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**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA BARBARA

APR 27 2005

GARY M. BLAIR, Executive Officer  
By *Carrie L. Wagner*  
CARRIE L. WAGNER, Deputy Clerk

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF SANTA BARBARA  
14 SANTA MARIA DIVISION

15 THE PEOPLE OF THE STATE OF  
16 CALIFORNIA,

17 Plaintiff,

18 vs.

19 MICHAEL JACKSON, et al.,

20 Defendant

Case No. 1133603

**FAX FILING**

MEMORANDUM REGARDING NON-  
PARTY JOURNALIST IAN DREW'S  
REQUEST FOR ORDER LIMITING THE  
SCOPE OF HIS TESTIMONY;  
SUPPORTING DECLARATION OF  
KELLI L. SAGER WITH EXHIBIT A

[Appendix of Non-California Authorities  
Submitted Concurrently]

Date: April 29, 2005  
Time: 10:00 a.m.  
Dept.: 8

[Assigned to the Hon. Rodney Melville]

Action Filed: December 18, 2003

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 Non-party journalist Ian Drew submits this memorandum concerning the scope of the  
3 examination of him at the trial in this matter. In particular, Mr. Drew requests that any questions to  
4 him be limited to "published" statements or information as defined under Article I, § 2(b) of the  
5 California Constitution, California Evidence Code § 1070, and the First Amendment.

6 California's Shield Law protects Mr. Drew from having to testify about "unpublished  
7 information" obtained by him in the course and scope of his work as a journalist. Independently,  
8 Mr. Drew's newsgathering efforts are protected under the First Amendment to the United States  
9 Constitution, which bars inquiries into unpublished information.<sup>1</sup>

10 The grounds for this request are amplified in the attached Memorandum of Points and  
11 Authorities, the attached Declaration of Kelli L. Sager with Exhibit A, on all pleadings, records,  
12 and files in this case, on all matters of which judicial notice may be taken, and on such additional  
13 argument as shall be presented at the hearing on this request.

14  
15 DATED: April 27, 2005

DAVIS WRIGHT TREMAINE LLP  
KELLI L. SAGER  
JEFFREY H. BLUM  
JOHN D. KOSTREY

16  
17  
18 By:   
19 Kelli L. Sager

20 Attorneys for Non-Party Journalist  
21 IAN DREW

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23  
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25  
26  
27 <sup>1</sup> As explained below, if these protections would be infringed upon by defendant's cross-  
28 examination, this Court can prevent the prosecution from eliciting testimony about even published  
information from Mr. Drew.

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# MEMORANDUM OF POINTS AND AUTHORITIES

## 1.

### SUMMARY OF ARGUMENT

In the seminal case of Miller v. Superior Court, 21 Cal. 4th 883, 901 (1999), the California Supreme Court made clear that a prosecutor cannot, under any circumstances, compel a journalist to testify about unpublished information, including but not limited to information that would reveal the identification of confidential sources. More recently, the First District Court of Appeal reiterated that a journalist's constitutional immunity under the California shield law "need never yield to any superior constitutional right of the People." Fost v. Superior Court, 80 Cal. App. 4th 724, 731 (2000). Moreover, the First Amendment to the United States Constitution affords journalists an independent, qualified privilege against compelled disclosure of unpublished information. See, e.g., Mitchell v. Superior Court, 37 Cal. 3d 268, 274-84 (1984); Shoen v. Shoen, 5 F.3d 1289, 1292 & n.5 (9th Cir. 1993) ("Shoen I").<sup>2</sup>

The California Constitution and the First Amendment provide these strong protections so that journalists can maintain their neutrality and continue to "serve as the eyes and ears of the public." Miller, 21 Cal. 4th at 898 (internal quotation marks omitted). As the Ninth Circuit has cautioned, "[i]f perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend." Shoen I, 5 F.3d at 1295. Thus, the "comprehensive reporter's immunity provision, in addition to protecting confidential or sensitive sources, has the effect of safeguarding the autonomy of the press." Miller, 21 Cal. 4th at 898 (internal quotation marks omitted).

Ian Drew, a reporter currently employed by the magazine *Us Weekly*, has been subpoenaed by the prosecution to appear at the trial in this matter. Although the subpoena does not state the purpose of the testimony or the material that he is to be questioned about, the district attorney's office has represented to counsel that the prosecution will not seek any information from Mr. Drew

---

<sup>2</sup> For the Court's convenience, non-California cases cited in this Memorandum are included in the concurrently-filed Appendix.

1 that is "unpublished," or that would reveal the identification of confidential sources. For that  
2 reason only, Mr. Drew has not filed a motion to quash the subpoena. (Declaration of Kelli L. Sager  
3 "Sager Decl." at ¶ 3.)<sup>3</sup> Mr. Drew intends to object to any question – from either side – that seeks  
4 testimony about "unpublished" information obtained by him in the course of newsgathering  
5 activities, and is submitting this memorandum in advance of his scheduled appearance to assist the  
6 Court in its consideration of these objections.

7 First, the California Constitution and California Evidence Code grant journalists, like  
8 Mr. Drew, a broadly-defined immunity from the compelled disclosure of any "unpublished  
9 information" obtained during the course of gathering and disseminating information to the public.  
10 Where, as here, the reporter is not a party to the underlying litigation and is subpoenaed by the  
11 prosecution in a criminal case, the Shield Law erects an absolute bar against the prosecutor  
12 compelling the reporter to reveal any unpublished information obtained in the course of his  
13 newsgathering. (See Sections 2(A)-(B), below.)

