"DAMNED IF YOU DO. DAMNED IF YOU DON'T." PROTECTING THE FIFTH AMENDMENT RIGHTS OF CIVIL LITIGANTS

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No person… shall be compelled in any criminal case to be a witness against himself

U.S. Constitution Amend. V

In all criminal prosecutions the accused… shall not be compelled to give evidence against himself.

Texas Constitution Art. 1 § 10

While it is relatively easy to identify when an issue involving the Fifth Amendment right against self-incrimination arises in a civil case, most civil litigators fail to properly evaluate the different legal options available to their client when confronted with this situation. This article is intended to serve as a summary of the law in this area while also offering guidance to the practitioner. While the authors have sought to address Texas and Fifth Circuit law only, where appropriate we have cited cases from other jurisdictions.

I. INVOKING THE PRIVILEGE

It is well established that the privilege against self-incrimination applies in civil as well as criminal proceedings. *Ex Parte Butler*, 522 S.W.2d 196, 197-198 (Tex. 1975). The privilege protects an individual from answering official questions in any type of official proceeding where the answers might incriminate him in a future criminal action. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Because of the constitutional dimension of the privilege, it is to be construed as broadly as possible in order to protect it. *See, Maness v. Meyers*, 419 U.S. 449 (1975).

However, in a civil case individuals have no right to refuse to give testimony or evidence completely. Blanket assertions of the right against self-incrimination are impermissible. *In Re Verbois*, 10 S.W.3d 825, 828-829 (Tex. App.-Waco 2000, orig. proceeding [mand.denied]); *In Re Speer*, 965 S.W.2d 41, 45-46 (Tex. App.-Fort Worth 1998, orig. proceeding). The defendant cannot completely refuse to submit to a deposition, answer discovery or take the witness stand. *Id.* Only where a court finds that the defendant could legitimately refuse to answer essentially all relevant questions is a person totally excused from responding to relevant inquiries. *SEC v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 668 (5th Cir. 1981). Otherwise, the defendant is only entitled to invoke the privilege as to "genuinely threatening questions". *Id.* A further complication is the fact that there is no constitutional prohibition against commenting on a party or a witness' invoking of the privilege in a civil case. *Baxter v. Palmigiano*, 425 U.S 308, 319 (1976). Therefore, counsel has two decisions to make. The first is to decide whether and when to invoke the privilege and second is to assess the likely impact of that assertion on the client not only in the civil case but in any possible criminal charges or administrative proceedings that might result.

Once the decision to invoke the privilege has been made, it is the Court which ultimately decides whether the defendant can refuse to answer. It is left up to the trial court to make the final decision on the applicability of this privilege.

The U.S. Supreme Court has established the following procedure for asserting the privilege against self-incrimination in a civil case.

> "When a witness refuses to answer, he is not the exclusive judge of his right to exercise the privilege. The judge is entitled to determine whether the refusal to answer appears to be based upon the good faith of the witness and is justifiable under all of the circumstances. The inquiry by the court is necessarily limited, because the witness need only show that an answer to the question is likely to be hazardous to him; the witness cannot be required to disclose the very information which the privilege protects. Before the judge may compel the witness to answer, he must be perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." *Hoffman v. United States*, 341 U.S. 479, 488 (1951).

If the trial court denies the witness' assertion of the privilege against self-incrimination in response to a specific inquiry, the witness may challenge the ruling in an original mandamus proceeding. *In Re Verbois*, 10 S.W.3d 825, 828-829 (Tex. App.-Waco 2000, orig. proceeding [mand. denied]); *In Re Speer*, 965 S.W.2d 41, 45-46 (Tex. App.-Fort Worth 1998, orig. proceeding).

II. USE IN CIVIL DISCOVERY AND TRIAL

The Fifth Amendment privilege against self-incrimination may be invoked during civil cases and applies not only at trial, but also during discovery. *S.E.C. v Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994). However, the use of the privilege often deprives the adverse party of a source of information that might be necessary to the prosecution or defense of their case. *Id.* There is also a real potential for

abuse because the privilege may be invoked during discovery only to be waived later at a time when the adverse party can no longer benefit from the information. *Id.* Courts become especially concerned when a party invokes the privilege during discovery, only to waive it at trial. *Id.*, at 191. At that point, the adverse party is at a disadvantage as they have conducted discovery and prepared the case without the benefit of knowing the privileged information. *Id.* The opportunity to combat newly available testimony may no longer exist, a new investigation may be required, and trial preparation could be disrupted. *Id.* In such a situation, the late waiver of the privilege may be unfair to the adverse party.

