

1 Rule 509. News reporters.

2 (a) Definitions. As used in this rule:

3 (a)(1) "News reporter" means a publisher, editor, reporter or other similar person  
4 gathering information for the primary purpose of disseminating news to the public and  
5 any newspaper, magazine, or other periodical publication, press association or wire  
6 service, radio station, television station, satellite broadcast, cable system or other  
7 organization with whom that person is connected.

8 (a)(2) "Confidential source information" means the name or any other information  
9 likely to lead directly to the disclosure of the identity of a person who gives information  
10 to a news reporter with a reasonable expectation of confidentiality.

11 (a)(3) "Confidential unpublished news information" means information, other than  
12 confidential source information, that is gathered by a news reporter from a source who  
13 provides the information on condition of confidentiality. This includes notes, outtakes,  
14 photographs, tapes or other data that are maintained by the news reporter or by the  
15 organization or entity on whose behalf the reporter was acting to the extent such  
16 records include information that was provided on condition of confidentiality.

17 (b) Privilege for Confidential Source Information. A news reporter or confidential  
18 source has a privilege to refuse to disclose and to prevent any other person from  
19 disclosing confidential source information. This privilege may be claimed by the news  
20 reporter, the organization or entity on whose behalf the news reporter was acting, the  
21 confidential source, the news reporter or confidential source's guardian or conservator  
22 or the personal representative of a deceased news reporter or confidential source. This  
23 privilege does not exist if the confidential source discloses his or her identity to the  
24 person seeking the information or otherwise consents to the disclosure of their identity.

25 (c) Privilege for Confidential Unpublished News Information. A news reporter has a  
26 privilege to refuse to disclose confidential unpublished news information, unless the  
27 person seeking the unpublished news information demonstrates a substantial need for  
28 that information which outweighs the interest of a continued free flow of information to  
29 news reporters. This privilege may be claimed by the news reporter, the organization or  
30 entity on whose behalf the news reporter was acting, the confidential source, the news  
31 reporter or confidential source's guardian or conservator or the personal representative

32 of a deceased news reporter or confidential source. If the confidential source consents  
33 to disclosure of the information, by so stating to the person seeking the information or  
34 otherwise, then the information is no longer confidential unpublished news information  
35 and is not privileged.

36 (d) Exceptions. No privilege exists under this rule:

37 (d)(1) Furtherance of Crime or Tort. If the news reporter's failure to disclose the  
38 information enables or aids anyone to commit or plan to commit a crime or tort;

39 (d)(2) Imminent Threat of Harm. If there is a clear and imminent threat of harm to  
40 any person or place if the information is withheld;

41 (d)(3) Defamation Action against the News Reporter. As to relevant information in a  
42 defamation action against the news reporter or the organization or entity on whose  
43 behalf the news reporter was acting; however, the privilege exists until the person  
44 maintaining the action has demonstrated a good faith evidentiary basis for the claim of  
45 defamation;

46 (d)(4) Duty to Report. As to any information that falls within a statutory duty to report  
47 sexual or physical abuse, neglect, or exploitation of a child or vulnerable adult to law  
48 enforcement or another governmental agency;

49 (d)(5) Witness. As to any personal direct observations the news reporter makes that  
50 involve the commission of a crime or tort; or,

51 (d)(6) Physical Evidence. As to any physical or tangible evidence of a crime or tort in  
52 the possession of the news reporter or organization or entity on whose behalf the news  
53 reporter was acting, except for notes, documents, photographs, audio and video  
54 recordings and other records that the news reporter created.

55 (e) In Camera Review. If the court makes an initial determination that information  
56 which is claimed to be privileged under this rule should be disclosed, the court shall  
57 conduct an in camera review of that information before a final determination is made.

58 Advisory Committee Note

59 Protection of news gathering and dissemination has roots in the First Amendment of  
60 the United States Constitution, but the existence and scope of a news reporter's  
61 privilege remains open. See Branzburg v. Hayes, 408 U.S. 665 (1972). Although  
62 recognition of a privilege may interfere with the establishment of the whole truth in a

63 specific case, the basic purpose of the privilege is to assure a continued free flow of  
64 information to those who gather and publish the news. See Silkwood v. KerrMcGee  
65 Corp., 563 F. 2d 433 (10th Cir. 1977). It is a qualified evidentiary privilege and must  
66 yield to more substantial interests when circumstances so require.

67 Since Branzburg, there has been an increasing but somewhat inconsistent  
68 development of the law concerning this privilege. To this day, the extent of a federally-  
69 recognized privilege remains unclear. Further, many states have addressed the subject  
70 with legislation such that there is substantial variation in how the privilege may operate  
71 in different jurisdictions.

72 This rule is intended to clarify the common law for Utah so that, on the one hand,  
73 news reporters can operate with more certainty over whether they will or will not be  
74 required to disclose confidential information but, on the other hand, minimize the need  
75 for courts to address on a case-by-case basis every circumstance where a privilege  
76 might be claimed.

77 The rule incorporates a relatively broad and flexible definition of news reporter to  
78 accommodate the ever-changing methods of expression and publication. While there  
79 are not many "lone pamphleteers" still functioning, they may have modern-day  
80 counterparts on the Internet.

81 The greatest protection is afforded to the name of the confidential source or other  
82 information that would lead directly to the disclosure of the source's identity. See  
83 Subparagraph (b). However, even this information must be disclosed if it falls within one  
84 of the exceptions found in Subparagraph (d). As to other information obtained on  
85 condition of confidentiality, the rule incorporates the balancing test set forth in Silkwood.  
86 See Subparagraph (c). Finally, the rule describes certain classes of information as to  
87 which no privilege exists. These are areas where the public interest so clearly  
88 outweighs the purposes of the privilege as to not require the court to conduct a  
89 balancing analysis. See Subparagraph (d)

90 The committee noted that traditional news organizations can be attractive targets for  
91 subpoenas if a party wishes to quickly gather the fruits of someone else's investigative  
92 work. However, it decided against providing news reporters with special protection for  
93 the non-confidential information they collect and maintain in their files. News reporters

94 may indeed have grounds for opposing such subpoenas as unduly burdensome or  
95 otherwise objectionable, but this rule of privilege does not apply to information gathered  
96 by a news reporter on a non-confidential basis. See *McKevitt v. Pallasch*, 339 F.3d 530  
97 (7th Cir. 2003). See also 8 John Henry Wigmore, *Evidence at Trials at Common Law* §  
98 2285 (4th ed. 1961).

99 Similarly, while proprietary interests of media organizations, such as protection of  
100 their intellectual property and avoiding discovery requests, have been protected in some  
101 jurisdictions through shield laws and similar legislation, the committee does not view the  
102 First Amendment basis for an evidentiary privilege to be sufficiently strong to support  
103 protection of such interests in a rule of evidence.

104 While subparagraph (e) requires the court to conduct an in camera review before  
105 ordering a disclosure of information to which a privilege has been claimed, this is not  
106 intended to infringe on the court's general discretionary authority to review evidence in  
107 camera whenever it is deemed necessary.

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