

1 [Insert Attorney name and address]

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4 [Insert Court Heading]

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9 THE PEOPLE OF THE STATE,
10 OF CALIFORNIA

11 Plaintiff,

12 vs.

13 SAM SAMPLE,

14 Defendant

) Case No.:

) Hearing Brief Re: Proper Forum In Which
) To Litigate Privileges Against Subpoena
) Under Uniform Act To Secure The
) Attendance Of Witnesses From Without A
) State In Criminal Proceedings.

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16 1.

17 Statutory or Constitutional privileges raised against a subpoena
18 issued under Uniform Act cannot be litigated in Utah, but must be
19 litigated in California.

20 The courts hold that when a person subpoenaed under Uniform Act To Secure The
21 Attendance Of Witnesses From Without A State In Criminal Proceedings objects to a
22 subpoena by raising a statutory or constitutional privilege under either state or federal
23 law, the privilege has to be litigated in the demanding state, and cannot be litigated in the
24 sending state. A leading case in this area is *Codey on Behalf of New Jersey v. Capital
25 Cities, American Broadcasting Corp., Inc.*, 626 N.E.2d 636 (N.Y. 1993).

26 In *Codey*, ABC news broadcast three stories about an alleged point-shaving
27 scheme by some members of the North Carolina State University men’s basketball team.
28 The stories were based in part on information obtained from confidential sources. The
broadcast also included excerpts from an interview with an unidentified player who could

1 not be recognized in the tape. The unidentified player later cooperated with a New Jersey
2 grand jury investigating illegal gambling. The New Jersey grand jury obtained a
3 certificate certifying that the video-taped out-takes and reporter's interview notes were
4 material and necessary to the investigation. The grand jury requested that these items be
5 produced by ABC and its custodian.

6 The New York trial judge found that the items were material and that there was no
7 hardship in complying with the New Jersey subpoena. The judge ruled that the question
8 of privilege under the New Jersey Shield Law was a question for the courts of New
9 Jersey, rather than the courts of New York. The Appellate Division reversed. And in
10 turn, the Court of Appeals of New York held that it was error for the Appellate Division
11 to consider the privileged nature of the evidence sought. New York's highest court said
12 that since the purpose of the Uniform Act was to establish a simple and consistent
13 method for compelling the attendance of out-of-state witnesses, that purpose would be
14 thwarted if the sending states became forums for litigating questions of admissibility and
15 evidentiary privilege that would have to be litigated again in the demanding state. 626
16 N.E.2d at p. 642.

17 In view of the sensitivity of privilege issues to local policy concerns and
18 particularized legal rules, it would make little sense to construe CPL
19 640.10(2) as authorizing the courts of this State to determine questions of
20 privilege that arise out of the law of another jurisdiction and which relate to
21 specific criminal proceedings pending in that other jurisdiction. In these
22 circumstances, the courts of the demanding jurisdiction are better qualified,
23 both because of their superior familiarity with local law and because of
24 their direct access to the parties or the facts in the underlying controversy
(see generally, Restatement [Second] of Conflict of Laws § 139 [generally,
questions of inadmissibility due to privilege are determined by law of
forum State]).

25 626 N.E.2d at p. 642. "Further, evidentiary questions such as privilege are best resolved
26 in the State-and in the proceeding-in which the evidence is to be used. Whether a
27 particular communication or document is entitled to the cloak of privilege is a complex
28 question that requires a balancing of values and policy choices (see, McCormick, op. cit.,
§ 72, at 171)." 626 N.E.2d at p. 642. Consider, as just one example, the question of

1 whether a privilege has been waived. “The question of waiver is factual and properly
2 determined by the State in which the evidence sought is to be used.” *In re Connecticut*,
3 687 N.Y.S.2d 219, 628 (N.Y. Co. Ct. 1999).