In some cases, courts have the power to prohibit such a witness from testifying altogether. For example, in *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), the trial court ordered that the defendant was precluded from testifying at trial because he earlier refused to answer questions during the discovery process. The Court of Appeals upheld this decision and stated that "[a] defendant may not use the Fifth Amendment to shield itself from the oppositions' inquiries during discovery only to impale her accusers with surprise testimony at trial." *Id.*, at 577.

Recognizing this danger, the Second Circuit has instructed district courts to "pay particular attention to how and when the privilege was originally invoked" before allowing a defendant to withdraw his claim of privilege. *United States v. Certain Real Prop. and Premises Known as 4003-4005 5th Ave. Brooklyn N.Y.*, 55 F.3d 78, 84 (2d Cir. 1995); *see also, S.E.C. v. Softpoint*, 958 F.Supp. 846, 855 (S.D.N.Y. 1997). These cases state that courts are to be alert to the danger that a party may invoke the privilege primarily to manipulate discovery or to gain an unfair advantage. *Id.* In such a situation, courts may bar litigants from testifying later about matters previously hidden from discovery through an improper invocation of the Fifth Amendment. *Certain Real Property*, 55 F.3d at 87; *Softpoint*, 958 F.Supp. at 855.

In *S.E.C. v. Softpoint*, the defendant did not invoke the Fifth Amendment privilege to protect himself from providing incriminating information but to avoid paying for his lawyer's flight to Reno, Nevada to attend his deposition. *Softpoint*, 958 F.Supp. at 855. The Court explained that the Fifth Amendment privilege is not properly invoked when its sole purpose is to force a change in location for a pre-trial examination or to delay proceedings. *Id.*, citing *Doe v. United States*, 487 U.S. 201, 212 (1988). A defendant cannot simply invoke his privilege against self-incrimination to impede the opposing party's efforts and then seek to waive the privilege when convenient or when faced with the consequences of his refusal to testify. *Id.*, at 857.

However, this is not a hard and fast rule and its application depends upon the circumstances of each case. For instance, in *S.E.C. v. Graystone Nash, Inc.*, the Court allowed the defendants to withdraw their claim of privilege, because the defendants properly invoked their Fifth Amendment privilege as a shield against self-incrimination and because the plaintiff was not prejudiced by the subsequent withdrawal of the privilege. *Graystone Nash, Inc.*, 25 F.3d at 192-94. In that case, the defendants refused to answer questions during depositions in reliance on their right to self-incrimination, not to delay the discovery process. *Id.*, at 188. Further, the Court rejected the S.E.C.'s allegation that defendants' belated withdrawal of their privilege caused it surprise and prejudice. *Id.*, at 193. Evidently, the two defendants were only two of seven defendants who had been sued by the S.E.C. for securities fraud operations and the S.E.C. had already taken depositions of other individuals with pertinent information. *Id.* Thus, the S.E.C. possessed enough evidence to proceed against the defendants and the defendants' invocation of the Fifth Amendment privilege did not prevent the S.E.C. from obtaining such evidence. *Id.* The Court held that the S.E.C's preclusion sanction did not "level the playing field" but instead, tilted it in favor of the S.E.C. *Id; See also, F.T.C. v. Kitco of Nevada*, 612 F.Supp. 1282, 1291 (D.Minn. 1985). [A complete ban on defense testimony was not justified since the plaintiff has received some information from the defendant about specific areas of inquiry.] The Court explained. "A trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment. Because the privilege is constitutionally based, the detriment to the party should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *Id.*, at 192. From these cases we see that the effect that an assertion of the Fifth Amendment privilege may have on a case depends largely on the particular circumstances of the litigation.

The lesson to take from these cases is that a defendant may invoke the Fifth Amendment privilege during discovery and then waive that privilege at trial so long as doing so does not unfairly prejudice the plaintiff. To do this, a defendant must be prepared to show that the plaintiff will not be surprised or prejudiced by the withdrawal of the privilege. Obviously, this is very big risk to take which should only be taken in extreme circumstances. The better approach is to seek protection from the Court in advance as will be discussed later.

III. THE PRIVILEGE AND DOCUMENTS

Another problem that commonly arises when asserting the privilege is when documents are sought in discovery. The general rule is that the privilege against

self-incrimination only applies when an accused is compelled to give testimony. *Fisher v. United States*, 425 U.S. 391, 397 (1976). Typically, the Fifth Amendment does not protect the contents of records that are in the possession of an accused. *United States v. Doe*, 465 U.S. 605, 612 n. 9 (1984). In *United States v. Doe*, the Supreme Court explained that "if the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." *Id.*, at n. 10.