14 Second, under the Court of Appeal's decision in Fost, before a trial court permits testimony  
15 on direct examination by a journalist even about published information, it should examine the  
16 ultimate impact of subsequent cross-examination on the journalist's shield law protection, and  
17 determine whether any testimony can be elicited from the journalist without interfering with the  
18 journalist's constitutional rights. (See Section 2(C), below.)

19 Third, although a criminal defendant has competing constitutional rights that must be  
20 balanced against a journalist's constitutional rights, the defendant must demonstrate a variety of  
21 factors before the reporter can be compelled to testify, including a threshold showing that the  
22 information sought will "materially" assist the defense. Delaney v. Superior Court, 50 Cal. 3d 785  
23 (1990). Absent such a showing, California courts have squarely held that the California shield law  
24 bars the compelled disclosure of unpublished information by a journalist, even when sought by the  
25 defendant. (See Section 2(D), below.)

26  
27 <sup>3</sup> Mr. Drew currently is employed as a reporter for the magazine Us Weekly. At all times  
28 relevant to this matter, Mr. Drew has been a journalist working either freelance or as an employee  
of a news publisher.

1 Finally, in addition to the state constitutional and statutory privileges, reporters have a  
2 qualified privilege under the First Amendment to the United States Constitution that protects them  
3 from compelled disclosure of unpublished information absent a showing by the subpoenaing party  
4 that the information sought goes to the heart of its case, that there exists a compelling need for the  
5 information, and that other means of obtaining the information have been exhausted. In this case,  
6 the information that the prosecution apparently intends to seek from Mr. Drew clearly is available  
7 from other sources. Because the prosecution has not demonstrated that the testimony it seeks from  
8 Mr. Drew is unavailable from other sources and/or is non-cumulative, the First Amendment also  
9 bars the prosecutor from compelling such testimony. For the same reasons, defendant will not be  
10 able to overcome Mr. Drew's qualified privilege under the First Amendment. (See Section 3,  
11 below.)

12 Accordingly, Mr. Drew respectfully requests this Court limit the scope of the prosecution's  
13 examination and the defense's cross-examination.

14 2

15 UNDER THE CALIFORNIA SHIELD LAW, THE PROSECUTION MAY EXAMINE  
16 MR. DREW ONLY AS TO PUBLISHED INFORMATION

17 Article I, Section 2(b) of the California Constitution provides, in pertinent part, that a news  
18 reporter:

19 shall not be adjudged in contempt [by a court] for refusing to disclose the source of  
20 any information procured while so connected or employed [as a news reporter], . . .  
21 or for refusing to disclose any unpublished information obtained or prepared in  
22 gathering, receiving or processing of information for communication to the public.

23 As used in this subdivision, "unpublished information" includes information not  
24 disseminated to the public by the person from whom disclosure is sought, whether or  
25 not related information has been disseminated and includes, but is not limited to, all  
26 notes, outtakes, photographs, tapes, or other data of whatever sort not itself  
27 disseminated to the public through a medium of communication, whether or not  
28 published information based upon or related to such materials has been  
disseminated.

Cal. Const. Art. I, § 2(b) (emphasis added).<sup>4</sup>

26 <sup>4</sup> California Evidence Code § 1070 contains virtually identical language. The Shield Law  
27 applies to any "publisher, editor, reporter, or other person connected with or employed upon a  
28 newspaper, magazine, or other periodical publication" and any "radio or television news reporter or  
other person connected with or employed by a radio or television station..." Evidence Code  
§ 1070(a)-(b).

1 This constitutional provision was enacted in 1980 by an overwhelming majority of  
2 California voters. By elevating the testimonial immunity from a statute – Evidence Code § 1070 –  
3 to the state constitution, the California electorate demonstrated its belief that reporters must be  
4 given the maximum possible protection for information obtained in the course of their  
5 newsgathering activities. As the Second Appellate District noted in Playboy Enterprises, Inc. v.  
6 Superior Court, 154 Cal. App. 3d 14 (1984):

7 The elevation to constitutional status must be viewed as an intention to favor the  
8 interest of the press in confidentiality over [the State's competing interests]. . . .

9 It has long been acknowledged that our state Constitution is the highest expression  
10 of the will of the people acting in their sovereign capacity as to matters of state law.  
When the Constitution speaks plainly on a particular matter, it must be given effect  
as the paramount law of the state.

11 Id. at 27-28.<sup>5</sup>

12 **A. The Shield Law Broadly Prohibits The Compelled Disclosure Of Unpublished**  
13 **Information.**

14 Mindful of the Shield Law's constitutional mandate, California courts have interpreted the  
15 law broadly. As the California Supreme Court explained in Delaney v. Superior Court, 50 Cal. 3d  
16 785 (1990), the Shield Law applies to any unpublished information, even if not obtained in  
17 confidence:

18 The language of article I, section 2(b) is clear and unambiguous . . . . The section  
19 states plainly that a newsperson shall not be adjudged in contempt for "refusing to  
disclose any unpublished information." . . . The use of the word "any" makes clear

