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The Journalist's Privilege: Ensuring that Compelled Disclosure Is the Exception, Not the Rule - Shoen v. Shoen

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THE JOURNALIST'S PRIVILEGE: ENSURING THAT COMPELLED DISCLOSURE IS THE EXCEPTION, NOT THE RULE

SHOEN v. SHOEN

I. INTRODUCTION

A general legal principle states that the "public . . . has a right to every man's evidence."[1] The United States Congress adhered to this maxim in promulgating the *Federal Rules of Civil Procedure*, which allow a party to "obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action."[2] In *Hickman v. Taylor*,[3] the United States Supreme

1. United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2192 (3d ed. 1940)). This quotation is attributed to Lord Hardwicke. Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 2, 2 n.1 (1986). Lord Hardwicke made this famous and often quoted statement on May 25, 1742 during a debate in the House of Lords. *Id.*

2. FED. R. CIV. P. 26(b)(1) (emphasis added). Additionally, Rule 26(b)(1) states that the "information sought need not be admissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence*." *Id.* (emphasis added). A party, however, is not automatically entitled to obtain discovery of "any matter" when there is a converse claim of privilege. *See id.* After the 1946 amendment to Federal Rules of Civil Procedure, the Advisory Committee Notes state that "the purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." Ugo Colella, *HIV-Related Information and the Tension Between Confidentiality and Liberal Discovery*, 16 J. LEGAL MED. 33, 63 (1995) (quoting FED. R. CIV. P. 26 advisory committee's note).

In determining whether a privilege exists, or in examining the extent of a privilege, federal courts look to Rule 501 of the *Federal Rules of Evidence*. Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73, 77 (1995). Rule 501 provides that:

> [e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, *the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.* However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501 (emphasis added). In 1973, the United States Supreme Court addressed evidentiary privileges and stated that "these exceptions to the demand

Court held that the rules governing discovery are accorded broad and liberal treatment.[4] However, a "broad and liberal" discovery process can, and often does, come into direct conflict with the First Amendment's Freedom of the Press Clause.[5] Journalists, reporters and other newsgatherers often claim a qualified First Amendment privilege against disclosure when faced with a court order to produce material and/or the names of sources during a judicial or investigatory proceeding.[6]

The United States Court of Appeals for the Ninth Circuit addressed the conflict between the First Amendment and the "broad and liberal" discovery process in *Shoen v. Shoen* (*Shoen II*).[7] In *Shoen II*, the Ninth Circuit held that the First Amendment freedom of the

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for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974).

3. 329 U.S. 495 (1947).

4. *Id.* at 507. The Court stated that "[m]utual knowledge of all relevant facts gathered by both parties is essential to proper litigation." *Id.* Additionally, the Court held that when discovery is conducted in a broad and liberal manner, a party may not argue against "fishing expedition" type request due to "the idea that discovery is mutual-that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position." *Id.* at 507 & n.8 (quoting James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 303 (1940)). Although a party may be required to provide valuable information to the opposing counsel, the same party may itself receive valuable information, in return, from the opposing party.

5. The First Amendment provides in part that: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

6. *See generally* MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 8.01, at 8-5 to 8-19 (1995) (explaining scope, limitations and procedures of journalist's privilege). The basis for the journalist's First Amendment privilege is to preserve the "free flow of information." Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739, 741 (1994). For a further discussion of the historical creation and application of the journalist's qualified First Amendment privilege against disclosure, see *infra* notes 15-63 and accompanying text.

Courts of the United States recognize other privileges against compelled disclosure, such as the attorney-client privilege, the clergy-parishioner privilege, the physician-patient privilege and the spousal privilege. GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE §§ 501.5 to 501.8 (1995). However, the Supreme Court noted in *United States v. Nixon* that "courts have historically been cautious about privileges." *Nixon*, 418 U.S. at 710 n.18. The Court asserted that the use of a privilege is proper when there is a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id.* (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). Additionally, the interest protected by such a privilege must be "of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." Herbert v. Lando, 441 U.S. 153, 183 (1979) (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 152 (Edward W. Cleary ed., 2d ed. 1972)).

7. 48 F.3d 412 (9th Cir. 1995).

press clause provided third party journalists with a qualified privilege against disclosure of nonconfidential information and materials during a civil trial.[8] The court created a three-part test to determine whether a civil litigant is entitled to discover a third party journalist's nonconfidential material when the journalist seeks protection under the First Amendment.[9]

This Note focuses on the Ninth Circuit's newly created three-part test for overcoming the journalist's privilege. As background, section II of this Note examines the creation and continuing evolution of the journalist's qualified First Amendment privilege against disclosure.[10] Section III of this Note recounts the factual foundation surrounding the *Shoen II* decision.[11] Additionally, section IV of this Note discusses and evaluates the Ninth Circuit's holding and its creation of the *Shoen II* three-part test.[12] Section V of this Note assesses the impact of the *Shoen II* decision on the application of the journalist's qualified First Amendment privilege and the extent to which other courts are likely to adopt the *Shoen II* three-part test.[13] This Note concludes that the Ninth Circuit's three-part test provides a viable option for other courts to use in determining whether to overcome the journalist's privilege.[14]

II. BACKGROUND

A. The Creation of the Journalist's Qualified Privilege

At common law, courts of the United States did not recognize a privilege permitting journalists to refuse to disclose their confidential sources or information acquired during the newsgathering process.[15] In *Garland v. Torre*,[16] a journalist refused to disclose the

8. *Id.* at 416-18. For a discussion of the *Shoen II* holding, see *infra* notes 83-142 and accompanying text.

9. *Id.* at 416. For a discussion of the *Shoen II* three-part test, see *infra* notes 88-98 and accompanying text.

10. For a discussion of the creation and the continuing evolution of the journalist's privilege under the First Amendment, see *infra* notes 15-63 and accompanying text.

11. For a discussion of the factual and procedural history of *Shoen II*, see *infra* notes 64-82 and accompanying text.

12. For a narrative and critical analysis of *Shoen II*, see *infra* notes 83-132 and accompanying text.

13. For a discussion of the impact of *Shoen II*, see *infra* notes 133-42 and accompanying text.

14. *See infra* notes 133-42 and accompanying text.

15. LARKIN, *supra* note 6, at 8-1. *See also* Timothy L. Alger, *Promises Not To Be Kept: The Illusory Newsgatherer's Privilege in California*, 25 LOY. L.A. L. REV. 155, 169 (1991) (stating that "common law refused to recognize reporters' claims of privilege"); Monk, *supra* note 1, at 18 ("All of the early American cases refused to recog-

identities of her confidential sources.[17] The *Garland* case marked the first time that a journalist claimed protection from disclosure under the First Amendment.[18] In upholding the contempt order against the journalist, the United States Court of Appeals for the Second Circuit held that freedom of the press is a qualified privi-

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nize a reporter's privilege, either under common law, or any of the other theoretical bases asserted."); Leslie A. Warren, *A Critique of an Illegal Conduct Limitation on the Reporter's Privilege Not to Testify*, 46 FED. COMM. L.J. 549, 553 (1994) (stating that "federal courts have historically rejected a common law privilege protecting journalists from revealing information"). However, other scholars note that "[s]ome judges . . . refused to compel disclosure . . . [while] others . . . imposed remarkably weak penalties for those who failed to comply. We are, therefore, left with the anomaly of the common law. Judges expressly rejected a reporter's privilege, yet when faced with refusal to divulge information, those same judges exercised great leniency." Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, Branzburg v. Hayes, *and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 820 (1983).

Commentators often highlight a situation involving Benjamin Franklin's brother to demonstrate the historical rejection of the journalist's privilege. Baker, *supra* note 6, at 740 (citing Marcus, *supra*, at 817). In 1772, after being offended by an article appearing in a local newspaper, the legislature requested Franklin's brother, a newspaper employee, to appear before a committee. *Id.* The legislature imprisoned Franklin's brother for one month when he refused to disclose the author of the offensive article. *Id. See* Alger, *supra*, at 169 n.76; Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 229 n.1 (1971) (quoting THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (Leonard W. Labaree et al. eds, 1964)). For other examples of early common law cases dealing with the journalist's privilege, see Marcus, *supra*, at 817-18 nn.23, 25-30.

Dean John H. Wigmore, a preeminent legal scholar, argued against the acceptance of a journalist's privilege, and other professional privileges, because "it [had] not been demonstrated 'that the occasional disclosure, in judicial proceedings, of the communication sought to be kept secret would be injurious to the general exercise of the occupation.' " Monk, *supra* note 1, at 3-4 (quoting JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286, at 532 (1961)). When describing the Maryland press shield law, Dean Wigmore remarked that it was " 'as detestable in substance as it is crude in form.' " John W. Zucker, *The Journalist's Privilege, in* TESTIMONIAL PRIVILEGES 8-16 (Scott N. Stone & Ronald S. Leibman eds., 1993) (quoting JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286 n.7 (1961)). For a further discussion of state shield laws, see *id.* at 8-16 to 8-22; *see also infra* note 31.

16. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

17. *Id.* at 547. In *Garland*, Judy Garland, a well known actress, brought an action against CBS for making allegedly defamatory statements, and then later authorizing, the publication of the statements in the print media. *Id.* Marie Torre wrote an article containing the allegedly defamatory statements, in which she attributed the statements to an unnamed CBS executive. *Id.* During pretrial discovery, Garland's attorneys deposed Torre concerning her article. *Id.* When Garland's attorney asked Torre which CBS executive provided the statements, she refused to answer. *Id.* The district court held Torre in contempt after she refused to name the source under a court order. *Id.* Before the Second Circuit, Torre argued that disclosure would "encroach upon the freedom of the press guaranteed by the First Amendment, because 'it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public.' " *Id.* at 547-48.

18. Monk, *supra* note 1, at 18.

lege, not an absolute privilege.[19] The court stated that it must therefore determine "whether the interest to be served by compelling the testimony . . . justifies some impairment of this First Amendment freedom."[20]

Fourteen years later, in *Branzburg v. Hayes*,[21] the Supreme Court addressed whether the First Amendment provided journalists with a privilege against disclosure of sources during a grand jury proceeding.[22] The majority opinion, signed by five Justices,[23] held

19. *Garland*, 259 F.2d at 548.

20. *Id.* Judge Stewart, the author of the *Garland* opinion, stated that forced disclosure of such information might infringe upon the freedom of the press by restricting the accessibility of news. *Id.* Some commentators consider the *Garland* decision to be the foundation for the journalist's First Amendment privilege. Zucker, *supra* note 15, at 8-4. This is likely the result of Judge Stewart's references to relevance, materiality and whether the "question asked . . . went to the heart of the plaintiff's claim." *Garland*, 259 F.2d at 549-50. Subsequent courts have considered *Garland* to be the groundwork for the balancing test standard to determine whether a journalist must reveal his or her sources and information. Monk, *supra* note 1, at 18. For a further discussion of the application of case-by-case balancing tests, see *infra* notes 31-52 and accompanying text.

21. 408 U.S. 665 (1972).