However, this does not mean that the Fifth Amendment provides no protection to documents. Even if the contents of the documents are unprotected, the Fifth Amendment's protection may still apply to the very act of producing the documents. *Id.*, at 612. This is true if the act of complying with a request for documents amounts to a testimonial act. For example, if the accused is required to testify to the existence, authenticity or possession of the documents produced, then such testimony may in itself be incriminating. *Id.*; *United States v. Hubbell*, 530 U.S. 27, 34 (2000).

This is known as the "Act of Production Doctrine" and means that the act of responding to a compelled request may have a testimonial effect if it "could provide a prosecutor with a lead to incriminating evidence, or a link in the chain of evidence needed to prosecute." *United States v. Hubbell*, 530 U.S. at 42. The extent of this protection is questionable. To understand the application and possible limitations of this protection, it is important to review the history of the doctrine.

It starts with the 1886 decision of the Supreme Court in *Boyd v. United States*, 116 U.S. 616, 633 (1886). In that case, the Court held that compulsory production of documents was the equivalent of an unreasonable search and seizure in violation of the Fifth Amendment. However, the Court limited this holding in *Fisher v. United States*, 425 U.S. at 397. In *Fisher*, the Court held that the "Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but only applies when the accused is compelled to make a testimonial communication that is incriminating." *Id.*, at 408. Because the preparation of the document in *Fisher* was "wholly voluntary", the Court held that it was not compelled testimonial evidence. *Id.*, at 409. Yet, the Court recognized that the act of producing the documents in certain circumstances may be testimonial to the extent that the act of production concedes "the existence of the papers demanded and their possession and control by the [defendant]". *Id.*, at 410. In *Fisher*, the Court easily disposed of the "act of production" issue because the government already knew of the documents existence and location and the defendant's testimony would add little by acknowledging that he in fact had the documents. *Id*, at 411. So, the Court successfully sidestepped the question as to whether the Fifth Amendment protects "private papers" in a case in which a witness is subpoenaed to produce personal documents, the location and existence of which are unknown. *Id.*, at 414.

Some eight years later the Supreme Court applied the same analysis in *United States v. Doe*. In that case, the defendant invoked the Fifth Amendment to resist production of subpoenaed business records. The Court held that the Fifth Amendment does not protect the contents of an individual's voluntarily prepared business records in his own possession. *United States v. Doe*, 465 U.S. at 612. In footnote 10 of that opinion, the Court stated, "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged. *Id.*, at 612 n. 10.

In her concurring opinion in *Doe*, Justice O'Connor went so far as to say that *Doe* "sounded the death knell of *Boyd*." *Id.*, at 618 (O'Connor, J., concurring). Since *Doe*, most of the Circuit Courts of Appeal have followed Justice O'Connor's lead and concluded that the Fifth Amendment does not protect private papers. Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell – New Protection For Private Papers*, 29 Am. J. Crim. L. 123, 125 (2002). However, in *Doe*, the Court declined to articulate a test or independently analyze the issue of deciding when an act of producing documents is privileged under the Fifth Amendment. Instead, the Court relied upon the factual findings of the lower courts which held that the act of producing documents under subpoena in that case would involve testimonial self-incrimination. Cole, at 148-149.

Thus, it has become relatively clear with respect to business records that where a party asserts the Fifth Amendment privilege and has voluntarily compiled the document, it is not considered compelled testimonial evidence, and the contents of the documents are not privileged. *Barrett v. Acevedo*, 169 F.3d 1155, 1167 (8th Cir. 1999). Nevertheless, whether *Doe's* rationale extends to purely personal papers in a defendant's possession remained an open question among the various Circuit Courts. *Compare United States v. Grable*, 98 F.3d 251, 253 (6th Cir. 1996); *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 93 (2nd Cir. 1993) [both holding that the Fifth Amendment does not protect the contents of voluntarily prepared documents, whether business or personal]; to, *In re Grand Jury Proceedings*, 55 F.3d 1012, 1013-14 (5th Cir. 1995) (per curiam), *In re Grand Jury Proceedings*, 632 F.2d 1033, 1043 (3rd Cir. 1980) [both holding that the contents of personal papers remain privileged in certain circumstances).

However, in 2000, the Supreme Court diminished somewhat the practical effect of *Fisher and Doe* and

restored Fifth Amendment protection to many private papers in the possession of individuals in *United States v. Hubbell*, 530 U.S. 27 (2000). Cole, at 123. This decision is said to have "effectively, if not explicitly, overruled *Fisher* in cases where private documents [are sought] from an individual." Cole, at 129. However, the facts in *Hubbell* differed from those in *Fisher* and *Doe* in one important respect—Hubbell initially invoked his Fifth Amendment privilege against self-incrimination and declined to produce any documents, but subsequently produced the subpoenaed documents after the prosecutor granted Hubbell immunity. *Hubbell*, 530 U.S. at 41. However, rather than providing a test of general application for whether a particular production of documents is sufficiently testimonial to be afforded Fifth Amendment protection, the Supreme Court focused on the facts, and Hubbell's act of production under immunity. Cole, at 163-164.