20 <sup>5</sup> The provisions of the California shield law have been interpreted broadly to include a  
21 wide range of individuals who gather and disseminate information to the public, regardless of  
22 whether those individuals are technically employed by a newspaper, magazine, radio station, or  
television station. For example, in People v. Von Villas, 10 Cal. App. 4th 201 (1992), the Court of  
23 Appeal held that an experienced freelance writer who contracted to write articles for two magazines  
was protected by the shield law with respect to information he gathered even before he entered into  
24 any publication agreements with the magazines. Notwithstanding the freelance status of the  
subpoenaed writer, the trial judge quashed a subpoena that sought the production of unpublished  
25 information and the Court of Appeal affirmed. Id. at 232. Other persons who have been found by  
courts to qualify for protection under the reporter's privilege include freelance reporters conducting  
26 an interview of comedians Cheech and Chong for Playboy Magazine (Playboy Enterprises, Inc. v.  
Superior Court, 154 Cal. App. 3d 14 (1984)); staff members for The Black Panther newspaper  
(Burse v. United States, 466 F.2d 1059, 1083-84 (9th Cir. 1972)); and members of the Anti-  
27 Defamation League, which publishes periodicals, books and pamphlets (Quigley v. Rosenthal, 43  
F. Supp.2d 1163, 1173 (D. Colo. 1999), affirmed on other grounds, 327 F.3d 1044 (10th Cir.  
28 2003)).

1 that article I, section 2(b) applies to all information, regardless of whether it was  
2 obtained in confidence. Words used in a constitutional provision "should be given  
3 the meaning they bear in ordinary use." . . . In the context of article I, section 2(b),  
4 the word "any" means without limit and no matter what kind.

5 Id. at 798 (emphasis added; citations omitted); accord New York Times Co. v. Superior Court, 51  
6 Cal. 3d 453, 461-62 (1990) (unpublished photographs of a public event are protected by the shield  
7 law).

8 The Shield Law thus immunizes from compelled disclosure any information received, or  
9 materials generated or compiled, during the newsgathering process that have not actually been  
10 published. Such "unpublished information" is protected from disclosure even when closely related  
11 information has been published. For example, in Playboy, a civil litigant sought audio and  
12 videotapes, notes, and other documents relating to an interview conducted by a reporter for Playboy  
13 magazine, portions of which had been republished verbatim in an article. 154 Cal. App. 3d at 21.  
14 The court rejected the litigant's argument that the protections of California's shield law were  
15 inapplicable because portions of the interview were published, noting that the language in Article I,  
16 Section 2(b) defines "unpublished information" as including any information "not disseminated to  
17 the public by the person from whom disclosure is sought, whether or not related information has  
18 been disseminated. . . ." Id. (emphasis added). The court noted:

19 Against the construction we have adopted, defendants contend that petitioner  
20 [Playboy] has waived whatever protection it might have under article I, section 2, by  
21 having published information that is either an exact transcription of the . . . source  
22 materials or so closely derived therefrom that disclosure of the source materials  
23 would essentially be a repeat disclosure of the already published statements . . .

24 It is evident that the published information . . . in the article is either based upon or  
25 related to the underlying records of the interview. Accordingly, this material falls  
26 squarely within the ambit of article I, section 2 protection whether the published  
27 information is an exact transcription of the source material or paraphrases or  
28 summarizes it.

Id. at 23-24 (emphasis added).

Thus, California's statutory and constitutional provisions protect Mr. Drew from being  
compelled to disclose any information that he has not voluntarily disseminated, regardless of  
whether that information was gained in confidence, and regardless of whether related information  
has been published.

1 B. The Prosecutor Has No Right to Compel Mr. Drew To Reveal Unpublished  
2 Information.

3 The California Supreme Court has declared that a journalist's right to refuse to disclose  
4 unpublished information in court is absolute, absent a "sufficiently clear and important competing  
5 federal or state constitutional right. . . ." New York Times, 51 Cal. 3d at 462 & n.11 (emphasis  
6 added). The Court elaborated:

7 [W]e [previously] explained that "[s]ince contempt is generally the only effective  
8 remedy against a nonparty witness, the California enactments [Article I, Section 2(b)  
9 and Evidence Code Section 1070] grant such witnesses virtually absolute protection  
10 against compelled disclosure." . . . We remain of the same view. We find nothing in  
11 the shield law's language or history to suggest the immunity from contempt is  
12 qualified such that it can be overcome by a showing of need for unpublished  
13 information within the scope of the shield law.

14 Id. at 461 (emphasis in original). See also Mitchell, 37 Cal. 3d at 274 ("[s]ince contempt is  
15 generally the only effective remedy against a non-party witness, the California enactments grant  
16 such witnesses virtually absolute protection") (emphasis added).

17 Importantly, the California Supreme Court held that the prosecution has no constitutional  
18 interest sufficient to overcome the shield law's immunity against the compelled disclosure of  
19 unpublished information. Miller, 21 Cal. 4th at 896-99; accord Fost, 80 Cal. App. 4th at 731  
20 (recognizing that under Miller, shield law "need never yield to any superior constitutional right of  
21 the People") (emphasis added). In Miller, the California Supreme Court reaffirmed that  
22 California's shield law "is, by its own terms, absolute rather than qualified in immunizing a  
23 newsperson from contempt for revealing unpublished information obtained in the newsgathering  
24 process." 21 Cal. 4th at 890 (emphasis in original). The Court went on to squarely reject the  
25 prosecution's argument that the state's "right" to a fair trial was sufficient to compel a journalist to  
26 disclose unpublished information:

27 Nor may we convert an absolute into a qualified immunity merely because it is in  
28 accord with a particular conception of the proper balance between journalists'  
rights and prosecutor's prerogatives. Thus, the absoluteness of the immunity  
embodied in the shield law only yields to a conflicting federal or, perhaps, state  
constitutional right. As explained, there is no such conflicting right presented in  
this case.