22. *Id.* at 667. In *Branzburg v. Hayes*, the Supreme Court consolidated four cases. *Id.* at 667, 672, 675. In the first case, Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972), a newspaper reporter wrote a story for the *Courier-Journal* of Louisville, Kentucky describing the drug activities of two individuals. Branzburg v. Hayes, 408 U.S. at 667. The newspaper reporter promised the two individuals that he would not reveal their identities. *Id.* at 667-68. The grand jury of Jefferson County subpoenaed the reporter concerning his research for the article, but when he appeared before the grand jury he refused to identify the two sources of his article. *Id.* at 668. The trial judge then ordered the reporter to identify his sources. *Id.* The Kentucky Court of Appeals upheld the trial judge's disclosure order. *Id.* at 668-69.

The second case, Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972), involved the same reporter, but in this situation he wrote an article concerning drug use in Frankfort, Kentucky. Branzburg v. Hayes, 408 U.S. at 669. For his article, the reporter interviewed many drug users and observed them using drugs. *Id.* The Franklin County grand jury subpoenaed the reporter to testify about drug use and the sale of drugs within Franklin County. *Id.* (quoting record without citation). When the reporter moved to quash the summons, the court ordered him to " 'answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him].' " *Id.* at 670 (alteration in original) (quoting record without citation). The Kentucky Court of Appeals upheld the lower court's order requiring disclosure. *Id.* at 670-71.

The third case, In re Pappas, 266 N.E.2d 297 (Mass. 1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972), involved a television newsman-photographer who chronicled the Black Panthers in New Bedford, Massachusetts. Branzburg v. Hayes, 408 U.S. at 672. During a riot in New Bedford on July 30, 1970, the reporter attended a meeting at the Black Panthers' headquarters. *Id.* The Bristol County grand jury summoned the reporter and asked him to testify about the Black Panthers' activities during the riot. *Id.* at 672-73. The reporter sought protection under the First Amendment. *Id.* at 673. The trial judge ruled that a constitutional privilege against disclosure of sources before a grand jury did not exist. *Id.* The Massachusetts Supreme Judicial Court affirmed the trial judge's

that courts may not provide newsgatherers with a privilege to withhold their sources during a grand jury proceeding conducted in good faith.[24]

The positions of the dissenting Justices along with Justice Powell, in his concurring opinion, have been interpreted to contend "that reporters *may have at least a qualified privilege* not to testify about their sources."[25]

In his concurring opinion, Justice Powell stated that "[t]he asserted claim to privilege should be judged on its facts by *the striking of a proper balance* between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal

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decision and rejected the reporter's appeal. *Id.* at 674. The court held that " '[t]he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable questions.' " *Id.* (alteration in original) (quoting *In re Pappas*, 266 N.E.2d at 302-03).

Finally, the case of United States v. Caldwell, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972), involved a reporter who covered the Black Panthers for the *New York Times*. Branzburg v. Hayes, 408 U.S. at 675. A grand jury served a subpoena duces tecum on the reporter. *Id.* A subpoena duces tecum is a "court process . . . compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of person or body served with the process." BLACK'S LAW DICTIONARY 1426 (6th ed. 1990). The reporter was to appear before the grand jury and provide "notes and tape recordings of interviews." Branzburg v. Hayes, 408 U.S. at 675 & n.12. On appeal, the Ninth Circuit held that a qualified testimonial privilege allowed reporters to withhold information absent a "special showing of necessity by the Government" due to the "potential impact of such [a disclosure] on the flow of news to the public." *Id.* at 679.

23. Justice White wrote the majority opinion, which was joined by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist. *Branzburg*, 408 U.S. at 665. Justice Powell filed an additional concurring opinion. *Id.*

24. *Id.* at 690-709. However, the Court recognized that protections for newsgathering did exist. *Id.* at 681. Furthermore, the Court stated that its opinion did not suggest "that news gathering does not qualify for First Amendment protection; without some protection for seeking out news, freedom of the press could be eviscerated." *Id.* However, the Court held that there was

> no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the *consequential, but uncertain*, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Id. at 690-91 (emphasis added).

25. Warren, *supra* note 15, at 555 (emphasis added). The four dissenting Justices included Justices Douglas, Stewart, Brennan and Marshall. *Branzburg*, 408 U.S. at 665. However, the United States Court of Appeals for the Sixth Circuit rejected this interpretation in *In re* Grand Jury Proceeding, 810 F.2d 580, 584 (6th Cir. 1987). For a further discussion of *In re Grand Jury Proceeding*, see *infra* note 32 and accompanying text.

conduct."[26] Similarly, in his dissent, Justice Stewart stated that "[t]he reporter's constitutional right to a confidential relationship with his sources stems from the broad societal interest in a full and free flow of information to the public."[27] Justice Stewart's dissent also proposed a three-part test for overcoming the reporter's privilege against disclosure of sources.[28] Justice Stewart stated that:

> the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[29]

In his dissenting opinion, Justice Douglas remarked that a journalist should always be entitled to an absolute privilege against disclosure of confidential sources of information.[30]

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26. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (emphasis added). In addition, Justice Powell stated that journalists are not left without protection in situations where there is a bad faith investigation, where the requested information bears "only a remote and tenuous relationship to the subject of the investigation" or where the government does not have a legitimate need for the requested information. *Id.* (Powell, J., concurring). Justice Powell's reference to a "remote and tenuous" relationship lends support to the heightened relevancy requirement in formal tests to determine the strength of the journalist's privilege. Zucker, *supra* note 15, at 8-51 to 8-52.

27. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). According to Justice Stewart, society's interest in receiving information was the underlying concern of the Constitution's free press protection. *Id.* at 725-26 (Stewart, J., dissenting) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)). Justices Brennan and Douglas joined Justice Stewart's dissent. *Id.*

28. *Id.* at 743 (Stewart, J., dissenting).

29. *Id.* (Stewart, J., dissenting). Justice Stewart's three-part test is strikingly similar to the test proposed by the individuals who sought the protection of the journalist's privilege in *Branzburg*. Monk, *supra* note 1, at 24 & n.112 (quoting *Branzburg*, 408 U.S. at 680)).

30. *Branzburg*, 408 U.S. at 711-25 (Douglas, J., dissenting). Justice Douglas stated in his dissent that "[i]t is my view that there is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. *His immunity in my view is therefore quite complete.*" *Id.* at 712 (Douglas, J., dissenting) (emphasis added). For an extensive discussion of *Branzburg*, see generally Monica Langley & Lee Levine, Branzburg *Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13 (1988); Donna M. Murasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 TEX. L. REV. 829 (1974).

B. The Post-*Branzburg* Application of the Journalist's Qualified First Amendment Privilege

1. *The Balancing Standard*

A majority of federal courts interpret the *Branzburg* decision as creating a qualified First Amendment privilege for journalists against compelled disclosure.[31] The Sixth Circuit is the only circuit to specifically reject the journalist's qualified privilege.[32] Two fed-

31. Shoen v. Shoen (*Shoen I*), 5 F.3d 1289, 1292 (9th Cir. 1993). For a further discussion of *Shoen I*, see *infra* notes 64-77 and accompanying text.

Dean Carl C. Monk stated that "*Branzburg*, with its amalgam of opinions, has become the cornerstone of what is today the widely-recognized qualified constitutional privilege of a newsperson not to reveal confidential sources." Monk, *supra* note 1, at 19. (footnote omitted). Immediately following *Branzburg*, federal courts "quickly gave notice that the Supreme Court's decision had not been the death knell for the journalist's First Amendment privilege that it might have seemed." Zucker, *supra* note 15, at 8-12 (discussing Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Cervantes v. Time, Inc., 464 F.2d 968 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973)). *But see* Baker, *supra* note 6, at 747 (asserting "[i]mmediately following *Branzburg*, many judges and commentators felt that a journalist's privilege had been completely rejected").

Nine circuits have established a qualified First Amendment privilege for journalists against compelled disclosure. *Shoen I*, 5 F.3d at 1292. *See* LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); United States v. Burke, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977); Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

Additionally, the Supreme Court acknowledged that individual states could create their own degree of protection for journalists. *Branzburg*, 408 U.S. at 706 (stating "we are powerless to bar state courts from . . . construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute"). Presently, a large majority of states recognize a journalist's privilege, either judicially or legislatively. Alger, *supra* note 15, at 157-58 & nn.10-11. *See also* Zucker, *supra* note 15, at 8-16 (stating that "28 states and the District of Columbia had enacted some form of shield law"). In the mid-1970s, Congress attempted, and subsequently failed, to amend Rule 501 of the *Federal Rules of Evidence* by enumerating eleven specific privileges. 120 CONG. REC. H40891 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate). Although Congress did not include the journalist's privilege within this proposed rule, Representative Hungate stated that "[t]he language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspeople any protection they may have from State newsperson's privilege law." *Id.*

32. *Shoen I*, 5 F.3d at 1292 n.5 (citing *In re* Grand Jury Proceedings, 810 F.2d 580, 584-85 (6th Cir. 1987)). In *In re Grand Jury Proceedings*, a group of gang members disclosed, during a videotaped interview, that a member of their gang murdered a local police officer. *In re* Grand Jury Proceedings, 810 F.2d 580, 583 (6th Cir. 1987). To assure the gang's cooperation during future interviews, the re-

eral appellate courts, the Seventh and Eleventh Circuits, have not yet addressed whether *Branzburg* created a journalist's qualified privilege.[33]

The Ninth Circuit, in *Farr v. Pitchess*,[34] became the first federal appellate court to "formally recognize a qualified privilege" for journalists.[35] In *Farr*, a California state court held a newspaper reporter in contempt for failing to identify the sources of statements used in an article he authored.[36] The reporter claimed that the

porter agreed not to disclose any footage showing the member's faces. *Id.* at 582. A Michigan grand jury served a subpoena duces tecum on the television reporter requesting that the reporter produce 60 seconds of film footage containing the faces of gang members. *Id.* at 581-83.

The court held the reporter in civil contempt after he refused to produce the materials. *Id.* at 583. The Sixth Circuit stayed the reporter's incarceration pending disposition of the appeal, but it rejected the reporter's claim for First Amendment protection. *Id.* at 583-84. The court held that *Branzburg* did not establish a qualified privilege, because "acceptance of [that] position . . . would be tantamount to our substituting, as the holding of *Branzburg*, the dissent written by Justice Stewart (joined by Justices Brennan and Marshall) for the majority opinion." *Id.* at 584. Furthermore, the Sixth Circuit refused to accept the "qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority." *Id.* (footnote omitted).

33. *Shoen I*, 5 F.3d at 1292 n.5. However, recently a state supreme court decision within the Seventh Circuit did support the use of the journalist's privilege in a civil malpractice suit. Kurzynski v. Spaeth, 538 N.W.2d 554 (Wis. Ct. App. 1995). In *Kurzynski*, *Milwaukee Magazine* published an article entitled *Bone of Contention* in January of 1994. *Id.* at 556. The article detailed the questionable medical practices of Dr. William Faber and his associates. *Id.* The authors of the article interviewed litigants to the pending lawsuit against the doctors. *Id.* Prior to the article's publication, the doctors' attorney served a subpoena duces tecum on the authors, seeking the production of "[a]ll documents and records pertaining in any way to interviews . . . with any persons in any way related to the litigation." *Id.* at 556-57. The trial court ordered the authors to produce the documents and to testify, but the authors asserted a journalist's privilege against such disclosure. *Id.* at 557. The Court of Appeals of Wisconsin reversed the trial court's order and recognized a qualified journalist's privilege under *Branzburg*. *Id.* at 558-59 (citing Branzburg v. Hayes, 408 U.S. 665 (1972)). *See generally* Marv Balousek, *Appeals Court Ruling Reverses Order for Journalists to Turn Over Materials*, WIS. ST. J., Aug. 2, 1995, at 3C (reporting that appeals court balanced "need to insulate journalists from undue intrusion into their news-gathering activities . . . [against] litigants' need for every person's evidence").