The Court began its analysis with the framework in *Fisher* and *Doe*, creating an analytical continuum. At one end, *Fisher* establishes two key points: (1) the Fifth Amendment does not protect the context of pre-existing, voluntarily prepared documents, and (2) the act of production does not implicate the Fifth Amendment if the existence and location of the subpoenaed documents is a foregone conclusion so that the party seeking the documents is not relying on the truth telling of the witness who produces the documents. Cole, at 129. At the other end of the continuum lies *Doe*, in which the party seeking the documents knew little about the documents it subpoenaed and therefore was unable to establish that possession, existence, and authentication were a foregone conclusion. *Id.*

The Court analyzed the subpoena itself and concluded that the prosecution needed Hubbell's assistance "both to identify potential sources of information and to produce those sources." *Hubbell*, 530 U.S. at 41. The Court emphasized the breadth of the eleven categories of information sought by the subpoena and compared Hubbell's efforts in identifying and producing large volumes of documents to answering a detailed interrogatory or a series of deposition questions. *Id.*, at 41-42. The Court, however, distinguished between the information that Hubbell provided through the act of producing documents, and the information that the contents of those documents provided on the other hand. *Id.* The Court held that, "entirely apart from the contents…providing a catalog of existing documents" in response to the categories sought by the subpoena was of sufficient testimonial value for Hubbell to invoke his Fifth Amendment privilege. *Id.*, at 42. The Court made clear that a witness' selection of documents that fit a general category of documents described in a subpoena is testimonial in nature because it requires a "truthful reply" by the witness. Cole, at 166-167. The Court concluded that "the assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." *Hubbell*, 530 U.S. at 42.

The Court failed to provide a definitive answer to the question of when the "foregone conclusion" doctrine applies to an act of production of documents, and only stated that "the facts of this case plainly fall outside of it." *Hubbell*, 530 U.S. at 44. Yet, the Court identified a crucial difference between *Hubbell* and *Fisher*: "here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,210 pages of documents ultimately produced by respondent." *Hubbell*, 530 U.S. at 44-45. In *Fisher*, the government knew or could confirm the location and existence of the documents without any assistance from the individual asserting the Fifth Amendment privilege. *Fisher*, 425 U.S. at 411. Arguably, the Court's recognition of the extent of the government's prior knowledge as the critical inquiry for purposes of the application of the "foregone conclusion" doctrine may have effectively resolved the issue of when that doctrine should apply. Cole, at 168.

After *Hubbell*, the distinction between the contents of documents and the act of producing documents remains visible, but the significance of that distinction varies based on the prosecutor's knowledge of the documents at issue. Cole, at 191. If the party seeking the documents can show prior knowledge of the existence, authenticity, and location of the documents, as in *Fisher*, then the witness cannot invoke the "act of production" Fifth Amendment privilege. *Id.* In such a case, the distinction between contents and production remains valid because the party seeking the documents need not show any knowledge of the contents of the documents. *Id.* On the other hand, if the party seeking the documents lacks prior knowledge of whether the witness possesses a particular document and is engaged in a "fishing expedition", then the witness can assert the act of production Fifth Amendment privilege. *Id.* In such a case, little remains of the distinction between content and production. *Id.* Thus, after *Hubbell*, it seems that a truly private document in an individual's possession (others do not know of the existence or location of the document) will be afforded Fifth Amendment protection. *Id.*

As to a court's determination of whether a document is business-related, as opposed to personal in nature, and thereby beyond the purview of the Fifth Amendment privilege, the Fifth Circuit has specifically adopted a multi-factor balancing approach. *In re Grand Jury Proceedings*, 44 F.3d 1012, 1014-15 (5th Cir. 1995). A trial court must attempt to determine whether the documents are business records or

personal documents in light of the entire context of the ownership, preparation and use of the document. *Id.* The following criteria are relevant to this determination: (1) who prepared the document; (2) what is the nature of the document's contents; (3) what is the document's use or purpose; (4) who possessed the document; (5) who had access to the document; (6) did a business require the document's preparation; and (7) was the document's existence necessary to or in the furtherance of business. *Id.* As a general rule, the greater the proportion of business related entries, the more likely it is that the trier of fact could reasonably conclude that the document was prepared, used and maintained as a business document. *Id.*

