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Assertion of Privilege in Deposition Proceedings

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NOTES AND COMMENTS

ASSERTION OF PRIVILEGE IN DEPOSITION PROCEEDINGS

A RECURRING problem in Texas today centers on the extent to which a witness may be forced to disclose in a deposition proceeding what he claims is privileged matter. If the matter is privileged, it should not be subject to disclosure either in a pre-trial deposition or at the trial of the case. It is proposed herein to discuss how the privilege can best be invoked in an oral deposition proceeding and what procedures should be followed once the witness refuses to answer on the grounds of privilege. While this Comment is limited in scope, the procedures suggested are generally applicable where there is a refusal to answer for any reason.

Claiming the Privilege. A witness, either on the stand or at the time of making a deposition, may refuse to answer on the basis of at least three different types of privilege: 1. the privilege against self-incrimination; 2. professional privileges; 3. privileges as to matters injurious to the public interest.[1] The first classification, derived from state and federal constitutions, has had many claimants in recent Congressional hearings. This privilege against self-incrimination may be invoked in civil actions as well as in criminal cases.[2] Similarly, the professional privilege of the attorney-client relationship which protects matters within that relationship from disclosure has been claimed in both civil and criminal actions.[3] Within the third category are state secrets and certain information acquired by public officers.

It is not the purpose here to examine all the substantive law of

[1] RAGLAND, DISCOVERY BEFORE TRIAL (1932) 147.

[2] Sovereign Camp of Woodmen of the World v. Bailey, 183 S. W. 107 (Tex. Civ. App. 1916), *rev'd on other grounds*, 222 S. W. 550 (Tex. Comm. App. 1920).

[3] 44 TEX. JUR., *Witnesses*, § 93.

privilege but rather to point out a suggested procedure for claiming privilege. It is fundamental that the privilege is personal to the witness, whether or not he is a party to the suit.[4] This characteristic must be kept in mind for it is the underlying theme throughout the cases from which the procedure herein suggested is derived.

Since the privilege is personal to one indivdual, no other person may claim it for the witness. The witness must claim it himself if the privilege is to be invoked. In *Ingersol v. McWillie*[5] the court said that the party producing a witness did not have ground for reversal of a judgment because the witness, without compulsion by the court, answered a relevant question which was admissible, though dealing with privileged matter. An extension of this holding is found where the courts have said that the adversary cannot claim the privilege on behalf of the witness.[6] In *San Antonio St. Ry. Co. v. Muth*[7] the court stated that neither party could object to testimony where the witness could have refused to testify on the ground of self-incrimination but did not do so. Even in the case of matter within the attorney-client privilege, the attorney may not claim the privilege.[8] It belongs to the client.[9]

The problem has arisen whether or not the attorney producing the witness or party may successfully invoke the privilege on behalf of the witness by objecting that the question propounded calls for a privileged answer. It may well be that the objection of the attorney will be regarded as the objection of the client.[10] However, in at least one case where counsel objected to a question which would tend to incriminate his client, the court held that this was

[4] Hines v. Howell, 15 S. W. 2d 1060 (Tex. Civ. App. 1929).

[5] 87 Tex. 647, 30 S. W. 869 (1895).

[6] Smith v. Wilson, 1 Tex. Civ. App. 115, 20 S. W. 1119 (1892) *er. dism.*

[7] 7 Tex. Civ. App. 443, 27 S. W. 752 (1894) *er. ref.*

[8] Ibanez v. State, 118 S. W. 2d 405, 409 (Tex. Civ. App. 1938), citing McCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937).

[9] Krumb v. Porter, 152 S. W. 2d 495 (Tex. Civ. App. 1941) *er. ref.*

[10] *Ex parte* Lipscomb, 111 Tex. 409, 239 S. W. 1101 (1922).

not an attempt by the witness to exercise the privilege of declining to answer, since privilege must be exercised by the witness alone.[11] Thus, we come back to the fundamental proposition: privilege is personal.