34. 522 F.2d 464 (9th Cir. 1975).

35. Baker, *supra* note 6, at 748. Shortly after the Supreme Court handed down *Branzburg*, the Eighth Circuit recognized the evolution of a qualified privilege against disclosure of confidential sources. Cervantes v. Time, Inc., 464 F.2d 986, 992 n.9 (8th Cir. 1972). In *Cervantes*, a reporter refused to reveal his sources during the pretrial discovery phase of a civil trial. *Id.* at 988-89. The article concerned the mayor of St. Louis' ties to organized crime. *Id.* at 988. In affirming summary judgment for the reporter, the Eighth Circuit held that the libel allegations lacked sufficient substance to require the disclosure of confidential sources. *Id.* at 990-95. *See also* Continental Cablevision, Inc. v. Storer Broadcasting Co., 583 F. Supp. 427, 432-35 (E.D. Mo. 1984) (discussing historical advancement of journalist's privilege and applying case-by-case balancing analysis).

36. *Farr*, 522 F.2d at 466. A state trial judge barred the public dissemination

First Amendment Freedom of the Press clause allowed him to refuse to divulge the names of his confidential sources.[37] On review, the Ninth Circuit applied a balancing test,[38] holding that "the newsman's privilege must yield to the more important and compelling need for disclosure."[39]

Subsequently, other circuits have adopted a balancing test similar to the *Farr* balancing test. In *Riley v. City of Chester*,[40] the United States Court of Appeals for the Third Circuit used a balancing test to determine that a third party newspaper reporter[41] did not have to disclose her confidential sources during a civil trial.[42] After first

of certain prejudicial statements dealing with the Charles Manson murder trial. *Id.* The judge feared that public dissemination of the statements would threaten the viability of a fair trial. *Id.* Shortly after the judge's order, Farr published an article in the *Los Angeles Herald Examiner* containing "full and lurid details" of the prejudicial statements. *Id.* In the judge's chambers, Farr refused to disclose the names of the individuals who provided him with the statements. *Id.* After the Manson trial ended, the trial judge "formally ordered" Farr to defend his nondisclosure of the sources. *Id.* The court held Farr in contempt and incarcerated him. *Id.* The United States District Court for the Central District of California denied Farr's Writ of Habeas Corpus. *Id.* Farr appealed the district court's decision to the Ninth Circuit. *Id.*

37. *Id.* at 467. Farr claimed that he had promised the two sources confidentiality in exchange for the individuals' statements. *Id.* In rejecting this particular use of the journalists' privilege, the Ninth Circuit stated that it "must be accepted factually that the ostensible purpose of the court order was to protect the right of the Manson defendants to a fair trial, free of prejudicial publicity." *Id.*

38. *Id.* at 468. The court stated that "[t]he application of the *Branzburg* holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure *be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest.*" *Id.* (emphasis added). One commentator has argued that courts tend not to conduct "an ad hoc balancing of particulars . . . but instead . . . have considered whether the moving party has demonstrated a sufficiently compelling need for the material to overcome a presumption of protection." Zucker, *supra* note 15, at 8-50.

39. *Farr*, 522 F.2d at 469. The court held that *Branzburg* recognized "some First Amendment protection of news sources." *Id.* at 467. However, the individuals who disclosed the statements to Farr "flagrantly disobeyed" the court's order. *Id.* at 468. According to the court, this action "constituted a direct challenge to the power and duty of the court to protect its processes and to guarantee due process to the accused persons." *Id.* In applying the balancing test, the Ninth Circuit stated that "the First Amendment protection announced by *Branzburg* collided head on with a compelling judicial interest in disclosure of the identity of those persons frustrating a duly entered order of the court." *Id.* Therefore, the court held that the defendant's due process guarantees outweighed Farr's First Amendment interests. *Id.* at 468-69.

40. 612 F.2d 708 (3d Cir. 1979).

41. The journalist's privilege provides the greatest protection to a third party journalist during a civil trial's discovery process. Warren, *supra* note 15, at 558 (citing Continental Cablevision, Inc. v. Storer Broadcast Co., 583 F. Supp. 427, 433 (E.D. Mo. 1984)). *See also* Alger, *supra* note 15, at 175 (asserting that courts are reluctant to order disclosure against nonparty journalists in civil litigation).

42. *Riley*, 612 F.2d at 710-13. William Riley, a Chester police officer running for mayor in the city of Chester, filed a complaint against the mayor of Chester, the

recognizing the existence of a qualified privilege for journalists, the Third Circuit adopted the balancing test set forth by Justice Powell in his *Branzburg* concurring opinion.[43] In *United States v. Cuthbertson*,[44] the Third Circuit extended the use of the *Riley* balancing test to protect unpublished materials during a criminal trial.[45] The

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Chester chief of police, and other Chester employees. *Id.* at 710. He alleged that they violated his constitutional right of freedom to conduct a campaign under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. *Id.* He claimed that the defendants illegally conducted performance investigations of him in his capacity as a police officer and publicly announced the results of the investigations. *Id.* At a hearing on the matter, Riley's attorney called a newspaper reporter to the stand who authored an article containing references to the Riley performance reports. *Id.* He asked the reporter to reveal the source that provided Riley's performance records. *Id.* at 711. Asserting her First Amendment privilege, the reporter refused to disclose her confidential sources. *Id.* Subsequent witnesses testified that the mayor gave them the information regarding Riley's performance records. *Id.* at 712-13. When the defendants moved to dismiss the claims, the trial judge stated, "I will not dismiss the complaint, not until I have heard [the reporter's] testimony." *Id.* at 713. The court held the reporter in contempt for refusing to identify her sources. *Id.* The reporter successfully appealed her contempt order to the Third Circuit. *Id.*

43. *Id.* at 715-16. Quoting from Justice Powell's concurrence in *Branzburg*, the Third Circuit held:

> [t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The *balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

Id. (quoting Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring)). Additionally, the court held that the public interest in protecting newsgatherers' "sources and information warrants an even greater weight" in civil trials. *Id.* (quoting Altemose Constr. Co. v. Building and Constr. Trades Council, 443 F. Supp. 489, 491 (E.D. Pa. 1977)). In deciding that the contempt order needed to be overturned, the court considered the following factors: whether the materiality, relevance and necessity of the information was shown; whether there was an " 'effort to obtain [the information] from other sources;' " and whether the requesting party had demonstrated his "interest in civil litigation . . . is dependent upon the information sought." *Id.* at 716-17 (alteration in original) (quoting Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977)). Using this balancing test, the court decided that necessity for the information did not exist. *Id.* at 717. The court held that the plaintiff failed to exhaust the most reasonable alternative source and that the information was only marginally relevant to the plaintiff's case. *Id.* at 717-18.

44. 630 F.2d 139 (3d Cir. 1980).

45. *Id.* at 146-47. On September 5, 1979, a Newark, New Jersey grand jury indicted several persons involved in "Wild Bill's," a family restaurant franchise, for conspiracy and fraud. *Id.* at 142. Prior to the indictment, a CBS news program, *60 Minutes*, broadcast a segment featuring the restaurant franchise and the ongoing investigation by the FBI and U.S. Attorney's Office into its activities. *Id.* Shortly before trial, "Wild Bill's" served CBS with a subpoena duces tecum. *Id.* After modifying the request, the court ordered CBS to produce numerous documents and audio tapes dealing with the *60 Minutes* broadcast for in camera inspection. *Id.* at 143. A trial judge may order in camera inspection to "inspect a document which counsel wishes to use at trial in his chambers before ruling on its admissibility or its use." BLACK'S LAW DICTIONARY 760 (6th ed. 1990). CBS refused to comply with

court found that "the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case."[46]

The United States Court of Appeals for the First Circuit adopted a balancing test for non-confidential sources, materials and information in *United States v. LaRouche Campaign*.[47] Explaining its balancing test, the court stated that First Amendment interests[48] must be balanced against the defendants' interests.[49] After applying the balancing test, the court held that the defendants' in-

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this order under its First Amendment privilege. *Cuthbertson*, 630 F.2d at 143. The court held CBS in civil contempt, imposing a fine of one dollar per day. *Id.*

46. *Cuthbertson*, 630 F.2d at 147. The Third Circuit held that a defendant's rights in a criminal trial "are important factors that must be considered in deciding whether . . . the privilege must yield to the defendant's need for the information." *Id.* In *Cuthbertson*, however, the Third Circuit refused to formalize an approach for determining when the journalist's privilege must yield. *Id.* at 148. By applying the balancing standard, the court held that the requesting party met its burden by showing that the information was unavailable from any other source. *Id.* The Third Circuit, like the district court, ordered disclosure of the material for in camera review. *Id.* at 148-49. Subsequently, the Third Circuit and district courts within the Third Circuit have followed the balancing approach set forth in *Riley* and *Cuthbertson*. *See* United States v. Criden, 633 F.2d 346, 357-360 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); Doe v. Kohn, Nast & Graf, P.C., 853 F. Supp. 150, 151-52 (E.D. Pa. 1994); United States v. McGoldrick, 796 F. Supp. 178, 179-80 (E.D. Pa. 1992); Parsons v. Watson, 778 F. Supp. 214, 217-19 (D. Del. 1991); *In re* Williams, 766 F. Supp. 358, 367-69 (W.D. Pa. 1991), *aff'd*, 963 F.2d 567 (3d Cir. 1992).

47. 841 F.2d 1176 (1st Cir. 1988). Lyndon H. LaRouche, a 1984 presidential candidate, along with "The LaRouche Campaign," and 17 other individuals and entities were indicted for mail fraud, wire fraud and for conspiracy to obstruct justice. *Id.* at 1177. All of the charges related to LaRouche's 1984 presidential campaign. *Id.* Prior to the indictment, NBC interviewed one of the individual defendants for one hour and forty-five minutes, of which NBC later broadcast only one minute. *Id.* Shortly thereafter, the other defendants served a subpoena duces tecum on NBC seeking the video interview and the payment records concerning the interviewee defendant. *Id.* After NBC sought protection under the First Amendment, the trial court ordered NBC to produce the documents for in camera review. *Id.* at 1178. It ordered the production because "the showing made by . . . NBC . . . [was] a weak showing relative to . . . the interests commonly implicated in circumstances in which the assertion of the news gatherers' privilege is invoked." *Id.* (alteration in original) (quoting district court's decision). The court noted that it was dealing with nonconfidential materials, and stated that the lack of confidential sources makes the search for First Amendment interests a far more elusive task. *Id.* at 1181.