IV. STAYING DISCOVERY AND PROTECTIVE ORDERS

One problem with asserting the right against self-incrimination is the inherent conflict it creates between the rights of the person asserting the privilege and the rights of the other parties and the Court to have that person's evidence. The party asserting the right also faces his own dilemma. The first horn of this dilemma arises because a civil litigant has the right to refuse to disclose information that he or she reasonably believes might be used against him or her as an accused in a criminal prosecution. *Wehling v. Columbia Broad Sys.*, 608 F.2d 1084, 1086 (5th Cir. 1979), citing *Maness v. Meyers*, 419 U.S. 449, 461 (1975); *Hoffman v. United States*, 341 U.S. 479, 486 (1951). On the other hand, this same person also has the right to defend civil claims, which the assertion of their Fifth Amendment rights might impair. Thus, a defendant may be forced to choose between protecting themselves criminally or civilly. As recognized in *Wehling v. Columbia Broad Sys.*, the U.S. Supreme Court has recognized this conflict and has disapproved of procedures which require a party to surrender one constitutional right to assert another. *Wehling*, 608 F.2d at 1088.

In *Wehling*, Carl and Geraldine Wehling sued CBS for defamation arising from a broadcast on the CBS Evening News. *Wehling*, 608 F.2d at 1086. In that broadcast CBS reported that Wehling, who ran a trade school, had defrauded his students and the federal government through abuse of federal student loan and grant programs. *Id.* During discovery, Wehling invoked his Fifth Amendment right against self – incrimination "as to all questions with respect to his operation of his schools." *Id.* The district court ordered Wehling to answer the questions at his deposition or to have his lawsuit dismissed. *Id.* Wehling filed a motion for protective order asking the Court to fashion some type of relief short of dismissal respecting the rights of both parties. *Id.* The trial court denied the motion and issued the same order giving Wehling a choice to either answer questions or face dismissal of his lawsuit. *Id.* Prior to the broadcast at issue in this case, Wehling had been subpoenaed five times to testify before a federal grand jury. *Id.* Wehling invoked his Fifth Amendment right each time. *Id.* Based upon these facts, his attorney advised him not to answer any questions at the deposition and his lawsuit was ordered dismissed. *Id.*

In reversing the dismissal, the Fifth Circuit noted that the Fifth Amendment is to serve as a shield to any party who feared that complying with discovery would expose him to a risk of self-incrimination. *Id.* The fact that the privilege is raised in a civil case does not deprive the litigant of its protection. *Id.* citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). While the Fifth Circuit recognized that a party cannot use the right against self-incrimination as a sword, rather than a shield, it recognized that Wehling was not trying to proceed to trial without answering any questions during discovery but was only asking that discovery be stayed until all threat of criminal liability had passed. *Id.*, at 1087. The Court held that dismissing a plaintiff's lawsuit simply because he asserted his Fifth Amendment privilege is unconstitutional and recognized that the Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another right, here the due process right to a determination of his civil action. *Id.*, at 1087, citing *Simmons v. United States*, 390 U.S. 377, 394 (1968); *Griffin v. California*, 380 U.S. 609 (1965) ["Penalty" is the imposition of any sanction which makes the assertion of the privilege "costly".]; quoting *Spevak v. Klein*, 385 U.S. 511, 515 (1967).

The Fifth Circuit went on to recognize that when a party asserts the privilege, the other parties' rights should also be respected. *Id.*, at 1088. Rather than dismissing the case, the Court held that the trial court should have "measured the relative weights of parties' competing interests with a view toward accommodating those interests if possible." *Id.* After balancing the interests, the Fifth Circuit said that they weighed in favor of Wehling and that in effect what Wehling was asking in his Motion for Protective Order was a three year discovery stay until the criminal charges could be resolved. *Id.* The Court held that this was preferable to requiring Wehling to choose between his silence and his lawsuit and reversed and remanded ordering the trial court to issue the protective order. *Id.*, at 1089.

As recognized in *Wehling*, to avoid the prejudice to litigants from having to choose between their rights in the civil case and protecting their Fifth Amendment rights, courts are empowered to postpone discovery pending the outcome of related criminal proceedings. *United States v. Kordel*, 397 U.S. 1, 9 n. 15 (1970); *Wehling*, 608 F.2d at 1089. This is especially true

when a party is under indictment for a serious offense and is required to defend a civil suit involving the same subject matter. *S.E.C. v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C.Cir. 1980). This is true even if there is only a "realistic possibility" of a future indictment. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 266 n.1 (1983).