4 Examples of privileges that have been held to be required to be raised in the
5 demanding state are the privilege under press-shield laws, *In re State of California for the*
6 *County of Los Angeles, Grand Jury Investigation*, 471 A.2d 1141 (Md.App. 1984); *Codey*
7 *on Behalf of New Jersey v. Capital Cities, American Broadcasting Corp., Inc., supra*; the
8 attorney-client privilege, *In re Connecticut, supra*; and the privileges a person has in
9 one’s tax returns under state and federal law, *In re Rhode Island Grand Jury Subpoena*,
10 605 N.E.2d 840 (Mass. 1993). Holding that a privilege could not be raised in the sending
11 state, but that protection had to be sought in the demanding state, the court in *In re State*
12 *of California for the County of Los Angeles, Grand Jury Investigation, supra*, stated,
13 “The Maryland Press Shield Law was designed to protect newsmen and newswomen in
14 this State; it has no extraterritorial application.” 471 A.2d at p. 1145. What about a
15 privilege that has extraterritorial application? According to the Utah Supreme Court, the
16 fact that a witness has a privilege against self-incrimination “did not constitute a
17 legitimate reason to consider her a nonmaterial witness for purposes of issuing a
18 certificate to compel her attendance at trial.” *State v. Schreuder*, 712 P.2d 264, 274 (Utah
19 1985). *Schreuder* was cited by the Supreme Court of Arizona in support of its conclusion
20 that “A witness cannot circumvent the Uniform Act by claiming his *intent* to assert the
21 privilege before the questions are actually posed in the proceeding to which the privilege
22 will pertain.” *Tracy v. Superior Court*, 810 P.2d 1030, 1034 (Ariz. 1991). Therefore,
23 even the privilege against self incrimination must be asserted in the demanding state.

24 25 2.

26 California law provides at least as much protection for the records of
27 alleged crime victims as does Utah law.

28 In footnote 3 of its opinion in *Codey on Behalf of New Jersey v. Capital Cities,*
American Broadcasting Corp., Inc., supra, the court said that there may be a future case

1 in which a witness might not be compelled to travel to a demanding state when justified
2 by a strong public policy of the sending state. 626 N.E.2d at p. 646. This footnote
3 became an issue in *In re Connecticut, supra*, where it was suggested that the footnote
4 meant that there may be an exception to the rule that privileges must be raised in the
5 demanding state where that state does not have a similar privilege. 687 N.E.2d at p. 628.
6 But the court pointed out that Connecticut, like New York, had an attorney-client
7 privilege and the privilege extended to private investigators working for attorneys. 687
8 N.E.2d at p. 629. Similarly in the present case, any privileges allowed to alleged victims
9 under Utah law will be found in California law.

10 Utah Rules of Criminal Procedure, Rule 14 subdivision (b) provides protections to
11 the records of alleged crime victims. Under Rule 14(b)(2) the subpoena or court order
12 has to identify the records with particularity. Under Rule 14(b)(4) the subpoenaed
13 records have to be sent to the court which shall then conduct an in camera hearing, and
14 disclose to the defense and prosecution only those records that the defendant is shown
15 that he has a right to inspect. This is the same procedure followed in California.

16 “Under Penal Code section 1326, subdivision (c), a person or entity responding to a third
17 party subpoena duces tecum in a criminal case must deliver the subject materials to the
18 clerk of court so that the court can hold a hearing to determine whether the requesting
19 party is entitled to receive them.” *Kling v. Superior Court*, 239 P.3d 670, 672; 116
20 Cal.Rptr. 3d 217, 219 (Cal. 2010). The party subpoenaed can move to quash the
21 subpoena, and it has the opportunity to lodge objections, and raise claims of privilege
22 against disclosure at an in camera hearing. *People v. Superior Court (Barrett)*, 96
23 Cal.Rptr.2d 264, 275 (Cal. App. 2000). If the person subpoenaed moves to quash the
24 subpoena, the defendant has the burden to show that the materials he seeks are relevant.
25 (*Ibid.*) “Assuming CDC moved to quash the subpoena duces tecum by Barrett, the
26 burden would be on Barrett to demonstrate the materials he seeks are relevant.” (*Ibid.*)
27 The rights of the defendant and the rights of the person having a privacy interest in the
28 records are balanced in the in camera procedures. (*Susan S. v. Israels*, 67 Cal.Rptr.2d 42,
45 (Cal.App. 1997)] (discussing the criminal subpoena duces tecum.) Thus the in camera

1 procedures provided under California law are designed to take care of problems such as
2 specificity, constitutional rights, and privileges of non-disclosure.

3 Under California law after the subpoenaed records arrive in court the defendant
4 will have to give notice to both the alleged victim and the prosecutor. *Kling v. Superior*
5 *Court, supra*, 239 P.3d at pp. 678-679; 116 Cal.Rptr.3d at p. 227. And even the
6 prosecutor will have the right to file a motion to quash the Utah subpoena. 239 P.3d at p.
7 677; 116 Cal.Rptr.3d at p. 225.

8 Any statutory or constitutional privileges asserted as a basis to resist the subpoena
9 must be litigated in California. California courts will offer all the protections afforded to
10 the records provided under Rule 14 of the Utah Rules of Criminal Procedure.

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13 Dated: January , 2011

Respectfully submitted,

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Attorney for Applicant and Defendant
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