48. *Id.* at 1181-82. NBC submitted an affidavit to the court outlining its First Amendment interests. *Id.* The First Circuit deemed the interests legitimate, and included them within its balancing test approach. *Id.* at 1182. The First Amendment interests are:

> "the threat of administrative and judicial intrusion" into the newsgathering and editorial process; the disadvantage of a journalist appearing to be "an investigative arm of the judicial system" or a research tool of government or of a private party; the disincentive to "compile and preserve non-

terests outweighed the news agency's First Amendment interests.[50] Additionally, the United States Court of Appeals for the D.C. Circuit adopted the balancing approach favored by the Third Circuit in *Riley*.[51] In weighing the various interests, the D.C. Circuit looked

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broadcast material"; [sic] and the burden on journalists' time and resources in responding to subpoenas.

Id. (quoting affidavit from Thomas Ross, Senior Vice President of *NBC News*). To amplify its concern over the possible infringement of the freedom of the press, the court stated that "[w]e discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled." *Id.*

49. *Id.* In support of their request for production, the defendants relied upon their Fifth Amendment rights to a fair trial and their Sixth Amendment rights to compulsory process and effective confrontation and cross-examination of adverse witnesses. *Id.* The Sixth Amendment of the Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The Fifth Amendment states that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V. The Framers of the Bill of Rights did not prioritize the Amendments numerically; therefore, the court is required to balance the First Amendment against the Fifth and Sixth Amendments on a case-by-case basis. Warren, *supra* note 15, at 559.

50. *LaRouche Campaign*, 841 F.2d at 1182. In affirming the production order, the court emphasized certain factors that narrowed its holding, which included the criminal nature of the litigation, that the requested materials concerned an important, hostile witness and the fact that the comprehensive interview was likely to produce a basis for impeachment. *Id.*

51. *See* Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981). In *Zerilli*, the D.C. Circuit first adopted the qualified journalist's privilege for use in the civil context. *Id.* Two individuals accused of conspiracy to violate the Federal Travel Act brought suit against the U.S. Attorney General, the Director of the FBI and the Department of Justice. *Id.* at 706. They claimed that the various government agencies allowed sealed court documents concerning their illegal activities to be leaked to a Detroit newspaper. *Id.* at 706-07. The *Detroit News* had published a series of articles entitled *Inside the Mafia*. *Id.* at 707. The article contained characterizations of the two accused individuals as a Detroit organized crime leader and an organized crime cohort. *Id.* The reporter stated that the information contained in the article was based on FBI logs. *Id.* The defendants did not seek discovery against certain individuals whom the government conceded had access to the wiretap logs. *Id.* at 708. However, the defendants sought to depose the "*Detroit News* reporters regarding the identity of the individuals who had released the wiretap logs." *Id.* at 709.

The *Detroit News* reporter "refused to answer, relying on a First Amendment privilege not to disclose information tending to identify confidential sources." *Id.* at 709 (footnote omitted). The district court denied the defendants' motion to compel because "it was unable to find a compelling interest sufficient to warrant subordination of First Amendment values" and the defendant failed to exhaust

to more precise guidelines in balancing the interests on a case-by-case basis, such as the efforts of the requesting party to "obtain the information from alternative sources," whether the journalist is a party to the litigation and whether the "information sought goes to 'the heart of the matter.' "[52]

2. *The Formalized Three-Part Test*

Other circuit courts have created or adopted a three-part or a four-part test to determine whether the journalist must be required to disclose his sources, information or materials.[53] In 1980, the United States Court of Appeals for the Fifth Circuit decided *Miller v. Transamerican Press, Inc.*[54] In this decision, the Fifth Circuit applied a three-part test based on the Second Circuit's holding in *Garland v. Torre.*[55] In deciding whether a journalist had to disclose the confidential source of his information, the court held that the fol-

alternative sources for the information. *Id.* (citing Zerilli v. Bell, 458 F. Supp. 26 (D.D.C. 1978)).

52. *Id.* at 713-14 (quoting Carey v. Hume, 492 F.2d 631, 634 (D.C. Cir.), *cert. dismissed,* 417 U.S. 938 (1974)). Additionally, the court implied that questioning an additional 60 possible sources would not be an unreasonable requirement. Zucker, *supra* note 15, at 8-55 (citing *Zerilli,* 656 F.2d at 715 n.53). *See also* Clyburn v. News World Communications, Inc., 903 F.2d 29, 35 (D.C. Cir. 1990) (recognizing qualified journalist's privilege under *Zerilli*); Grunseth v. Marriott Corp., 868 F. Supp. 333, 334-37 (D.D.C. 1994) (same).

53. For an example of a formalized test, see Los Angeles Memorial Coliseum Comm'n v. NFL, 89 F.R.D. 489 (C.D. Cal. 1981), in which the United States District Court for the Central District of California applied a four-part test in determining whether to quash a defendant's subpoena in a civil trial. *Id.* at 494, 496. The court concluded that:

> [i]n civil cases, courts faced with motions to enforce or to quash subpoenas directed against non-party journalists have refused to enforce such subpoenas, absent a showing: (1) that the information is of certain relevance; (2) that there is a compelling reason for disclosure; (3) that other means of obtaining the information have been exhausted; and (4) that the information sought goes to the heart of the seeker's case.

Id. at 494 (citing Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972); Garland v. Torre, 259 F.2d 545 (2d Cir. 1958); Zerilli v. Bell, 458 F. Supp. 26 (D.D.C. 1978); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978); Altemose Constr. Co. v. Building and Constr. Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977); Gilbert v. Allied Chem. Corp., 411 F. Supp. 505 (E.D. Va. 1976)).

54. 621 F.2d 721 (5th Cir. 1980).

55. *Id.* at 726. In *Miller, Overdrive Magazine* published an article in 1972 entitled *Central State Pension Fund-How Your Sweat Finances Crooks' Cadillacs. Id.* at 723. The article alleged that the plaintiff, Miller, fraudulently embezzled $1.6 million out of a pension fund. *Id.* Miller filed a libel suit against the journalists and sought to discover the confidential source used in the article. *Id.* After ruling three times against compelled disclosure due to the availability of other means of proving recklessness, the district judge ordered disclosure, "concluding that the informant's identity went to the heart of the matter." *Id.* For a further discussion of *Garland,* see *supra* notes 16-20 and accompanying text.

lowing questions must be posed: "(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information."[56] Subsequent to *Miller*, the United States Court of Appeals for the Fourth Circuit adopted the *Miller* test to protect confidential sources used in the production of a television program.[57] The Second Circuit applied a heightened three-part test to determine that a publishing company could refuse to reveal information dealing with confidential sources in *In re Petroleum Products*.[58] The court held that "disclosure may be

56. *Miller*, 621 F.2d at 726. The Fifth Circuit determined that the district court was correct in holding that the information was relevant and that the plaintiff had exhausted reasonable alternative means for obtaining the information. *Id.* The court held that the requesting party demonstrated that a compelling interest existed under the third prong of its test because he needed to know the identity of the confidential source to prove actual malice. *Id.* at 726-27.

Subsequent courts within the Fifth Circuit have followed the *Miller* decision. *See generally In re* Selcraig, 705 F.2d 789, 792-99 (5th Cir. 1983); Holland v. Centennial Homes, Inc., Nos. 3:92-CV-1533-T, 3:92-CV-1534-T, 1993 WL 755590, at *3-*6 (N.D. Tex. Dec. 21, 1993); Cinel v. Connick, 792 F. Supp. 492, 498-500 (E.D. La. 1992), *aff'd*, 15 F.3d 1338 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 189 (1994); Karem v. Priest, 744 F. Supp. 136, 138-42 (W.D. Tex. 1990).

A relevancy requirement, such as the one set forth in *Miller*, serves as a heightened version of Rule 401 of the *Federal Rules of Evidence*. Zucker, *supra* note 15, at 8-51. *See also* Andrew J. Norris, *To Divulge or Not to Divulge: The Ability of an Agricultural Researcher to Avoid CERCLA's Affirmative Disclosure Requirements*, 9 J. LAND USE & ENVTL. L. 327, 339 (1994) (stating that "heart of the claim" requirement is heightened relevancy standard) (citing FED. R. CIV. P. 26(b)). Rule 401 states: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

57. LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir. 1986). The Fourth Circuit adopted the *Miller* three-part test to balance the competing interests at issue in *LaRouche*. *Id.* In *LaRouche*, NBC News published two separate television programs concerning Lyndon H. LaRouche. *Id.* at 1136. One of the programs aired on the *NBC Nightly News* and the other aired on *First Camera*. *Id.* LaRouche alleged that the two programs contained defamatory statements about him. *Id.* He moved to compel, from NBC, a list of the sources responsible for providing the information dealing with his beliefs, his organization and his alleged proposal to assassinate President Jimmy Carter. *Id.* at 1136-37. When applying the three-part test, the court held that the attorneys for LaRouche did not exhaust reasonable alternative means for obtaining the requested information. *Id.* at 1137. Subsequent cases within the Fourth Circuit have embraced the *LaRouche* decision. *See* Church of Scientology Int'l v. Daniels, 992 F.2d 1329, 1335 (4th Cir.), *cert. denied*, 114 S. Ct 195 (1993); *In re* Shain, 978 F.2d 850, 854-55 (4th Cir. 1992) (Wilkinson, J., concurring); Stickels v. General Rental Co., 750 F. Supp. 729, 731-33 (E.D. Va. 1990). For a further discussion of the *Miller* test, see *supra* notes 54-56 and accompanying text.

58. 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982). The *Petroleum Products* case began with a lawsuit filed by the states of Arizona, California, Florida, Oregon and Washington against 17 oil companies for their alleged violation of federal antitrust laws. *Id.* at 6. The states alleged that the oil companies conspired to set prices for refined oil products and the conspiracy was possibly "facilitated by communications to and from trade publications." *Id.* at 7. The states served a

ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."[59] Subsequently, the Second Circuit applied the *Petroleum Products* test during a criminal case in *United States v. Burke.*[60] In *Burke,* the court held that the third party journalists did not have to disclose nonconfidential materials.[61] Recently, the United States District Court for the Southern District of New York applied the *Petroleum Products* test to a request for nonconfidential information during a civil trial.[62] The court required disclosure because it found the information highly material and relevant, necessary and critical to the defense, and unavailable from another source.[63]

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subpoena duces tecum on the publisher of *Platt's Oilgram Price Report* seeking the "production of any document referring to communications concerning petroleum products prices for the period 1970-73." *Id.* (citing the subpoena issued to *Platt's Oilgram Price Report*). The publisher refused to produce the documents, which contained information dealing with confidential sources, under the journalist's privilege. *Id.* The trial judge ordered the publisher to produce the names and documents because the need for disclosure outweighed the privilege against such a disclosure. *Id.* Upon the publisher's continued refusal, the court fined the publisher $100 per day for civil contempt. *Id.*

59. *Id.* (citing Baker v. F & F Inv., 470 F.2d 778, 783-85 (2d Cir. 1972)). The court stated that its adherence to this test would "protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources." *Id.* The court applied its three-part test and held that there was an insufficient basis for requiring the publishing company to disclose its sources because the states did not seek the information from any other means, nor did they prove that the publisher was involved with the price-setting. *Id.* at 8. Additionally, the court held that there was less interest in disclosure here than in *Branzburg* because this case dealt with a civil matter and *Branzburg* dealt with a grand jury proceeding. *Id.* at 9.