The view in *Wehling* is consistent with other circuit courts. *Dienstag v. Bronsen*, 49 F.R.D. 327, 328-29 (S.D.N.Y. 1970) [holding discovery as to defendants preparing for trial of criminal action should be stayed to protect defendants' Fifth Amendment rights); *Paul Harrigan & Sons. v. Enter. Animal Co.*, 14 F.R.D. 333, 335 (E.D. Pa 1953) [postponing discovery until termination of related criminal action to protect "right guaranteed by the Fifth Amendment"].

Although not binding on Texas courts, in *American Express Business Finance Corporation v. RW Professional Leasing Services Corp.*, 225 F.Supp. 263 (E.D.N.Y. 2002), the Court identified six factors to consider when determining whether to stay discovery in a civil case pending the resolution of a factually related criminal matter. These are: (1) the extent to which the issues in the criminal case overlap with those present in the civil case; (2) the status of the criminal case, including whether the defendant has been indicted; (3) the private interests of the plaintiff in proceeding expeditiously weighed against the prejudice to the plaintiff caused by the delay; (4) the private interests of and burden on the defendant; (5) the interests of the courts; and, (6) the public interest. *Id.*, at 264-65. Therefore, counsel should always explore the option of seeking relief from the Court by some form of protective order when faced with discovery that would involve a client or witness potentially giving incriminating evidence against him or herself.

V. OFFENSIVE USE OF THE PRIVILEGE

A related issue that makes relief by way of a protective order more difficult is the prohibition against "offensive use" of the privilege. This situation typically arises when a plaintiff asserts the privilege to prevent the discovery of information that would be material and relevant to the defense against those claims. The "offensive use" doctrine does not really prohibit the use of the privilege. It is actually a waiver of the right against self-incrimination. This waiver applies to a broad variety of privileges and not just to the privilege against self-incrimination. *See, Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, (Tex. 1985) [discussing the offensive use of the mental health information privilege under Tex. R. Evid. 501]; *Republic Inc. Co. v. Davis*, 856 S.W.2d 158 (Tex. 1993) [applying the "offensive use" doctrine to assertion of the attorney-client privilege]. As noted by the Court in *Ginsberg*, it has been said that a plaintiff "cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action." *Id.*, at 108 (quoting *Pavlinko v. Yale-New Haven Hosp.*, 192 Con. 138, 470 A.2d 246, 251 (1984).

The Texas Supreme Court has set out the following factors to be considered by courts to determine whether a plaintiff has waived their right against self-incrimination by an "offensive use" of the privilege.

(1) The party asserting the privilege must seek affirmative relief; (2) the information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted; ["Mere relevance is insufficient. A contradiction in position without more is insufficient. The confidential communication must go to the very heart of the affirmative relief sought."]; (3) disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. *Republic Ins. Co. v. Davis*. 856 S.W.2d 158, 163 (Tex. 1993).

While this test seems fairly clear cut on paper, it is far from that in application. Part of the problem has been that courts have not been able to come up with any consistent approach in dealing with this issue. In fact, the very application of the "offensive use" doctrine to the constitutional privilege against self-incrimination has been questioned. *Texas Dept. of Public Safety Officers Assoc. v. Denton*, 897 S.W.2d 757, 764-766 (Tex. 1994), Gonzalez, Gammage, Owen J. concurring.

The leading Texas case on "offensive use" of the privilege against self-incrimination prior to *Republic Inc. Co. v. Davis* was *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, (Tex. 1985).

In *Ginsberg*, Plaintiff Gaynier brought a trespass to try title action against Ginsberg claiming that one of the deeds in which Ginsberg claimed to hold title to a building, which Gaynier also claimed, was a forgery and that she had been fraudulently induced into signing a second deed in favor of Ginsberg. *Id.*, at 106. Ginsberg claimed that Gaynier knew at the time of the conveyance that title was to pass to Ginsberg and that Gaynier's psychiatric medical records showed that she had told her psychiatrist at the time that the building had been sold, confirming Ginsberg's defense to Gaynier's claim. *Id.* Ginsberg sought to depose the psychiatrist and Gaynier objected asserting her psychotherapist-patient privilege. *Id.* The trial court denied Gaynier's request for a protective order and the Court of Appeals granted her request for mandamus relief. *Id.* Ginsberg petitioned the Supreme Court for mandamus relief and granted him conditional relief in the form of access to the records. *Id*, at 108.