Privilege, of course, may be waived.[12] In fact, if it is not invoked, it is considered to be waived.[13] Care must be taken that the privilege is not invoked too late, since the witness must assert his privilege at the earliest opportunity. Once he answers some privileged questions, he cannot refuse to answer other questions proper under cross-examination.[14] Thus, a waiver may occur even if a few questions which are privileged are answered.[15]

It is recommended that in the event a question is asked which deals with information within the scope of privilege, counsel for deponent should immediately decide whether the privilege should be waived or not. If the attorney then deems that waiver should be avoided, he should object to the question, stating the grounds therefor. He should then instruct the witness to refuse to answer. The attorney should make certain that the witness personally states to the officer taking the deposition why he refuses to answer, thus claiming his privilege. If this procedure is followed, there will be no question of waiver, no question that the privilege was claimed by one not entitled to claim it, and no question concerning the sufficiency of counsel's objection to invoke the privilege of the client.

A problem arises in deposition practice when, subsequent to the taking of the deposition, counsel suddenly realizes that a large number of the questions asked dealt with privileged matter and that his witness answered them all without objection. What

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[11] *Ex parte* Miers, 124 Tex. Crim. Rep. 592, 64 S. W. 2d 778 (1933).

[12] Shelton v. Northern Texas Traction Co., 75 S. W. 338 (Tex. Civ. App. 1903).

[13] Kolbrenner v. U. S., 11 F. 2d 754 (5th Cir. 1926), *cert. denied*, 271 U. S. 677 (1926).

[14] *Ex parte* Adams, 76 Tex. Crim. Rep. 277, 174 S. W. 1044 (1915); *Ex parte* Park, 37 Tex. Crim. Rep. 590, 40 S. W. 300 (1897).

[15] For a discussion on the extent of the waiver of privilege, see 8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2276, 2327.

can counsel do, if anything, to remedy this oversight on his part? If the deposition was being taken for discovery purposes, then counsel may as well resign himself to his fate, since the opposing counsel has already garnered the sought-for fruits. On the other hand, if the deposition was primarily to perpetuate testimony or to serve as additional testimony at the trial, counsel may have a possible solution. Rule 213 of the Texas Rules of Civil Procedure provides,

> Depositions may be read in evidence upon the trial of any suit in which they are taken, subject to all legal exceptions which might have been made to the interrogatories and answers, were the witness personally present before the court giving evidence.

Counsel may urge that within the meaning of this rule, privilege may be invoked at the trial if deponent wishes to do so. He may thus preclude the introduction in evidence of that part of the deposition which is protected. It is submitted that counsel's objection at the trial should not prove successful. The difficulty in it is that the earlier failure to invoke the privilege has acted as a waiver. Once a privilege is waived, the courts should not allow subsequent reinstatement of that privilege. The situation is fundamentally different from the instance where late objection is made that testimony is irrelevant. An irrelevant question even when answered remains irrelevant, and therefore subject to objection; however, privileged matter is normally admissible but for the fact that the witness has insisted upon his privilege. Thus, it is submitted that the waiver makes it admissible from that time on.

Review of the Claimed Privilege. When a witness refuses to answer a question, the next step is up to the attorney taking the deposition. He is faced with a witness who is refusing to answer questions because opposing counsel has advised the witness that the matter is privileged and should not be answered. It is recommended that the examining attorney should get from the witness a definite refusal to answer in order to lay the predicate for subsequent proceedings. Questions should be repeated with different

phraseology to avoid objections based upon the form of the question, *e.g.*, leading questions and those calling for a conclusion. In many instances following the refusal the contending attorneys will have a discussion off the record in an attempt to determine whether the matter is truly privileged or not. It is possible that in such discussion the examining attorney will obtain sufficient information to obviate the need for further pursuing the challenged line of questioning. When the attorneys genuinely differ over whether a question calls for a privileged answer or when a dispute arises as to whether waiver of the privilege has occurred because of prior answers, the examining attorney may, due to the exigencies of the situation or for other reasons not wish to press the issue. Where he seeks to compel answers to his questions, a difficult problem arises as to how he should proceed.

The examining attorney has two alternative routes available. The first lies in completing the deposition as to all other matters and then filing a motion in the court where the case is filed, seeking an order compelling the deponent to answer. Practice varies as to the matter included within this motion. The primary consideration should be the placing of all necessary information before the court. Some attorneys will include in the motion the entire deposition, while others will merely excerpt that portion where the witness refused to answer. The court will then determine the basic issue of privilege from a consideration of the questions and all the surrounding circumstances.[16]

This procedure was followed in *Saenz v. Sanders*,[17] a recent case where the defendant gave proper notices and sought to take the pre-trial deposition of the plaintiff. The plaintiff refused to answer certain questions relative to the cause of action but did not place his refusal on the basis of privilege. The defendant then filed a motion seeking an order compelling the plaintiff to answer the disputed questions. After hearing, the motion was granted, but

[16] See text at notes 2 and 14 *supra*.

