocket. In other words, it is civil contempt when one may procure his release by compliance with the provisions of the order of the court. *Ex parte Werblud*, 536 S.W.2d 542, 545-6 (Tex. 1976) (citations and internal quotation marks omitted).

Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being punished for some completed act which affronted the dignity and authority of the court. *Id.*

## 1. Civil contempt +++ 7D1 +++ T +++

Under Texas Rule of Civil Procedure 176.8, refusal to comply with a subpoena can be deemed contempt of court of either the court granting the subpoena or the court in the county in which the subpoena was served. The rules authorize punishment by fine or confinement, or both. Tex. R. Civ. Proc. 176.8. There is no limit in the Rules of Civil Procedure to the amount of a fine that may be imposed for civil contempt and no limit to the maximum confinement time a court may order. Generally, however, a court will order confinement until compliance or until the reason for confinement is moot. This is the usual compliance vehicle — put the reporter in jail until he/she complies or his/her complicity becomes moot.

The Texas Code of Criminal Procedure authorizes a punishment for refusal to obey a subpoena of up to \$500 (for a felony case), \$100 (for a misdemeanor case). Tex. Code Crim. Proc., art. 24.05. If the witness does not appear, the state or the defendant may issue an attachment for that witness to appear, which will command some peace officer to take the body of a witness and bring him before such court, magistrate or grand jury on a day named. Tex. Code Crim. Proc., art. 24.11.

The similar provision applicable to grand jury subpoenas allows for a maximum fine of \$500 and confinement until compliance. Tex. Code Crim. Proc., art. 20.15. A grand jury foreman may also issue a writ of attachment pursuant to Article 24.11 to force the appearance of a witness. Tex. Code Crim. Proc., art. 24.11.

### a. Fines +++ 7D1a +++ S +++

### b. Jail +++ 7D1b +++ S +++

## 2. Criminal contempt +++ 7D2 +++ T +++

In one recent Texas Court of Criminal Appeals case, a Nueces County grand jury issued a subpoena to a witness who refused to comply because he was scared to “point the finger at someone.” *In re Dotson*, 76 S.W.3d 393, (Tex. Crim. App. 2002). The state filed a motion that the witness be held in contempt for refusing to obey the subpoena; and the trial court granted the motion and confined the witness to jail and fined him \$500. The Texas Court of Criminal Appeals held that the penalty for failure to answer a subpoena in a criminal case is limited to the provisions of Art. 24.05 (allowing only fines). The court noted that the case involved a criminal contempt. The case stands for the proposition that where a criminal court finds a person in criminal contempt the only remedy is a fine.

## 3. Other remedies +++ 7D3 +++ T +++

Texas does not follow the rule in defamation cases that where a party refuses to testify about certain facts, the trier of fact may infer a presumption against that party of actual malice; however, Texas does have a spoliation rule that allows a presumption to attach where evidence is intentionally destroyed to avoid disclosure. The case law suggests that if evidence was destroyed in the regular course of business, the party can defend against an assertion of negligent or intentional destruction. *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40 (Tex. App.—Corpus Christi 2001) (holding that spoliation of videotapes of entire television broadcasts did not render remaining portions inadmissible in action for invasion of privacy and defamation or entitle plaintiffs to presumption that missing portions of broadcasts were unfavorable to television station, where spoliation occurred in regular course of station’s business and therefore did not amount to negligent or intentional destruction).

## **VIII. Appealing**   +++ 8 +++ H +++

### **A. Timing**   +++ 8A +++ H +++

#### **1. Interlocutory appeals**   +++ 8A1 +++ T +++

Interlocutory appeals are not available from an order denying a motion to quash or a contempt order. A person may seek appellate review of the denial of a motion to quash; however, such “appeal” is actually an original proceeding initiated in the appropriate court of appeals for mandamus or habeas corpus relief. A petition for writ of mandamus is appropriate where the trial court’s order did not involve confinement as a noncompliance remedy. Where confinement is involved, the appropriate procedure is a writ of habeas corpus. Mandamus and habeas corpus are extraordinary writs that should be issued only when the trial court has clearly abused its discretion and there is no adequate remedy by normal appeal. Any such petition for a writ of mandamus or habeas corpus must be made within twenty (20) days of the trial court’s order denying the motion to quash. Tex. R. Civ. Proc. 306a(1).

#### **2. Expedited appeals**   +++ 8A2 +++ T +++

Because the only relief available is mandamus or habeas corpus relief, an expedited appeal is not available for an order denying a motion to quash or a contempt order.