Citing to the self-incrimination case of *Henson v. Citizens Bank*, 549 S.W.2d 446 (Tex. Civ. App.-Eastland 1977, no writ), the Supreme Court reasoned that a plaintiff may not use a privilege as an offensive weapon, seeking affirmative relief in the court while silencing otherwise pertinent information. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d at 108. The Court held that while a plaintiff may invoke the privilege, the trial court may then dismiss the case. Thus, a plaintiff is forced to make a choice to either waive the privilege and continue the case or maintain the privilege and abandon the action. *Id*, at 107. However, the Court also said in dicta that this rule should not be construed as giving license to litigants to engage in "fishing expeditions" into privileged matters. *Id.*, at 108.

This was the rule until the Supreme Court refined it in *Republic Ins. Co. v. Davis*, 856 S.W.2d 158 (Tex. 1993). That case concerned the attorney-client privilege. In that case, Republic issued a re-insurance policy on National County Insurance which insured Culver Concrete whose employee Reginald Davis was involved in an accident in which another party (Trevino) was killed. *Id.*, at 159. Davis and Culver were sued but prior to the conclusion of that case, National County went into receivership. *Id.* After a judgment was entered in the suit against Davis, Republic filed a declaratory judgment action because of competing interests being asserted against the proceeds of its policy. *Id.* The third party plaintiffs [Trevino Plaintiffs] Culver and Davis countersued for DTPA and insurance code violations. *Id.* The Trevino Plaintiffs served requests for production on Republic and Republic refused to provide the responsive documents relying on its attorney-client privilege. *Id.*, at 160. The trial court ordered the documents produced because Republic had waived its privilege under the "offensive use" doctrine of *Ginsberg. Id.*

The Supreme Court determined that the *Ginsberg* "offensive use" waiver does apply to the attorney-client privilege and created the three part test to determine when "offensive use" would waive the privilege. *Id.*, at 163. As set out previously, those standards are (1) The party asserting the privilege must seek affirmative relief; (2) the information sought must be outcome determinative; and, (3) disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. *Republic Ins. Co. v. Davis*. 856 S.W.2d 158, 163 (Tex. 1993). However, in *Republic Ins.* the Court held that there has been no waiver of the privilege because Republic was not seeking affirmative relief because it was only pursuing a declaratory judgment action. *Id.*, at 164. Because Republic's action was in reality "defensive in nature", Republic was not using the waiver in an offensive manner. *Id.* Therefore, the Supreme Court held that the trial court had abused its discretion in ordering the plaintiff to produce documents protected by the attorney-client privilege. *Id.*

One year later the Supreme Court again addressed "offensive use", this time in the context of the privilege against self-incrimination. *Texas Dept. of Public Safety Officers Assoc. v. Denton*, 897 S.W.2d 757 (Tex. 1994). In that case, Denton was fired by the Association under suspicion of embezzlement. Denton sued the Association but then later failed to appear for deposition and was subsequently indicted by the grand jury. *Id.*, at 759. Denton attempted to abate his civil case indefinitely until after the conclusion of the criminal case but the trial court denied this motion. *Id.* Denton then appeared for his deposition but refused to answer questions or produce documents. *Id.* The Association filed a motion to compel and for sanctions. After hearing, the Court ordered Denton to answer some questions as to the allegations against the Association. Denton answered some questions but refused to answer others, and the trial court dismissed his case. *Id.* The Austin Court of Appeals reversed holding that there was no offensive use of the privilege and that Denton's due process rights were violated by the dismissal which was an impermissible discovery sanction. *Id.*, at 690. The Supreme Court affirmed the decision of the Court of Appeals, but for different reasons.

The Court of Appeals found that Denton was not "offensively" using the privilege because he had non-suited all of his claims that were not barred by limitations and had unsuccessfully sought a protective order to stay discovery until the conclusion of his criminal case. *Denton v. Texas DPSOA*, 862 S.W.2d 785, 788 (Tex. App.-Austin 1993) affirmed in part 897 S.W.2d 757 (Tex. 1994). The Court of Appeals was of the opinion that these actions showed that Denton was not trying to litigate his action without providing the necessary information and was not trying to thwart the discovery process as a whole. *Id.*, at 790. The Court of Appeals also found that since the Court's order instructing Denton to answer certain questions included questions that were not outcome determinative, the second prong of the *Republic Ins.* test had not been met. Furthermore, the Court of Appeals also found that the third prong had not been met because some of the information sought, though not all of it, could have been obtained from other sources. *Id.*, 790-791.