21 Cal. 4th at 901 (emphasis added).

1 In addition, California courts long have recognized that a journalist does not lose his or her  
2 shield law immunity against being compelled to disclose how information came into the journalist's  
3 possession merely by quoting or reporting statements attributed to others. For example, in In re  
4 Jack Howard, 136 Cal. App. 2d 816, 818-19 (1955), the Court of Appeal held that the publication  
5 of a news article containing attributed quotations did not deprive the author of his right to decline to  
6 answer whether he ever had a conversation with the purported source. "[I]n the absence of any  
7 showing other than the published news story," the court reasoned, the reporter had not disclosed the  
8 source of the published information. Id. at 819. As the court explained:

9 It cannot be assumed from the use of quotation marks that the statement attributed to  
10 [the source] was made directly to the petitioner. As [petitioner] notes, his  
11 information could have been secured in many ways; that is, . . . he might have  
12 learned of [the source's statements] from another person; he might have received his  
information from a printed press release; he might have listened to a recording of the  
speech; or the story might have been telephoned to his newspaper and rewritten by  
someone else under his byline.

13 Id.

14 The article in Howard did not disclose anything other than the quoted statements that  
15 appeared within the four corners of the article. Accordingly, the reporter could not be compelled to  
16 answer questions about the context of those statements, including how the statements came to be  
17 reported in the newspaper. See also Foster, 80 Cal. App. 4th at 735 ("the shield law explicitly  
18 provides that 'unpublished' information remains protected 'whether or not related information has  
19 been disseminated'"); Delaney, 50 Cal. 3d at 797 ("the shield law's definition of 'unpublished  
20 information' includes a newsperson's unpublished, nonconfidential eyewitness observations of an  
21 occurrence in a public place"); Miller, 21 Cal. 4th at 897 ("the shield law applies to unpublished  
22 information whether confidential or not").

23 Under this controlling authority, Mr. Drew is absolutely protected against the compelled  
24 disclosure of any unpublished information sought by the prosecution, and thus this Court should  
25 limit the scope of the prosecution's examination solely to information that Mr. Drew voluntarily  
26 disseminated to the public.

1 C. Because The Prosecution's Subpoena May Prompt The Defense To Seek Unpublished  
2 Information In Contravention Of The Shield Law, This Court Must Consider  
3 Whether Any Testimony Can Be Elicited from Mr. Drew.

4 Under the Court of Appeal's recent decision in Fost, before a trial court permits testimony  
5 on direct examination by a journalist even about published information, it should examine the  
6 ultimate impact of such testimony on the journalist's shield law protection upon subsequent cross-  
7 examination. 80 Cal. App. 4th at 731. In Fost, the defendant sought testimony from a reporter  
8 concerning only what the witness conceded was published information, and the prosecution  
9 asserted that, once such testimony had been permitted, the State was entitled to cross-examine the  
10 reporter, even though the questions would elicit unpublished information. Citing Miller, the Fost  
11 court held that because the prosecution could not require such testimony, the direct testimony of the  
12 reporter should be "barred or stricken." Id. at 736-37 ("where the shield law is invoked to resist  
13 proper cross-examination regarding material matters, a trial court may bar the receipt in evidence of  
14 the direct testimony to which it relates or strike such testimony if it has already been given").

15 The Fost court recognized that the only exception to barring or striking direct testimony on  
16 such an occasion occurs where "the defendant can show that excluding or striking such evidence  
17 would deprive him of his federal constitutional right to a fair trial and, if he makes this threshold  
18 showing, that his right transcends the conflicting right protected by the shield law." 80 Cal. App.  
19 4th at 737 (emphasis added). See also id. (where the witness refuses to disclose unpublished  
20 information on cross-examination, "the remedy is ... to move to exclude or strike related testimony  
21 sought from the witness on direct examination. The motion should be granted unless the defendant  
22 can [make such a showing]").<sup>6</sup>

23  
24 <sup>6</sup> Where the defendant satisfies this Delaney-type test, the Court of Appeal suggested that  
25 the State might then be able to inquire into unpublished information in order to vindicate its right to  
26 cross-examination, a holding that Mr. Drew believes conflicts with Miller. Nevertheless, this  
27 aspect of the Fost holding is irrelevant here, since the prosecution does not seek Mr. Drew's  
28 testimony for purposes of cross-examination. More to the point, the Fost decision recognizes the  
self-evident proposition that, if eliciting a reporter's testimony regarding published information on  
direct examination will inevitably lead to the compelled disclosure of unpublished information on  
cross-examination, the direct examination should not be allowed unless it serves a sufficiently  
compelling constitutional interest – a showing that Miller holds a prosecutor can never make. Here,  
if the prosecutor's subpoena is not limited to published information, the Court will be faced with  
the Hobson's choice of compelling disclosure of constitutionally-protected information by Mr.

1 Here, it is the prosecutor who seeks to put in motion an analogous sequence of events that  
2 inevitably will lead to demands by defendant for the disclosure of unpublished information  
3 protected by the shield law. Under both Miller and Fost, the defendant is the only party who, if he  
4 satisfies Delaney, has a constitutional interest sufficient to overcome the shield law and to compel  
5 disclosure of published information if it will inevitably lead to disclosure of unpublished  
6 information. Because, under Miller, the prosecution has no such constitutional interest sufficient to  
7 overcome the shield law, the scope of Mr. Drew's testimony should be limited to published  
8 information or entirely disallowed.

