

# Reporter Ordered to Sit for Second Deposition

## Digital Media and Data Privacy Law Blog

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Posted in Reporters Privilege

In a new twist in a matter we have been following closely, a federal judge in Michigan issued a written ruling today ordering Detroit Free Press reporter David Ashenfelter to sit for a second deposition. The judge released his decision just over two weeks after conducting a hearing on a motion to hold Ashenfelter in contempt for refusing to testify at his deposition in a civil lawsuit about a confidential government source who divulged information to him about the plaintiff.

As we first reported in December, this case is particularly interesting because Ashenfelter invoked the Fifth Amendment privilege against self-incrimination in an effort to maintain his source's confidentiality. Traditionally, reporters rely upon state shield statutes or the First Amendment to protect their sources. However, in this case no shield law was available to Ashenfelter because the matter is pending in federal court (a problem that will be remedied if Congress passes the federal Free Flow of Information Act this year), and the judge had previously rejected Ashenfelter's invocation of a First Amendment privilege against being compelled to disclose the identity of a confidential source.

The basis of Ashenfelter invocation of the Fifth Amendment -- and his response to the plaintiff's motion to hold him in contempt for refusing to answer questions under oath about his source -- was his fear that he could face criminal prosecution related to his source's actions. The plaintiff had argued that the source violated the federal Privacy Act by disclosing information about the plaintiff to Ashenfelter and that Ashenfelter was aiding that crime by refusing to name the source.

After hearing the parties' arguments earlier this month -- including hearing from Justice Department officials who demurred as to whether Ashenfelter might face criminal prosecution -- the presiding judge ruled that he needs further testimony before he can resolve Ashenfelter's Fifth Amendment claim.

In his written decision, the judge explained that Ashenfelter should clarify the basis of his fears of criminal prosecution -- under oath. According to the judge, when a question asked does not patently seek information that would tend to incriminate a witness (such as a question whether the witness committed a crime), then

the witness must present sufficient evidence such that the "court can, by the use of reasonable inference or judicial imagination, conceive a sound basis for a reasonable fear of prosecution." Above all, it is the witness's claim of the Fifth Amendment which controls, and therefore it is the witness who "must supply personal statements under oath or provide evidence with respect to each question propounded to him to indicate the nature of the criminal charge which provides the basis for his fear of prosecution."

The court concluded that Ashenfelter had not carried his burden under this standard because he had refused to provide any testimony at all that would substantiate the basis of his claim of privilege. In fact, in a footnote the Court stated that the transcript of Ashenfelter's deposition contains "many questionable invocations of the Fifth Amendment," as Ashenfelter had invoked the privilege in response to all but four questions he was asked. Nor had Ashenfelter provided any other evidence concerning the nature of the criminal charge he feared.

As a result, the court could not "either validate or reject his asserted fear of prosecution" on the record as it currently stands. The judge therefore ruled that Ashenfelter must re-appear for a deposition or give a personal statement under oath with respect to each question asked to indicate the nature of the criminal charge he fears. The judge also ordered that the deposition take place in the federal courthouse "at a time that the undersigned judge is readily available to review and decide disputed objections." The court also noted that in lieu of a second deposition, the parties could negotiate a solution, such as a detailed affidavit or an ex parte in camera review of Ashenfelter basis for asserting the Fifth Amendment privilege against self-incrimination.

We will continue to monitor the progress of this matter.