The Supreme Court affirmed the Court of Appeals but on other grounds. In so doing it may have created more confusion than it resolved. It held that the trial court had abused its discretion but did not clearly state why. *Texas Dept. of Public Safety Officers Assoc. v. Denton*, 897 S.W.2d at 763. Instead the Court reiterated the standards for imposing discovery sanctions that it had set out in *TransAmerican Natural Gas Corp. v Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

These are (1) the nature of the questions involved and privilege asserted; (2) the resulting unfairness to a defendant if trial were to proceed without the sought discovery; (3) the court should weigh the options for delaying civil proceedings during the pendency of the criminal proceedings; and (4) the court should recognize that options available to impose remedies if any delay afforded the plaintiff resulted in unanticipated or extraordinary hardships. *Texas Dept. of Public Safety Officers Assoc. v. Denton*, 897 S.W.2d at 763.

The Supreme Court also briefly discussed the Fifth Circuit's decision in *Wehling v. Columbia Broadcasting Systems*, 608 F.2d 1084, 1086 (5th Cir. 1979). The Supreme Court then simply stated that the trial court has abused its discretion in *Denton* and remanded the case to the trial court to reconsider its decision in light of the Court's opinion. *Texas Dept. of Public Safety Officers Assoc. v. Denton*, 897 S.W.2d at 763-764.

In reaching this conclusion, the Supreme Court appears to be trying to establish a broad balancing approach as to when the sanction of dismissal should be applied in an "offensive use" case. However, the Court seemed to focus more on the proper application of discovery sanctions rather than on the constitutional dimension of the privilege asserted. This fact was noted by Justice Gonzalez in his concurring opinion in which he questioned whether the "offensive use" doctrine should apply to the Fifth Amendment right against self-incrimination because of the constitutional nature of that right. *Id.*, at 764. While the Supreme Court mentioned the Fifth Circuit's balancing test in *Wehling*, it did not adopt it. In contrast to *Wehling*, the decision in *Denton* supports the contrary proposition and holds that a trial court can dismiss a plaintiff's lawsuit for offensive use but only requires the trial court to go through a more detailed analysis to justify the death penalty sanction.

Thus, under the present state of the law it appears that a plaintiff has a better chance in Federal Court of not having his or her case dismissed for "offensive use" than does a plaintiff in State Court. Undoubtedly the Texas Supreme Court will be faced with this issue again thanks to their failure to adequately address the constitutional implications of the "offensive use" doctrine.

VI. THE PRIVILEGE AND IMMUNITY

The concept of immunity goes hand in hand with an individual's right against self-incrimination. *United States v. Apfelbaum*, 445 U.S. 115, 124 (1980). The question becomes, how far can a court go in compelling a witness' testimony? If a witness is compelled to give testimony over his assertion of the privilege, does that constitute a grant of immunity against the use of that information or testimony against him?

In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court considered whether the government may compel testimony from an unwilling witness who invokes their Fifth Amendment privilege by conferring on the witness immunity from the use of compelled testimony in subsequent criminal proceedings. In that case, the Court was interpreting 18 U.S. C. §§ 6002, and 6003 which provided:

> "Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to: (1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a [subsequent] prosecution for perjury, giving a false statement or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1970).
>
> "In the case of an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United State or a grand jury of the United States, the United States District Court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Section 6002 of this part." 18 U.S.C. § 6003 (1970).

The Court held in *Kastigar* that this statute's proscription of the use in any criminal case of testimony compelled under this order is consistent with Fifth Amendment standards. *Katigar*, 406 U.S. at 453.

The Court stated that "such immunity from use and derivative use is co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege.

However, no federal court has inherent authority to immunize a witness. That responsibility belongs solely to the executive and only the Attorney General or a designated officer of the Department of Justice may grant immunity under this statute. *See, The Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983). This is also the rule in Texas. Texas courts have no inherent power to grant immunity. *United States v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992); *See, also, Norwood v. Texas*, 768 S.W.2d 347, 349 (Tex. App.-Corpus Christi 1989, writ dism'd) [Court has no authority to grant use immunity to a witness over the State's objection or to order the State to do so.]. A prosecutor may grant immunity, but must obtain the approval of the Court. If the Court does not approve of the grant of immunity, then there is no immunity on which the defendant may rely. *Id.*, at 654. Thus, only the state may grant use immunity, with the approval of the Court, in order to compel a witness to testify. *In re Verbois,* 10 S.W.3d at 829.

VII. CONCLUSION

In summary, the most important thing to remember when dealing with a client who is faced with a self-incrimination issue is that the constitutional nature of the right gives your client some flexibility in responding to the inquiry. These options include, waiving the right as to some or all of the inquiries, invoking the right where appropriate and seeking relief from the Court to fashion an appropriate remedy, including possibly staying discovery in whole or in part. Most importantly, do not forget the general rule as established by the Supreme Court. A party should not be punished for asserting their Fifth Amendment rights in a civil case in order to protect themselves against the real or potential threat of criminal prosecution.