9 Fost also teaches that, wherever possible, a trial court should resolve the shield law issues  
10 before any testimony from the reporter is elicited. As the Court of Appeal noted in Fost: "[i]f the  
11 issue can then be anticipated, the defendant can be required to make this [Delaney] showing by an  
12 in limine motion in advance of trial." Id. at 736-37 & n.8. The very purpose of a preliminary  
13 motion "is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is  
14 granted in the proceedings before the jury." Kelly v. New West Federal Savings, 49 Cal. App. 4th  
15 659, 669 (1996). In other words, to avoid the difficulties of trying to "unring the bell" by striking a  
16 reporter's direct examination testimony after the fact, the court should resolve the issue before the  
17 reporter testifies at all.

18 **D. Defendant Should Not Be Permitted To Cross-Examine Mr. Drew About**  
19 **"Unpublished" Information Because Defendant Cannot Satisfy The California**  
20 **Supreme Court's Test in Delaney**

21 In Delaney, the California Supreme Court recognized that the absolute immunity afforded  
22 by the newsperson's Shield Law embodied in Article I, Section 2(b) of the California Constitution  
23 and Section 1070 of the Evidence Code may only be overcome in a criminal proceeding "on a  
24 showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair  
25 trial." 50 Cal. 3d at 805. The Court outlined a "two-stage inquiry" that trial courts must conduct  
26 before finding that a reporter may be compelled to testify about information protected by the Shield  
27 Law. Delaney, 50 Cal. 3d at 809; Miller, 21 Cal. 4th at 891.

28 Drew on cross-examination or barring the defense from conducting on cross-examination an  
inquiry that it undoubtedly will contend is essential to its right to present an adequate defense.

1 As a preliminary matter, the defendant must "show that nondisclosure would deprive him of  
2 his federal constitutional right to a fair trial." People v. Sanchez, 12 Cal. 4th 1, 56 (1996). See also  
3 In re Walloon, 47 Cal. App. 4th 1080, 1085 (1996) (holding "that the Shield Law protects the news  
4 media from contempt absent a specific showing that nondisclosure of the source will create a  
5 substantial probability of injury to a criminal defendant's right to a fair trial"). To satisfy this  
6 requirement, the defendant must establish "a reasonable possibility the information will materially  
7 assist his defense." Delaney, 50 Cal. 3d at 808 (emphasis added). The "burden is on the criminal  
8 defendant to make th[is] required showing." Id. at 809. If the defendant cannot make this  
9 preliminary showing, then the inquiry is over, and the reporter cannot be compelled to testify.<sup>7</sup>

10 In Delaney, the Court found that the defendant had satisfied this test because the reporters  
11 were eyewitnesses to the police officers' search of the defendant and were the only disinterested  
12 witnesses on the issue of whether the defendant consented to the search. 50 Cal. 3d at 814-16. In  
13 so holding, the Supreme Court found that the testimony sought from the reporters was "pivotal"  
14 and would "likely be determinative of the outcome" of the case. Id. at 815 (emphasis added). In  
15 circumstances where the information sought from a journalist is neither eyewitness testimony, nor  
16 as "pivotal" as it was in Delaney, courts have been reluctant to find that such information is likely  
17 to provide material assistance to the defense.<sup>8</sup>

18  
19 <sup>7</sup> See, e.g., Sanchez, 12 Cal. 4th at 58 n.4 (declining to apply Delaney balancing factors  
20 where defendant failed to show reasonable possibility that unpublished information would  
21 materially assist his defense); In re Willon, 47 Cal. App. 4th at 1093 (noting that Delaney balancing  
22 test is "inapplicable [where court is] not confronted with a request by a defendant for information  
23 that would directly assist in his or her defense"); People v. Von Villas, 10 Cal. App. 4th 201, 235  
(1992) (finding "no requirement for the trial court to balance the interests of the newsperson with  
24 those of the criminal defendant as set forth in Delaney" where defendant failed to show reasonable  
25 possibility that information would materially assist his defense).

26 <sup>8</sup> See, e.g., Sanchez, 12 Cal. 4th at 57 (holding that defendant who sought unpublished  
27 information that "might have shown" that reporter's testimony regarding published information  
28 "was his own interpretation of [defendant's] account, not an actual admission," and "might have  
proven that [the reporter's] conclusion was not supported by the interviews" failed to make  
threshold showing required to overcome the Shield Law); People v. Cooper, 53 Cal. 3d 771, 820  
(1991) (declining to compel reporter to produce anonymous letter describing mishandling of  
murder investigation where "the competency of the investigation, which was only tangentially  
relevant to the issue of guilt, was exhaustively explored"); In re Willon, 47 Cal. App. 4th at 1093  
(declining to compel reporters to disclose source who violated protective order where testimony  
was sought only "to prevent the further spread of pretrial publicity").

1 Even if the defendant satisfies the "threshold requirement" discussed above, he or she is  
2 "not necessarily entitled to a newsperson's unpublished information." Delaney, 50 Cal. 3d at 809.  
3 Rather, the trial court must then proceed to the second stage of the Delaney inquiry and "consider  
4 the importance of protecting the unpublished information" by "balancing the defendant's and  
5 newsperson's respective ... interests." Id.

6 The Delaney Court set forth four factors that a trial court must consider in applying this  
7 balancing test. First, the court must consider whether "disclosure would somehow unduly restrict  
8 the newsperson's access to future sources and information," because "protection of that ability is  
9 the primary purpose of the Shield Law." Delaney, 50 Cal. 3d at 810.