60. 700 F.2d 70 (2d Cir. 1983).

61. *Id.* at 76-78. In *Burke,* a criminal defendant served a subpoena on the magazine *Sports Illustrated* and on one of its journalists. *Id.* at 76. The defendant sought "virtually every document and tape" dealing with an article co-written by another defendant. *Id.* The trial court held that the defendant's need for the information, to impeach testimony, did not defeat the journalist's First Amendment privilege. *Id.* On appeal, although the Second Circuit held that the criminal nature of the litigation may be an important factor, the court barred disclosure because the defendant failed to "make the clear and specific showing that [the] documents were necessary or critical to the maintenance of his defense." *Id.* at 77.

62. *In re* NBC, No. M8-85, 1995 WL 598972, at *2 (S.D.N.Y. Oct. 10, 1995).

63. *Id.* at *1. *Dateline,* an NBC news program, aired a segment on infant deaths caused by Graco Converta-Cradles. *Id.* The segment contained interviews with the plaintiffs to a product liability suit against the cradle manufacturer, Graco Children's Products (Graco). *Id.* Graco served a subpoena on NBC seeking the interview outtakes and the interview notes. *Id.* NBC filed a motion to quash the subpoena under the New York State Shield Law, the New York State Constitution and the First Amendment to the United States Constitution. *Id.* During oral argument, Graco limited its request to the interview outtakes. *Id.* NBC admitted, during oral argument, that the information was nonconfidential and that the individuals being interviewed did not have an expectation of confidentiality. *Id.*

III. *SHOEN V. SHOEN*

A. Factual Background

Ronald Watkins, an author of investigative books,[64] contracted with a major publishing company to write *Birthright: Murder, Greed and Power in the U-Haul Family Dynasty*.[65] This book chronicled the bitter Shoen family feud.[66] In a portion of the book, Watkins also detailed the 1990 brutal death of Eva Berg Shoen, who was mur-

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The district court applied the three-part *Petroleum Products* test and held that NBC must observe the subpoenas and produce any video out-takes of interviews of the plaintiffs. *Id.* at *1-*2. The court stated that the requested outtakes were highly material and relevant because it contained the plaintiffs' inconsistent statements; it was necessary and critical because it provided a defense for Graco and it was unavailable from other sources because it was solely in NBC's control. *Id.* at *1.

See also United States v. Hendron, 820 F. Supp. 715, 716-18 (E.D.N.Y. 1993) (applying three-part *Burke* test to disclosure request for third party reporter's nonconfidential materials during criminal trial); Don King Prod. v. Douglas, 131 F.R.D. 421, 422-27 (S.D.N.Y. 1990) (applying three-part *Burke* test to disclosure request for third party reporter's nonconfidential materials during civil trial); Westmoreland v. CBS, 97 F.R.D. 703, 704-06 (S.D.N.Y. 1983) (applying three-part *Petroleum Products* test to disclosure request for defendant's nonconfidential "self-evaluative analysis" during civil trial). For examples of courts which followed both the *Burke* decision and the *Petroleum Products* decision, see United States v. Cutler, 6 F.3d 67, 70-72 (2d Cir. 1993); Aequitron Medical, Inc. v. CBS, No. 93 Civ. 950 (DC), 1995 WL 406157, at *2-*3, (S.D.N.Y. July 10, 1995); *In re* Behar, 779 F. Supp. 273, 274-76 (S.D.N.Y. 1991); United States v. Marcos, No. SSSS 87 CR. 598 (JFK), 1990 WL 74521, at *2-*3 (S.D.N.Y. June 1, 1990).

64. Shoen v. Shoen (*Shoen II*), 48 F.3d 412, 413 (9th Cir. 1995). Prior to his book on the Shoen family, Ronald Watkins wrote two non-fiction investigative books. Shoen v. Shoen (*Shoen I*), 5. F.3d 1289, 1290 n.1 (9th Cir. 1993). His first book, *High Crimes and Misdemeanors*, was about the impeachment of Evan Mecham, the former governor of Arizona, and his second book, *Evil Intentions*, detailed the murder of Suzanne Rossetti. *Id.*

65. RONALD J. WATKINS, BIRTHRIGHT: MURDER, GREED AND POWER IN THE U-HAUL FAMILY DYNASTY (1993) [hereinafter BIRTHRIGHT]. William Morrow & Company published BIRTHRIGHT in December 1993. Elliot B. Smith & Jeff Rowe, *Business Bookshelf*, SAN DIEGO UNION-TRIB., Dec. 14, 1993, at C-6.

66. *Shoen II*, 48 F.3d at 413; *Shoen I*, 5 F.3d at 1290. The Shoen family owns and controls the U-Haul rental truck company. *Shoen I*, 5 F.3d at 1290. The Shoen family feud originated in 1987 when Joe Shoen, son of U-Haul founder Leonard Shoen, removed his father from the U-Haul Board of Directors. Catherine Reagor, *U-Haul Fights $1.47 Billion Verdict in Family Feud*, BUS. J. (Phoenix), Oct. 14, 1994, § 1, at 3. At that point, Leonard Shoen and several of the twelve Shoen children, owners of 47% of the U-Haul stock, sought to either sell the company or take it public. *Id.* To prevent the takeover, Joe Shoen issued 8,099 shares of stock, an act which gave the board of directors majority control and blocking any coup attempt by the L.S. Shoen group. *Id.* On October 7, 1994, a jury decided that Joe Shoen and other members of the board of directors acted improperly to defeat the coalition's plans. *Author of Book on U-Haul Family Feud Spared Jailing*, ROCKY MOUNTAIN NEWS (Denver), Feb. 17, 1995, at A22 [hereinafter *Author of Book on U-Haul Family Feud*]; Reagor, *supra*, at 3. The trial judge later reduced the jury's $1.48 billion damage award to $461.8 million. *Id. See generally* Shoen v. Amerco, 885 F. Supp. 1332 (D. Nev. 1994) (describing Shoen family feud and lawsuit between Shoen family members over control of U-Haul); Amerco v. Shoen, 907 P.2d 536,

dered at the family's cabin in Telluride, Colorado.[67] In exchange for a series of interviews, Watkins agreed to share royalties and proceeds with the U-Haul founder, Leonard Shoen.[68] Leonard Shoen and Watkins did not keep their agreement secret and there was no expectation of confidentiality for the interviews.[69] Beginning in September 1991, Watkins interviewed Leonard Shoen numerous times concerning the Shoen family, the battle for control of U-Haul and the unsolved Shoen murder.[70]

Prior to his interviews with Ronald Watkins, "Leonard Shoen made at least 29 public statements, most to the press, implicating his sons, Mark and Edward in the death of Eva Berg Shoen."[71] Because of the severity of these statements, Mark and Edward Shoen filed a defamation action against their father, alleging damage to their reputations occasioned by his public statements.[72]

B. Procedural Background

During pretrial discovery, Mark and Edward Shoen served Watkins with a subpoena duces tecum, to gain insight into their father's public statements.[73] At his deposition, Watkins declined to pro-

537 (Ariz. Ct. App. 1995) (describing "many battles in the ongoing Shoen family war for control of the U-Haul corporate empire").

67. *Shoen II*, 48 F.3d at 413. Eva Berg Shoen was the wife of Sam Shoen, Leonard Shoen's oldest son. *Shoen I*, 5 F.3d at 1290. When the Ninth Circuit decided *Shoen I*, the 1990 murder remained unsolved. *Id.* In July 1993, authorities arrested Frank Marquis in connection with the murder. Brent Whiting, *Killer of U-Haul Heiress Sentenced in Plea Bargain*, ARIZ. REPUBLIC, Nov. 24, 1994, at B1. On November 24, 1994, a Colorado court sentenced Marquis to 24 years in jail under a plea bargain agreement. *Id.* As part of the plea bargain, Marquis had to assist the police in locating evidence and answer other questions concerning Eva Berg Shoen's death. *Id.*

68. *Shoen II*, 48 F.3d at 413.

69. *Shoen I*, 5 F.3d at 1290.

70. *Shoen II*, 48 F.3d at 413; *Shoen I*, 5 F.3d at 1290. Watkins tape recorded several of the interviews. *Shoen I*, 5 F.3d at 1290.

71. *Shoen II*, 48 F.3d at 413. Leonard Shoen made the allegedly defamatory statements between September 1990 and August 1991. *Id.* at 417.

72. *Id.* at 413. The two sons claimed that the allegedly defamatory statements caused irreparable damage to their reputation. Ellen Miller, *U-Haul Heir Speaks Out About Murder*, DENVER POST, Nov. 2, 1994, at A1. They also claimed that Leonard Shoen and their older brother Sam Shoen hired a public relations firm to link them to the murder. *Id.*

73. *Shoen II*, 48 F.3d at 414. Mark and Edward Shoen did not allege that their father made any defamatory statements to Watkins. *Id.* However, they wanted Watkins to appear for a deposition and bring any document or recording dealing with the Shoen family feud and the death of Eva Berg Shoen. *Id.* Watkins sought protection under the Arizona press shield law. *Shoen I*, 5 F.3d at 1291. The district court rejected this attempt because the Arizona Court of Appeals interpreted this statute to exclude investigative book authors from its protection. *Id.* at 1291 n.3 (citing Matera v. Superior Court, 825 P.2d 971 (Ariz. Ct. App. 1992)).

duce documents or recordings or to answer questions dealing with his interviews of Leonard Shoen.[74] The United States District Court for the District of Arizona held Watkins in contempt when he refused to appear at his second scheduled deposition.[75] The Ninth Circuit reversed the contempt order and remanded the case to the district court.[76] In *Shoen I*, the Ninth Circuit decided three main issues: first, that an investigative book author can have standing to invoke the journalist's privilege; second, that the journalist's privilege can protect nonconfidential resource materials; and third, that the plaintiffs, the Shoen brothers, failed to meet the threshold requirements for disclosure.[77]

Three days after the Ninth Circuit remanded the case back to the district court, the plaintiffs again sought to compel disclosure from Watkins because they had recently deposed Leonard Shoen.[78]

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74. *Shoen I*, 5 F.3d at 1291. Mark and Edward Shoen filed a motion to compel the production of the documents and testimony when Watkins failed to comply with the subpoena duces tecum. *Id.* In response, Watkins asserted that disclosure of the information dealing with Leonard Shoen's interviews would infringe upon his journalist's qualified privilege under the First Amendment. *Id.* The district court granted the motion to compel. *Id.* The court rejected Watkins' argument and held that "the qualified privilege must yield to the plaintiffs' litigation needs." *Id.*

75. *Id.* In ordering Watkins to testify, the court held that Mark and Edward Shoen "were entitled to 'each and every method, mode, scrap of paper, computer disk, note, recollection, shred of evidence that would evidence' Leonard Shoen's communications to Watkins on matters concerning 'the murder, the family feud, and any statements made as to . . . the plaintiffs [Mark and Edward Shoen] themselves.' " *Id.* (alteration in original) (quoting telephone conference between court and parties).

76. *Id.* at 1298.