### **B. Procedure**   +++ 8B +++ H +++

#### **1. To whom is the appeal made?**   +++ 8B1 +++ T +++

A petition for a writ of mandamus or habeas corpus is governed by Texas Rule of Appellate Procedure 52. The writ is commenced by filing a petition with the clerk of the appropriate appellate court. Tex. R. App. P. 52. The appropriate appellate court is most likely the court of appeals for the circuit in which the trial court is located.

## **2. Stays pending appeal** +++ 8B2 +++ T +++

A stay may be sought in either the trial court of the appellate court; however, the granting of any such stay is entirely up to the discretion of the court. Just because a reporter may be appealing an issue with constitutional implications does not necessarily mean that the requested stay is more likely to be granted. Indeed, a petition involving constitutional issues must include “substantive analysis of the facts and authorities relied upon” or it may be considered inadequate. *In re Kuhler*, 60 S.W.3d 381, 384 (Tex. App.—Amarillo 2001, orig. proceeding).

## **3. Nature of appeal** +++ 8B3 +++ T +++

The contents of a petition for writ of mandamus or habeas corpus are the same. All statements in the petition must be verified by affidavit and follow the instructions of Rule 52 carefully. Tex. R. App. P. 52. The petition must identify the parties, include a table of contents, index of authorities and a statement of the case, as well as a list of the issues presented, a statement of the facts, the argument for relief, a prayer and an appendix containing the order of the trial court denying the motion to quash. Tex. R. App. P. 52. If the relief requested is from confinement, the petition for habeas corpus should include proof that the person seeking relief is actually being restrained. The person filing the petition must file therewith and certify by affidavit every document that is related to the claim for relief that was filed in the trial court. Tex. R. App. P. 52.

## **4. Standard of review** +++ 8B4 +++ T +++

A party seeking mandamus relief must show that the trial court either failed to perform a clear legal duty or committed a clear abuse of discretion, that the person’s legal remedies are inadequate, and that the petition raises important issues for the state’s jurisprudence. *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996). The standard of review is “abuse of discretion.” *In re Union Pacific Railroad Co.*, 6 S.W.3d 310, 311 (Tex. App.—Houston [14th Dist.] 1999). This is a relatively high standard wherein the appellate court gives the determination of the trial court wide latitude before overturning it. If the appellate court finds that a reporter’s privilege exists and applies to the case, it will likely find the trial court’s denial of the motion to quash an “abuse of discretion.”

## **5. Addressing mootness questions** +++ 8B5 +++ T +++

## **6. Relief** +++ 8B6 +++ T +++

The appellate court reviewing the petition may either grant or deny it. In granting the petition, the appellate court must issue an opinion. If the relief is denied, the appellate court does not have to issue an opinion explaining why it is being denied. Tex. R. App. P. 52.

## **IX. Other issues**    +++ 9 +++ H +++

### **A. Newsroom searches**    +++ 9A +++ T +++

Perhaps surprisingly, Texas has a strong statutory provision protecting newsrooms from search warrants. Article 18 of the Texas Code of Criminal Procedure provides:

A search warrant may not be issued ... [for items] in an office of a newspaper, news magazine, television station, or radio station, and in no event may property or items ... be legally seized in any search pursuant to a search warrant of an office of a newspaper, news magazine, television station, or radio station.

Tex. Code Crim. Proc., art. 18.01(e).

In *State ex. rel. Healey v. McMeans*, Justice Maloney noted this provision of the criminal code and suggested that it was anathema to the court's anti-reporter's privilege jurisprudence. 884 S.W.2d 772 (Tex. Crim. App 1994) (en banc).

### **B. Separation orders**    +++ 9B +++ T +++

### **C. Third-party subpoenas**    +++ 9C +++ T +++

Anybody affected by a subpoena may file a motion to quash or for a protective order seeking to have the subpoena amended or voided. Tex. R. Civ. Proc. 192.6(b). For instance, if a reporter learns that a civil litigant has subpoenaed telephone records in an attempt to discover the reporter's confidential source, he may file a motion to quash the subpoena based on an assertion of the reporter's privilege.

### **D. The source's rights and interests**    +++ 9D +++ T +++

Texas has not had a case where a source has tried to intervene in a suit to halt disclosure of their identities. However, there is precedent for the argument that a source may sue a reporter for violating the confidential source relationship. The United States Supreme Court held in *Cohen v. Cowles Media* that a reporter could be held liable in monetary damages for breaking a promise of confidentiality to a source. 501 U.S. 663 (1991).