10 Second, the "trial court must determine whether the policy of the Shield Law will in fact be  
11 thwarted by disclosure." Id. at 811. The Shield Law was enacted to prevent journalist from being  
12 subpoenaed routinely by litigants. "'Because journalists not only gather a great deal of information,  
13 but publicly identify themselves as possessing it, they are especially prone to be called upon by  
14 litigants seeking to minimize the costs of obtaining needed information.'" Miller, 21 Cal. 4th at  
15 898 (citation omitted). Thus, the Shield Law prevents subpoenas to journalists that in effect  
16 convert reporters into investigative or testimonial arms of prosecutors and/or defense counsel: "[i]f  
17 perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons  
18 who might otherwise give them information without a promise of confidentiality, barred from  
19 meetings which they would otherwise be free to attend." Shoen v. Shoen, 5 F.3d 1289, 1295 (9th  
20 Cir. 1993) ("Shoen").

21 Third, the court must consider the "importance of the information to the criminal  
22 defendant." Id. Specifically, where a defendant is "able to show that the evidence would be  
23 dispositive in his favor, ... the balance will weigh more heavily in favor of disclosure than if he  
24 could show only a reasonable possibility the evidence would assist his defense." Id.

25 Fourth, the Court should consider "whether there is an alternative source for the  
26 unpublished information."

27 Here, the defense will not be able to satisfy the test mandated by Delaney to overcome the  
28 Shield Law. Mr. Drew has not been subpoenaed because he has eyewitness information about any

1 events that form the basis of the allegations against Mr. Jackson, nor are the subjects about which  
2 Mr. Drew will be questioned ones that directly relate to Mr. Jackson's guilt or innocence.  
3 Consequently, the defense will not be able to show that Mr. Drew's testimony is material to his  
4 defense.

5 Moreover, even the defense meets the threshold test of materiality, the four-part balancing  
6 test strongly favors limiting the scope of Mr. Drew's testimony, given the state constitution's clear  
7 preference that reporters not be turned into witnesses, the adverse impact on Mr. Drew's ability to  
8 gather news in the future if he is compelled to disclose unpublished information, the marginal  
9 relevance of any information that Mr. Drew could provide, and the availability of other sources  
10 who have first-hand knowledge of the same information. For these reasons, the defense will not be  
11 able to overcome Mr. Draw's state constitutional protection and the scope of his testimony should  
12 be limited to published information, if allowed at all.

13 3.

14 **MR. DREW INDEPENDENTLY IS PROTECTED BY A QUALIFIED PRIVILEGE**  
15 **UNDER THE FIRST AMENDMENT**

16 In addition to the protections offered by California's Shield Law, Mr. Drew also has a  
17 qualified privilege against forced disclosure of unpublished information under the First Amendment  
18 to the United States Constitution.<sup>9</sup> The United States Supreme Court recognized the important First  
19 Amendment interests in journalists' newsgathering activities in Branzburg v. Hayes, 408 U.S. 665,  
20 681 (1972), observing that "news gathering is not without its First Amendment protections; without  
21 some protection for seeking out the news, freedom of the press could be eviscerated." Following  
22 Branzburg, numerous federal circuit courts have recognized a qualified "journalists' privilege"  
23 under the First Amendment, which protects both confidential sources and unpublished information.

24 In Shoen I, the Ninth Circuit explained that the Ninth Circuit, along with most other federal  
25 circuits, had interpreted Branzburg as establishing a "qualified privilege for journalists" under the

26 <sup>9</sup> Courts regularly have applied the federal constitutional privilege to journalists working in  
27 various media. See, e.g., Shoen I, 5 F.3d at 1290 (book author); United States v. Burke, 700 F.2d  
28 70, 75 (2d Cir. 1983) (magazine reporter); Silkwood v. Kett-McGee Corp., 563 F.2d 433 (10th Cir.  
1977) (documentary filmmaker).

1 First Amendment against compelled disclosure of unpublished information. 5 F.3d at 1292 & n.5.  
2 The court also held that this qualified federal privilege applies regardless of whether the  
3 information sought is confidential. Id. at 1295. In the case known as Shoen II (Shoen v. Shoen, 48  
4 F.3d 412, 416 (9th Cir. 1995)), the Ninth Circuit ruled that a party may overcome the qualified First  
5 Amendment privilege "only upon a showing that the requested material is (1) unavailable despite  
6 exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an  
7 important issue in this case."<sup>10</sup>

8 California state courts also expressly have recognized a qualified journalists' privilege  
9 arising from the First Amendment. See Mitchell, 37 Cal. 3d at 274-84; KSDQ v. Superior Court,  
10 136 Cal. App. 3d 375, 185-86 (1982) (holding that qualified First Amendment reporter's privilege  
11 protected journalist's notes from compelled disclosure). In Mitchell, the California Supreme Court  
12 held that courts should evaluate five factors in determining whether disclosure by a journalist  
13 should be compelled: (1) whether the journalist is a party to the litigation; (2) whether the  
14 information sought "goes to the heart of the party's claim"; (3) whether the party seeking the  
15 information has exhausted all alternative sources; (4) the importance of protecting confidentiality,  
16 including whether the information "relates to matters of great public importance" and whether the  
17 risk of harm to the source is "substantial"; and (5) whether the party seeking disclosure has made a  
18 prima facie showing on its underlying claim. See id. at 279-83.

19 Neither side will be able to meet these tests under the qualified federal privilege, and thus  
20 should be limited to examining Mr. Drew about published information. First, a person seeking  
21 information from a journalist must attempt to exhaust alternative sources before proceeding against  
22 the journalist, and also must demonstrate that the information is not otherwise available. See e.g.,  
23 Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (privilege cannot be abrogated absent a  
24 "strong showing" that "there is no other source for the information requested"); Mitchell, 37 Cal.