77. *Id.* at 1293-98. First, the court adopted the Second Circuit's test to determine that Watkins did have standing to invoke the privilege because he was an investigative book author. *Id.* at 1293 (citing von Bulow v. von Bulow, 811 F.2d 136 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987)). The Second Circuit's test looks to "whether the person seeking to invoke the privilege had 'the intent to use material—sought, gathered or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process.' " *Id.* (alteration in original) (quoting *von Bulow*, 811 F.2d at 144). Second, the court held that the journalist's privilege could protect a journalist's nonconfidential material. *Id.* at 1295. Third, the Ninth Circuit held that Mark and Edward Shoen failed to meet the threshold requirements for compelling disclosure because they did not exhaust "all reasonable alternative means for obtaining the information." *Id.* at 1296 (citing Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981)). Therefore, they did not "demonstrate a sufficiently compelling need for the journalist's materials to overcome the privilege." *Id.* For a discussion of Second Circuit case law regarding the journalist's privilege, see *supra* notes 58-63 and accompanying text.

78. *Shoen II*, 48 F.3d at 414. The plaintiffs deposed Leonard Shoen during the period between the oral argument and the Ninth Circuit's decision. *Id.* According to the plaintiffs, by deposing Leonard Shoen they had exhausted all reasonable alternative sources for the material and were entitled to the tapes and notes of the interviews between Watkins and Leonard Shoen. *Id.*

The district court ruled that the plaintiffs exhausted all reasonable sources for the information and granted the motion to compel Watkins' disclosure of the requested information.[79] Watkins again refused to attend his deposition or produce the requested materials.[80] The district court declared Watkins a recalcitrant witness and ordered his incarceration under 28 U.S.C. § 1826(a).[81] Ronald Watkins then appealed the district court's ruling to the Ninth Circuit.[82]

IV. NARRATIVE ANALYSIS

A. The Majority Opinion

In *Shoen II*, the Ninth Circuit reviewed the district court's order compelling Watkins to produce his nonconfidential materials gathered during the interviewing process.[83] The primary issue before the Ninth Circuit thus became "whether [the] plaintiffs had demonstrated a 'sufficiently compelling need' for the requested materials to overcome Watkins' assertion of the journalist's

79. *Id.* The district court ordered Watkins to attend the deposition and to produce for examination materials dealing with the Shoen family feud and Eva Berg Shoen's murder. *Id.*

80. *Id.* On August 19, 1994, the court held an oral argument to determine whether Watkins should be held in contempt for his failure to comply with the court's order. *Id.* After the oral argument, the court held that Watkins would be incarcerated unless he immediately complied with the courts' previous order. *Id.*

81. *Id.* 28 U.S.C. § 1826(a) states:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of-
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

28 U.S.C. § 1826(a) (1994).

82. *Shoen II*, 48 F.3d at 414. The Ninth Circuit "stayed the incarceration order pending disposition" of Watkins' appeal. *Id.*

83. *Id.* at 414. As a preliminary matter, the court noted that all but one of the circuits that have addressed *Branzburg*, interpreted it as establishing a journalist's qualified privilege against disclosure of information gathered in the course of their work. *Id.* (citing *Shoen I*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993)). The court affirmed its *Shoen I* decision concerning two of the three issues present on appeal. *Id.* First, the court affirmed the holding that the journalist's privilege extends to investigative book authors and, second, that the journalist's privilege can protect nonconfidential sources and materials. *Id.*

privilege."[84]

Watkins argued that the Ninth Circuit had adopted a four-part test in *Shoen I* to determine whether the journalist's privilege must yield.[85] In its holding, the district court had applied a three-part test based upon its interpretation of *Shoen I*.[86] However, the Ninth Circuit rejected both Watkins' and the district court's tests, finding instead that "the *Shoen I* court did not adopt a test for determining whether the requesting party has a compelling need sufficient to override the privilege."[87]

The court stated, in reaffirming its acceptance of a qualified journalist's privilege, that the *Shoen I* court only observed the use of a balancing test and thus did not enumerate a clear standard to determine whether the journalist's privilege is overcome by the need for the requested information.[88] The Ninth Circuit decided that the time had come to formalize the required specific showing in its balancing of competing interests.[89]

In evaluating the various First Amendment interests involved,

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84. *Id.* at 414-415 (citing *Shoen I*, 5 F.3d at 1296).

85. *Id.* at 415. In addition to the three-part test used by the district court, Watkins contended that a fourth element should look to whether the requesting party had demonstrated that "the requested information goes to the 'heart of the seeker's case.' " *Id.* Watkins argued that the Ninth Circuit, in *Shoen I*, adopted the four-part test set forth by the United States District Court of the Central District of California in Los Angeles Memorial Coliseum Comm'n v. NFL, 89 F.R.D. 489 (C.D. Cal. 1981). *Shoen II*, 48 F.3d at 415. For a discussion of *Los Angeles Memorial Coliseum Comm'n*, see *supra* note 53.

86. *Shoen II*, 48 F.3d at 415-16. After the *Shoen I* court remanded the case, the district court adopted a three-part test which examined the following: "(1) whether the requesting party has exhausted all reasonable alternative sources; (2) whether the information sought is relevant, material, and noncumulative; and (3) whether the information sought is crucial to the maintenance of the plaintiffs' legal claims." *Id.* at 415.

87. *Id.* The Ninth Circuit found Watkins' argument "unpersuasive." *Id.* Watkins based his argument upon the *Shoen I* court's reference, in a footnote, to *Los Angeles Memorial Coliseum Comm'n*. *Id.* The Ninth Circuit remarked that "[s]urely, had the court chosen to announce such a test, it would not have done so in a footnote." *Id.*

88. *Id.* The *Shoen I* court followed the earlier Ninth Circuit *Farr* decision which held, "the process of deciding whether the privilege is overcome requires that 'the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest.' " *Shoen I*, 5 F.3d at 1292-93 (quoting Farr v. Pitchess, 522 F.2d 464, 468 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)) *quoted in Shoen II*, 48 F.3d at 415. The prior use of a mere balancing test led the *Shoen II* court to proclaim that "[w]e have yet to formalize this balance by identifying the specific showing required to pierce the journalist's privilege." *Shoen II*, 48 F.3d at 415 (citing LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981)).

89. *Shoen II*, 48 F.3d at 415. The court stated that there were two reasons for creating a specific test: to alleviate the courts' and the parties' uncertainty over the

the court held that "[t]he test we adopt must . . . ensure that compelled disclosure is the exception, not the rule."[90] To amplify the importance of the journalist's privilege, the court proclaimed that the significance of the privilege will be substantially diminished if it "does not prevail in all but the most exceptional cases."[91]

The Ninth Circuit further noted that no other circuit had adopted a specific test to determine when a journalist must produce nonconfidential information.[92] The court recognized that a few circuits did establish tests to determine when the privilege should yield to a civil litigant's need for the identity of confidential sources.[93]

With the facts of *Shoen II* and the background of the journalist's privilege expressed, the Ninth Circuit established its test as follows:

> [W]here information sought is not confidential, a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege by a nonparty only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable al-

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privilege's application and to finally resolve whether Watkins must provide the requested materials to the Shoen brothers. *Id.*

90. *Id.* at 416. The Ninth Circuit, when deciding what test to accept, "recognize[d] that routine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process." *Id.* at 415-16. The court noted " 'a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled.' " *Id.* at 416 (citing United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988)). In addition, the court cited the First Circuit's *LaRouche Campaign* decision as setting forth a list of First Amendment media interests against compelled disclosure. *Id.* For a discussion of the First Circuit's proposed First Amendment media interests, see *supra* note 48 and accompanying text.

91. *Shoen II*, 48 F.3d at 416 (quoting *Zerilli*, 656 F.2d at 712).

92. *Id.* The court stated that under the facts presented in *Shoen II*, Leonard Shoen was not considered a confidential source nor did he request that his interviews with Watkins not be disclosed to third parties. *Id.*

93. *Id.* In particular, the Ninth Circuit highlighted the test used by the Second Circuit in *In re Petroleum Products*. *Id.* The Second Circuit held that "disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *Id.* (quoting *In re* Petroleum Products, 680 F.2d 5, 7 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982)). The Ninth Circuit also cited the Fourth, Fifth and D.C. Circuits as jurisdictions that have adopted and applied similar tests. *Id.* (citing LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir. 1986); *Zerilli*, 656 F.2d at 713-15; Miller v. Transamerican Press, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)). For a further discussion of the various tests applied in other circuits, see *supra* notes 31-63 and accompanying text.

> ternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. We note that there must be a showing of actual relevance; a showing of potential relevance will not suffice.[94]

In applying its newly adopted test, the Ninth Circuit considered the plaintiffs' position, whereby their need for the information outweighed Watkins' First Amendment interests.[95] The plaintiffs further argued that the information could demonstrate that Leonard Shoen made the allegedly defamatory statements with actual malice and such information could be used to impeach his testimony.[96]

The Ninth Circuit, however, rejected this argument and held that the plaintiffs' request for the privileged information failed the second and third prongs of the newly adopted test.[97] Thus, the

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94. *Shoen II*, 48 F.3d at 416. Prior to adopting its test, the court noted that the *Shoen I* court had "observed that 'the lack of a confidential source may be an important element in balancing the . . . need for the material sought against the interest of the journalist in preventing production in a particular case.' " *Id.* (quoting United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981)) (alteration in original). This "confidential source" element, cited from *Cuthbertson*, apparently influenced the Ninth Circuit in its decision to adopt the *Shoen II* test. *Id.* (stating newly adopted three-part test directly after above cited *Cuthbertson* quotation).

95. *Id.* at 416-18.

96. *Id.* at 416-17. The plaintiffs felt the information could impeach Leonard Shoen's testimony because Leonard Shoen testified during his deposition that he "loved his sons and harbored no ill will toward them." *Id.* at 417.

97. *Id.* at 417. Under New York Times v. Sullivan, 376 U.S. 254 (1964), the plaintiffs were considered to be public figures and, therefore, had to prove that Leonard Shoen made the statements knowing they were "(1) false, and (2) . . . with knowledge of their falsehood or with reckless disregard of the truth." *Shoen II*, 48 F.3d at 417 (citing *Sullivan*, 376 U.S. at 279-80). Under Arizona defamation law, public figures may rely on circumstantial evidence of ill will in their efforts to prove the *New York Times v. Sullivan* definition of actual malice. Currier v. Western Newspapers, Inc., 855 P.2d 1351, 1355 (Ariz. 1993) (citing Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562, 574 (Ariz. 1986)). In *Shoen II*, the plaintiffs argued that the contents of the Watkins' interview could prove their father's ill will. *Shoen II*, 48 F.3d at 417.

First, the Ninth Circuit held that the plaintiff must prove actual malice at the time the allegedly defamatory statements were made. *Id.* (citing New York Times v. Sullivan, 376 U.S. at 280). Therefore, Leonard Shoen's interviews with Watkins could not be considered "*clearly relevant* to an important issue in this litigation." *Id.* (emphasis added). Secondly, the Ninth Circuit held that "the requested material is also cumulative insofar as it pertains to the question of ill will." *Id.* During the Shoen litigation, Leonard Shoen had already made statements demonstrating ill will, such as his referring to a son as Hitler and saying that he thought Mark and Edward Shoen were sociopaths. *Id.* To further support its decision, the court stated that Watkins signed three affidavits providing that he did not discuss the allegedly defamatory statements with Leonard Shoen. *Id.* at 417-18. The Ninth Circuit also held that use of the information to impeach Leonard Shoen's testimony did not relate to "an important issue in the case." *Id.* at 418. The court felt the effort to prove actual malice should not force the disclosure. *Id.* at 418.

Ninth Circuit vacated the district court's contempt ruling.[98]

B. The Dissenting Opinion

In his dissent, Judge Leavy stated that the plaintiffs met their burden by fulfilling the three-part test adopted in the majority's opinion.[99] First, the dissent determined that the requested information was relevant evidence under the third prong of the test.[100] Second, the dissent maintained that the requested evidence was not cumulative.[101] In sum, Judge Leavy would have held that the district court's contempt order should have been affirmed.[102]

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98. *Shoen II*, 48 F.3d at 417-18. At the conclusion of the defamation action, the jury in the district court refused to award damages to Joe and Mark Shoen. Brent Whiting, *Jury Refuses to Give Damages to U-Haul Brothers in Libel Suit*, ARIZ. REPUBLIC, Apr. 9, 1995, at B6. An attorney for the Shoen brothers stated that "the jury 'obviously' was confused by the case as evidenced by its seemingly inconsistent verdicts." John Schwartz, *U-Haul's Joe, Mark Shoen Appeal Libel Verdict*, BUS. J. (Phoenix), July 21, 1995, § 1, at 3.

99. *Shoen II*, 48 F.3d at 418-19 (Leavy, J., dissenting). The dissent did not directly address whether the information was available from a reasonable alternative source, first prong of the majority's test. *Id.* at 418 (Leavy, J., dissenting). Judge Leavy simply stated that due to the requirements to prove actual malice, "the requested material is practically unavailable, despite the plaintiffs' exhaustion of all reasonable alternative sources." *Id.* at 419 (Leavy, J., dissenting).

100. *Id.* at 418-19 (Leavy, J., dissenting). Judge Leavy remarked that there was "no more relevant evidence available to any party that would help the trier of fact to determine whether, at the time Shoen published the . . . statements, he may have known they were false or acted with reckless disregard for the truth." *Id.* at 419 (Leavy, J., dissenting). He stated that Leonard Shoen's alleged defamatory public statements could not be deemed irrelevant by the "mere passage of time." *Id.* at 418 (Leavy, J., dissenting). Judge Leavy felt that to hold as the majority did "would effectively preclude the admission of *any* evidence that does not coincide precisely with the time of the allegedly defamatory act(s)." *Id.* (Leavy, J., dissenting) (alterations in original). Additionally, the dissent stated that the interviews could reveal Leonard Shoen's knowledge of his daughter-in-law's death. *Id.* at 419 (Leavy, J., dissenting). This knowledge had a direct relationship to the plaintiffs' actual malice claim. *Id.* (Leavy, J., dissenting).

101. *Id.* (Leavy, J., dissenting). Judge Leavy stated that, although other evidence existed showing ill will, "it [was] not enough under *Sullivan* to prove mere ill will on Shoen's part; rather, the plaintiffs must prove the extent of his knowledge." *Id.* (Leavy, J., dissenting). He also stated that any evidence demonstrating Leonard Shoen's actual knowledge of Eva Berg Shoen's murder is noncumulative. *Id.* (Leavy, J., dissenting). Additionally, Judge Leavy felt the following two factors strengthened the necessity for disclosure, "[f]irst, the trial court offered to allow Watkins to redact any material that might suggest the existence and identity of a confidential source; and, second, Shoen is to have a share in future royalties on the book and any possible movie deal." *Id.* (Leavy, J., dissenting). He asserted that this sharing of the proceeds destroyed Watkins' professional ethical obligation to Leonard Shoen. *Id.* (Leavy, J., dissenting). Judge Leavy, therefore, determined that the Shoen brothers sought the evidence to prove Leonard Shoen's actual malice when making the statements, not to prove he lied about his feelings towards his sons while being deposed. *Id.* (Leavy, J., dissenting).

102. *Id.* at 419 (Leavy, J., dissenting). Judge Leavy also stated, after scrutinizing the application of the three-part test, that the plaintiffs met the burden im-

V. CRITICAL ANALYSIS

A. Creation of the Three-Part Test

In *Shoen II*, the Ninth Circuit held that it had not previously adopted a formal test to determine "whether the requesting party has a compelling need sufficient to override the [journalist's] privilege."[103] The Ninth Circuit's conclusion is correct because the *Shoen I* court stopped its analysis when it had decided that the plaintiffs failed to obtain discovery from other reasonable alternative means.[104] As the court correctly stated in *Shoen II*, the *Shoen I* court did not look to other balancing factors besides the "all reasonable alternative means" factor, nor did it apply or adopt a formal three or four-part test.[105]

As a backdrop to its discussion on the showing required to overcome the journalist's privilege, the Ninth Circuit recognized four specific First Amendment media interests against discovery requests.[106] The Ninth Circuit almost definitively accepted these four

posed upon them by the majority's test. *Id.* (Leavy, J., dissenting). Therefore, Judge Leavy felt that the plaintiffs, Mark and Edward Shoen, were entitled to disclosure of the requested information because they overcame Watkins' assertion of the journalist's privilege. *Id.* (Leavy, J., dissenting).

103. *Shoen II*, 48 F.3d 412, 415 (9th Cir. 1995). For a further discussion of the Ninth Circuit's prior failure to accept such a test, see *supra* notes 85-87 and accompanying text.

104. *Shoen I*, 5 F.3d 1289, 1296 (9th Cir. 1993) (quoting Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981)). The *Shoen I* court did not address the other factors of the balancing test because it held that the plaintiffs failed to satisfy this threshold requirement. *Id.* at 1296 n.14.

105. *Id.* In footnote 14 of its decision, the *Shoen I* court stated that "[b]ecause we hold that plaintiffs have not satisfied the exhaustion requirement, we express no opinion on whether plaintiffs have made a sufficient showing on the other questions considered in the balance." *Id.* Absent any Ninth Circuit precedent on this issue, the *Shoen II* court correctly rejected the three-part test applied by the United States District Court for the District of Arizona and the four-part test proposed by Watkins. *Shoen II*, 48 F.3d at 415. For a further discussion of the test used by the district court and the test proffered by Watkins, see *supra* notes 85-87 and accompanying text.

106. *Shoen II*, 48 F.3d at 415-416 (citing *Shoen I*, 5 F.3d at 1294-95). The Ninth Circuit adopted the First Amendment interests set forth by the First Circuit in United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988). *Shoen II*, 48 F.3d at 416. The First Circuit set forth the following First Amendment interests in favor of the journalist's privilege:

> "the threat of administrative and judicial intrusion" into the newsgathering and editorial process; the disadvantage of a journalist appearing to be "an investigative arm of the judicial system" or a research tool of government or of a private party; the disincentive to "compile and preserve nonbroadcast material"; [sic] and the burden on journalists' time and resources in responding to subpoenas.

LaRouche Campaign, 841 F.2d at 1182. *See also Shoen II*, 48 F.3d at 416 (listing *LaRouche Campaign* First Amendment interests); *Shoen I*, 5 F.3d at 1294-95 (same). For a further discussion of the First Amendment media interests highlighted by

interests.[107] Yet, the First Circuit, the circuit that originally identified the interests,[108] stated only that "[t]here is *some merit* to these asserted First Amendment interests."[109] Although the Ninth Circuit identified the media interests, it did not specifically explain how the disclosure of the requested material would threaten Watkins' interests or how disclosure would adversely effect his newsgathering process.[110] Additionally, one could argue that a major television network's media interests and an investigative book author's media interests are not as similar as suggested by the Ninth Circuit.[111]

In citing to a case from the D.C. Circuit, the *Shoen II* court stated that " 'in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege.' "[112] However, the D.C. Circuit made this statement in reference to the disclosure of confidential sources, not nonconfidential information, as was the situation in *Shoen II*.[113] The *Shoen II* court recognized that the First

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the Ninth Circuit and in *LaRouche Campaign*, see *supra* notes 48 & 90 and accompanying text.

107. *Shoen II*, 48 F.3d at 416. The Ninth Circuit demonstrated its near definitive acceptance by reaffirming the *Shoen I* court's recognition of the four media interests set forth in *LaRouche Campaign*. *Id.*

108. *See supra* note 48 and accompanying text. Although the First Circuit originally recognized the four media interests, NBC, a major television network, actually set forth the proposed interests. *LaRouche Campaign*, 841 F.2d at 1181-82.

109. *LaRouche Campaign*, 841 F.2d at 1182 (emphasis added). The First Circuit continued its analysis by recognizing that a "lurking and subtle threat to journalists" existed. *Id.* While the First Circuit used the media interests in its balancing test, the court did not discuss how it applied the interests to the facts of the case. For a further discussion on *LaRouche Campaign*, see *supra* notes 47-50 and accompanying text.

110. *Shoen II*, 48 F.3d at 415-16.

111. In *LaRouche Campaign*, the First Circuit was likely concerned about the effect of granting the discovery request because it was dealing with a major television network's newsgathering process, a process that disseminated news to the public on a daily basis. *LaRouche Campaign*, 841 F.2d at 1177, 1182. However, one could view the burden upon an investigative book author as less imposing because there is no necessity for the immediate and/or daily dissemination of information and news. *But see Shoen I*, 5 F.3d 1289, 1301 (9th Cir. 1993) (Kleinfeld, J., concurring). In his concurring opinion, Judge Kleinfeld noted that compelled disclosure placed significant burdens on Watkins. *Id.* (Kleinfeld, J., concurring). Judge Kleinfeld stated that such burdens included Watkins losing potential sources, the damaging effect on Watkins' "legitimate commercial interest in shaping the mode, form, and timing of disclosure" of the Leonard Shoen interviews and intimidation causing Watkins to not tell what he believes to be the truth about Mark and Edward Shoen. *Id.* (Kleinfeld, J., concurring).

112. *Shoen II*, 48 F.3d at 416 (quoting Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981)). For a further discussion of *Zerilli v. Smith*, see *supra* notes 51-52 and accompanying text.

113. The Ninth Circuit determined that Leonard Shoen was a nonconfidential source and that Leonard Shoen did not request that his interviews with Watkins not be disclosed to third parties. *Shoen II*, 48 F.3d at 416. For a discussion of the information sought in *Zerilli*, see *supra* note 51 and accompanying text.