25  
26  
27 <sup>10</sup> As with California's state constitutional Shield Law, the federal constitutional privilege  
28 protects all unpublished information, regardless of whether related information has been published.  
See Shaklee Corp. v. Gumer, 110 F.R.D. 190, 193 (N.D. Cal. 1986).

3d at 282 (1984) ("virtually all cases agree that discovery should be denied unless the plaintiff has exhausted all alternative sources of obtaining the needed information").

Second, the party seeking testimony must show that the information sought is not cumulative, because cumulative information cannot reach the level of significance required to overcome the journalists' privilege. See, e.g., Burke, 700 F.2d at 77 (quashing subpoena because information sought "would be merely cumulative and would not defeat [the reporters'] first Amendment privilege"); United States v. Hubbard, 493 F. Supp. 202, 205 (D.D.C. 1979) (same).

Third, the questioning party must demonstrate that the information sought is clearly relevant to an important issue in the case before it is entitled to compel Mr. Drew to testify. To meet this burden; the prosecution or defendant must do more than merely speculate as to the importance of particular information. See, e.g., United States v. Cuthbertson, 651 F.2d 189, 196 (3d Cir. 1981) (defendant seeking information must prove that the information sought is "crucial to the claim"); Mitchell, 37 Cal. 3d at 276 (information sought must go "to the heart" of the subpoenaing party's case). Mr. Drew is not a percipient witness to any events or issue here; consequently, his testimony would not go to the heart of this case and the prosecution has failed to demonstrate otherwise.

Because neither side would be able to meet its burden under the First Amendment privilege, the Court should enter a protective order limiting Mr. Drew's testimony to information in his previously published interview and statements.

#### 4.

### CONCLUSION

If Mr. Drew is forced to testify about his unpublished observations and impressions gathered in the course of his journalistic activities, his future newsgathering ability will be significantly impaired. Mr. Drew's sources would shy away from giving interviews or insist on off-the-record status. That would thwart the very purpose of the Shield Law and the qualified First Amendment reporter's privilege, which are designed to "safeguard the free flow of information from the news media to the public[.]" In re Willon, 47 Cal. App. 4th 1080, 1091 (1996).

1 For the reasons set forth above, Mr. Drew respectfully requests that the Court limit the  
2 scope of the prosecution's examination and the defense's cross-examination of Mr. Drew.

3 DATED: April 27, 2005

DAVIS WRIGHT TREMAINE LLP  
KELLI L. SAGER  
JEFFREY H. BLUM  
JOHN D. KOSTREY

6 By:   
Kelli L. Sager

Attorneys for Non-Party Journalist  
IAN DREW



DECLARATION OF KELLI L. SAGER

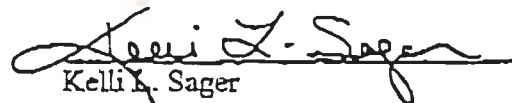
I, Kelli L. Sager, declare:

1. I am a lawyer admitted to practice before all the courts in the State of California and before this Court. I am a partner in the law firm of Davis Wright Tremaine, and am one of the lawyers responsible for representing non-party journalist Ian Drew in this action. The matters stated here are true of my own personal knowledge, except for those matters stated on information and belief, which matters I believe to be true.

2. Attached as Exhibit A to this Declaration is a true and correct copy of the State's subpoena directing Mr. Drew to appear and testify in this criminal trial.

3. On April 25, 2005, I spoke with Deputy District Attorney Ronald Zonen on the telephone. During that conversation, I was informed that the prosecution intended to ask Mr. Drew about information contained in an interview given by Mr. Drew, and that the prosecution would not ask Mr. Drew any questions that would seek the identity of confidential sources or any unpublished information that is within the scope of the reporter's Shield Law.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on April 27, 2005, at Los Angeles, California.

  
Kelli L. Sager



OFFICE OF THE DISTRICT ATTORNEY  
COUNTY OF SANTA BARBARA

THOMAS W. SNEDDON, JR.  
DISTRICT ATTORNEY

## SUBPOENA FOR APPEARANCE OF WITNESS

THE SUPERIOR COURT, STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA BARBARA  
Santa Maria Division

The People Of The State Of California VS. MICHAEL JOE JACKSON

TO:

IAN DREW  
Alca IAN DREW MAYERCHAK  
570 N. ROSSMORE AVE., #104  
LOS ANGELES, CA 90004

Comments:

HEARING DATE: March 1, 2005 at 09:00  
DEPT: 8  
JUDGE: RODNEY MELVILLE

TYPE OF HEARING: Superior Court Jury Trial

REPORT NO: 03-5670

COURT NO: 1133603

DA NO: 03-12-098996

REPORT TO: Santa Barbara Superior Court  
312-G East Cook Street  
Santa Maria, CA 93454

DDA NAME: THOMAS W. SNEDDON,  
JR.

OFFENSE DATE: 02/07/2003

VIOLATION: PC 288(A)

**YOU ARE:** Ordered to appear at the location, date and time on the subpoena. Since the actual time and date of the testimony may change, you may save yourself unnecessary court appearances by agreeing to remain "ON-CALL." To do so, YOU MUST contact the WITNESS COORDINATOR IMMEDIATELY at the number listed below to verify your phone number and make necessary arrangements to be placed "ON-CALL."