Amendment privilege affords journalists seeking to protect confidential sources more protection than it affords journalists seeking to protect nonconfidential sources or material.[114] Yet, it appears that the Ninth Circuit treated confidential sources and nonconfidential information equally when citing *Zerilli v. Smith.*

Prior to adopting its own three-part test, the Ninth Circuit stated that no other circuit had adopted a formalized test applying to a journalist's nonconfidential information.[115] However, the Second Circuit applied a three-part test in *United States v. Burke.*[116] In *Burke,* the requested information consisted of documents and other material used in writing a *Sports Illustrated* article.[117] The Second Circuit discussed the journalist's privilege as it related to confidential sources, yet *Burke* contained no confidential sources.[118] The court applied the *Petroleum Products* three-part test for confidential sources[119] to the *Burke* situation.[120] Subsequent cases within the Second Circuit have similarly applied the three-part test used in *Burke* and *Petroleum Products* to cases dealing with nonconfidential materials and information.[121]

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114. *Shoen II,* 48 F.3d at 416 (observing "lack of a confidential source may be an important element in balancing the [competing interests]") (quoting Shoen I, 5 F.3d 1289, 1295-96 (9th Cir. 1993) (citations omitted)). One could support this extra protection by applying the four First Amendment interests, whereby a potential confidential source might view the journalist as an investigative arm of the judicial system or a research tool of the government, and therefore refuse to discuss the potentially newsworthy information.

115. *Shoen II,* 48 F.3d at 416.

116. For a discussion of the Second Circuit's application of a three-part test, see *supra* notes 58-63 and accompanying text.

117. United States v. Burke, 700 F.2d 70, 76 (2d Cir.), *cert. denied,* 464 U.S. 816 (1983). The Second Circuit referred to the requested information as "documents" and "work papers." *Id.* at 77-78.

118. *Id.* at 76-78. In *Burke,* the source of information for the article was one of the co-authors. *Id.* at 76.

119. For a discussion of the *Petroleum Products* three-part test, see *supra* notes 58-59 and accompanying text.

120. *Burke,* 700 F.2d at 77-78.

121. For example, in *In re* NBC, No. M8-85, 1995 WL 598972 (S.D.N.Y. Oct. 10, 1995), the United States District Court for the Southern District of New York applied the *Petroleum Products* test during a civil suit. *Id.* at *1. The court decided that NBC had to produce nonconfidential material that had "no expectation of privacy." *Id.* The court was highly critical of NBC's motion to quash the subpoenas. *Id.* at *2. The court stated:

> NBC has no interest in the out-takes and any statements contained therein were never considered confidential by those being interviewed. This seems, at best, an academic pursuit by counsel to [NBC] which caused needless expense to NBC and to the parties. This type of useless proceeding merely clogs the dockets of our courts.

Id.

Furthermore, in United States v. Hendron, 820 F. Supp. 715, 718 (E.D.N.Y. 1993), the United States District Court for the Eastern District of New York held

As the court asserted, the Ninth Circuit needed to adopt a formal balancing test to identify the specific showing required to overcome the journalist's privilege.[122] The need for a formal test is best illustrated by two facts. First, the United States District Court for the District of Arizona declared Watkins in civil contempt twice, and also Watkins appeared twice before the Ninth Circuit in a two year period.[123] Second, the district court did not know how to determine the sufficient showing required to overcome the journalist's privilege.[124] This confusion and prolonged litigation demonstrated the need to adopt a formal test.[125] The Ninth Circuit effectively addressed these two concerns by adopting the formal three-part *Shoen II* test.

B. Application of the Three-Part Test

Judge Leavy's dissent accepted the majority's adoption of a three-part test for determining whether sufficient showing has been made to overcome the journalist's privilege.[126] Judge Leavy, however, did not accept the majority's application of the three-part test in determining that Watkins need not produce his information for review.[127]

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that the *Burke* decision applied beyond cases dealing solely with confidential information. *Id.* at 718. The court stated that the *Burke* court "did not discuss the fact that [the source in *Burke*] was in no sense a 'confidential source' . . . . *The decision thus recognized that the reporter had First Amendment interests beyond those of preserving the confidentiality of his source or of his information.*" *Id.* (emphasis added). *See also* Don King Prod. v. Douglas, 131 F.R.D. 421, 424 (S.D.N.Y. 1990) (citing *Burke* as applying three-part test for nonconfidential materials); Westmoreland v. CBS, 97 F.R.D. 703, 706 (S.D.N.Y. 1983) (citing *Burke* as applying three-part test to determine whether reporter's nonconfidential documents need to be disclosed).

122. *Shoen II*, 48 F.3d 412, 415 (9th Cir. 1995).

123. *Id.* at 414. Following the media interests approach set forth by the court, one could argue that the prolonged *Shoen* litigation placed a burden on Watkins' time and resources, taking him away from the investigatory process.

124. *Id.* at 415. The district court, interpreting *Shoen I*, applied a three-part test to determine that Watkins had to disclose the requested material. *Id.* On appeal, the Ninth Circuit declared that it had never adopted a formal test in *Shoen I*. *Id.* For a further discussion of the district courts' misinterpretation of *Shoen I*, see *supra* note 86 and accompanying text.

125. *Shoen II*, 48 F.3d at 415.

126. *Id.* at 418-19 (Leavy, J., dissenting). Judge Leavy considered two additional factors beyond those enumerated in the majority's three-part test: the district court's offer to redact any information dealing with a confidential source and Leonard Shoen's share in future royalties. *Id.* at 419. This essentially created a hybrid analysis, consisting of the majority's three-part test and the Ninth Circuit's former case-by-case balancing approach. For a further discussion of Judge Leavy's dissent, see *supra* notes 99-102 and accompanying text.

127. *Shoen II*, 48 F.3d at 419. To the contrary, Judge Leavy stated that "the plaintiffs have more than carried their burden with respect to all three prongs of the test enunciated here." *Id.* (Leavy, J., dissenting).

Under the Arizona defamation law, the plaintiffs had to prove that Leonard Shoen made the allegedly defamatory statements with actual malice.[128] Although the majority opinion concluded that evidence of ill will alone cannot prove actual malice, it failed to address what impact Leonard Shoen's knowledge of the murder would have on the defamation case.[129] Thus, the majority held that the evidence of ill will was not clearly relevant to an important issue.[130] However, the plaintiffs could have used the requested materials to show the extent of Leonard Shoen's knowledge, and, in this manner, the material could be considered relevant.[131] The court likely dismissed this possibility because the requested evidence was only potentially relevant, not actually relevant as required by the third prong of the *Shoen II* test.[132] This requirement poses an unanswered question: how can a party prove actual relevance absent an opportunity to determine if the requested information is indeed actually relevant to their case?

VI. CONCLUSION

In *Shoen II*, the Ninth Circuit formally adopted a three-part test to alleviate the uncertainty expressed by district courts and litigants.[133] A court can apply the *Shoen II* test to determine when the third party journalist's qualified First Amendment privilege yields to a civil litigants's discovery request for nonconfidential information.[134] The Ninth Circuit's three-part *Shoen II* test, however, is ap-

128. *Id.* at 417.

129. *Id.* The majority remarked that Watkins signed an affidavit stating that he did not interview Leonard Shoen about the allegedly defamatory statements. *Id.* at 417-18. Even if this was true, Leonard Shoen could have discussed his knowledge of Eva Berg Shoen's murder. *Id.* at 419 (Leavy, J., dissenting). If the interviews proved that Leonard Shoen knew nothing about the murder, the plaintiffs could have shown he made the statements with knowledge of their falsehood or with actual malice. *Id.* (Leavy, J., dissenting). Thus, the court could consider the evidence to be "clearly relevant to an important issue in the litigation." *Id.* at 418-19 (Leavy, J., dissenting).

130. *Id.* at 417. Judge Leavy's dissent asserted numerous times that the requested information was relevant to "determine whether, *at the time Shoen published the allegedly defamatory statements*, he may have known they were false or acted with reckless disregard for the truth." *Id.* at 419 (Leavy, J., dissenting) (emphasis added).

131. After the Ninth Circuit handed down its decision, the Shoen brothers' attorney, stated that "[i]f L.S. Shoen had made a statement to Watkins indicating he had never believed [Joe and Mark Shoen] had had any connection to the murder, he could make the statement today and it would be of the highest relevance." *Author of Book on U-Haul Family Feud, supra* note 65, at A22.

132. *Shoen II*, 48 F.3d at 416.

133. *Shoen II*, 48 F.3d at 415.

134. *Id.* at 416.

plicable in a narrowly defined situation. First, the case must be of a civil nature; second, the party seeking protection under the journalist's privilege must be a nonparty; and third, the requested information must be nonconfidential.[135] Outside of this narrowly defined situation, the Ninth Circuit is likely to revert to its earlier practice of applying the *Farr v. Pitchess* case-by-case balancing test.[136]

When another federal or state court is faced with a discovery request during a *Shoen II* scenario, it has three options in determining whether to order disclosure. First, it can refuse to adopt the journalist's privilege and order production of the requested information.[137] Second, it can apply a balancing test to weigh the competing interests of the journalist and the requesting party.[138] Third, the court can adopt a formal, three or four-part test.[139]

The Ninth Circuit's *Shoen II* three-part test offers federal courts an alternative, and arguably less protective, method for determining whether the journalist's privilege must succumb to the civil litigant's needs.[140] Since the Ninth Circuit decided *Shoen II*, the Wisconsin Court of Appeals adopted the *Shoen II* test for civil cases within its jurisdiction.[141] Other state and federal courts may choose to follow the Wisconsin court in adopting the *Shoen II* test. How-

135. *Id.* The second element, requiring the journalist to be a nonparty, is ordinarily met because an "overwhelming majority" of subpoenas are issued against nonparty journalists. John P. Borger, *Resisting Subpoenas for Published or Broadcast Information*, 12 COMM. LAW. 10 & n.1 (1994) (reporting that subpoenas issued against nonparty journalists accounted for 96.4% of subpoenas reported).

136. For a further discussion of the *Farr v. Pitchess* balancing test, see *supra* notes 34-39 and accompanying text.

137. This is the Sixth Circuit's approach, whereby courts refuse to recognize the journalist's qualified First Amendment privilege. For a further discussion of the Sixth Circuit's rejection of the journalist's privilege, see *supra* note 32 and accompanying text.

138. The First, Third and D.C. Circuits apply a balancing test to determine whether the journalist's privilege should yield to a request for disclosure. For a further discussion of the balancing approach favored by the First, Third and D.C. Circuits, see *supra* notes 40-52 and accompanying text.

139. For a further discussion of the various formal tests applied by circuit courts, see *supra* notes 53-63 and accompanying text.

140. For a further discussion comparing the *Shoen II* test with the Second Circuit's heightened test, see *supra* notes 116-21 and accompanying text. However, some view the *Shoen II* test as "not significantly different from the showing generally considered necessary to overcome the privilege when confidential information is at the heart of the discovery request." *Journalist's Privilege - Nonconfidential Information-Showing Required to Overcome Privilege*, FED. LITIGATOR, July 1995, at 145.

141. Kurzynski v. Spaeth, 538 N.W.2d 554, 559-60 (Wis. Ct. App. 1995). The Wisconsin Court of Appeals applied the *Shoen II* test to balance the journalist's interests in a free newsgathering process against a party's need for every person's evidence. *Id.* at 559 (citing *Shoen II*, 48 F.3d at 415-16). For a further discussion of *Kurzynski*, see *supra* note 33 and accompanying text.

ever, the apparent inconsistency between the majority's and the dissenting judge's application of the test in *Shoen II* may convince other courts to continue to follow their own practices, by rejecting the privilege altogether, by applying a pure balancing standard, or by applying a formal three or four-part test.[142]

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142. For a further discussion of the inconsistent application of *Shoen II* test, see *supra* notes 126-27 and accompanying text.