### FOR CASE STATUS INFORMATION:

Please call the Witness Coordinator's Office prior to your actual appearance to confirm the court schedule at:  
(805) 346-7529 - Shamra Limon or (805) 346-7527 - Mag Nicola

DATE ISSUED:

Witness may be entitled to witness fees and mileage. If you reside outside Santa Barbara County contact the Witness Coordinator for assistance.



Thomas W. Sneddon, Jr., District Attorney  
County of Santa Barbara

SECTION 1331 & 1331.5 PENAL CODE: A WITNESS MAY, IN LIEU OF APPEARANCE AT THE TIME SPECIFIED IN THE SUBPOENA, AGREE TO APPEAR AT ANOTHER TIME. DISOBEDIENCE TO A SUBPOENA, OR REFUSAL TO BE SWORN TO TESTIFY AS A WITNESS MAY BE PUNISHED BY THE COURT OR MAGISTRATE AS A CONTEMPT

I hereby certify that at \_\_\_\_\_ (AM)(PM) on \_\_\_\_\_ 200\_, I served the within subpoena by delivering a copy of the subpoena personally to \_\_\_\_\_. Date: \_\_\_\_\_  
By: \_\_\_\_\_ Reason not served \_\_\_\_\_

FILED  
SANTA BARBARA  
SUPERIOR COURT

JAN 16 2004

GARY M. BLAIR  
Deputy Clerk  
By: *[Signature]*  
LORNA FREY Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF	}	Case No.: 1133603
CALIFORNIA,		Protective Order
Plaintiff,		
vs.		
MICHAEL JACKSON, et al		
Defendant		

TO: Thomas W. Sneddon, District Attorney for the County of Santa Barbara, and to  
Mark F. Geragos; attorney of record for Defendant Michael Jackson, and all interested parties:

It is the Order of this Court that no attorney connected with this case as Prosecutor or  
Defense Counsel, nor any other attorney working in or with the offices of either of them, nor  
their agents, staff, or experts, nor any judicial officer or court employee, nor any law  
enforcement employee of any agency involved in this case, nor any persons subpoenaed or  
expected to testify in this matter, shall do any of the following:

1. Release or authorize the release for public dissemination of any purported extrajudicial  
statement of either the defendant or witnesses relating to this case;

2. Release or authorize the release of any documents, exhibits, photographs, or any evidence, the admissibility of which may have to be determined by the Court;
3. Make any statement for public dissemination as to the existence or possible existence of any document, exhibit, photograph or any other evidence, the admissibility of which may have to be determined by the Court;
4. Express outside of court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence;
5. Make any statement outside of court as to the content, nature, substance, or effect of any statements or testimony that have been given or is expected to be given in any proceeding in or relating to this matter;
6. Issue any statement as to the identity of any prospective witness, or the witness's probable testimony, or the effect thereof;
7. Make any out-of-court statement as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter.

This Order does not include any of the following:

1. Factual statements of the accused person's name, age, residence, occupation and family status.
2. The time and place of arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation.
3. The nature, substance, and text of the charge, including a brief description of the offenses charged.

1 4. Quotations from, or any reference without comment to, public records of the Court in the  
2 case.

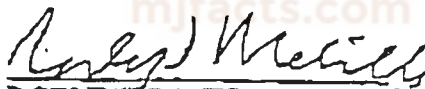
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4 5. The scheduling and result of any stage of the judicial proceedings held in open court in an  
5 open or public session

6 6. A request for assistance in obtaining evidence or the names of possible witnesses.

7 7. Any witness may discuss any matter with any Prosecution or Defense Attorney in this  
8 action, or any agent thereof, and if represented may discuss any matter with his or her  
9 own attorney.  
10

11  
12 Any violation of this order will result in a contempt action for any offender within  
13 the jurisdiction of this Court. A copy of this Order shall be provided to any prospective witness  
14 that a party intends to call for any proceeding in this action.  
15

16  
17 DATED: January 16, 2004

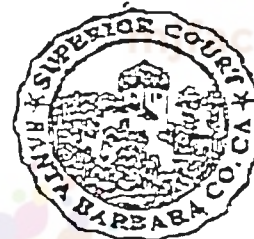
18  
19   
20 RODNEY S. MELVILLE  
21 Judge of the Superior Court  
22

23  
24 This is a true certified copy of the original document on file or of  
25 record in my office. It bears the seal and signature, imprinted in  
26 purple ink, of the Clerk of the Superior Court.

27  
28   
29 CLERK OF THE SUPERIOR COURT, SANTA BARBARA COUNTY, CALIFORNIA

30  
31 DATE DEC 22 2004

32 BY DEPUTY 



**PROOF OF SERVICE BY FACSIMILE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine LLP, 865 S. Figueroa St., Suite 2400, Los Angeles, California 90017-2566.

On April 27, 2005, I served the foregoing document(s) described as: **MEMORANDUM REGARDING NON-PARTY JOURNALIST IAN DREW'S REQUEST FOR ORDER LIMITING THE SCOPE OF HIS TESTIMONY TO PUBLISHED INFORMATION; DECLARATION OF KELLI L. SAGER WITH EXHIBIT A** on the interested parties to this action, by Facsimile to the following parties at their facsimile machine telephone number(s) as follows:

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Executed on April 27, 2005, at Los Angeles, California.

- ☒ **State** I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.
- ☐ **Federal** I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Lisa M. Dunbar  
Print Name

*Lisa M. Dunbar*  
Signature

SERVICE LIST

The People of the State of California v. Michael Joe Jackson  
Case No. 1133603

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District Attorney

Gerald Franklin, Esq.

Ronald Zonen, Esq.

Gordon Auchincloss, Esq.

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