[17] 241 S. W. 2d 316 (Tex. Civ. App. 1951).

the plaintiff again refused to answer, thereby disobeying a specific order of the court. To enforce its order, the court removed the case from setting and declared that the setting would be made only after the plaintiff answered the deposition. Since the deposition was being used for discovery, the provisions of the Texas Rules of Civil Procedure relating to confession were inapplicable. Only direct answers would serve defendant's needs in the case. This method of enforcement points up that Rule 180[18] of the Texas Rules of Civil Procedure is not exclusive in providing a remedy if a witness refuses to answer. Of course, the removal of a case from setting would not be effective against a defendant. The plaintiff in the *Saenz* case sought to review the trial court's action by filing an application for a writ of mandamus in the court of civil appeals. The writ was denied. A dissenting opinion urged that the proper action by the trial court should have been a contempt proceeding, from which an appeal could have been taken through habeas corpus. The ruling of the court on the motion and order to compel an answer is not reviewable by direct appeal, since it is interlocutory.[19] The appellate courts will not interfere unless there was a clear abuse of the trial court's discretion.

The second alternative procedure that the examining attorney may use relies for its efficacy upon the powers possessed by the notary public as an officer authorized to take depositions.[20] At common law the notary public could not punish for contempt because he did not have judicial powers.[21] In several states, legistion giving the notary such authority has been enacted. Its constitutionality has been questioned, particularly where the constitution

[18] "Any witness refusing to give evidence may be committed to jail, there to remain without bail until such witness shall consent to give evidence."

[19] 4 McDONALD, TEXAS CIVIL PRACTICE (1950) § 17.03; see Southern Bag and Burlap v. Boyd, 120 Tex. 418, 38 S. W. 2d 565 (Tex. Comm. App. 1931).

[20] TEX. REV. CIV. STAT. (VERNON, 1948) art. 3746 states: "The commission shall be addressed to the following officers, either of whom may execute and return the same:
1. If the witness be alleged to reside or be within the State, to any ... notary public of the proper county...."

[21] 12 AM. JUR., *Contempt*, p. 425, n. 19.

vests the state judicial powers in specified courts and does not mention notaries. Some of these statutes have been upheld[22] while others have been voided.[23]

Texas has such legislation in Articles 3748[24] and 3757[25] of the *Texas Revised Civil Statutes (Vernon, 1948)*. A question of constitutionality may be raised since Article V, Section 1, of the Texas Constitution names specific judicial tribunals and does not include notaries therein. The Texas Court of Criminal Appeals discussed this question in Ex parte *Wolf*[26] but did not decide the issue. *Texas Jurisprudence* is of the opinion that there is no authority vested in a notary public, engaged in taking a deposition, to punish for contempt.[27] Cited for this proposition is Ex parte *Johnson*.[28] It should be noted, however, that this case contains no reference to either Article 3748 or Article 3757 or their forebears.

In light of this, there is little wonder that notaries are very reluctant to compel a deponent to answer questions in a deposition proceeding. Despite the seemingly clear language of the statutes, there is grave doubt whether they actually possess such power. Article 3769b[29] of *Texas Revised Civil Statutes (Vernon, 1948)* provides a solution where a witness disobeys a writ issued by a

[22] *Ex parte* Schoepf, 74 Ohio St. 1, 77 N. E. 276 (1906); De Camp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056 (1893); see Note, 8 A. L .R. 1575 (1920).

[23] Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190 (1892); *Re* Huron, 58 Kan. 152, 48 Pac. 574 (1897).

[24] "If the witness, after being duly summoned, shall fail to appear, or, having appeared, shall refuse to answer the interrogatories, such officer shall have power to issue an attachment against such witness and to fine and imprison him in like manner as the district and county courts are empowered to do in like cases."

[25] "Said officer shall have the same power and authority to enforce the attendance of the witness, and to compel him to testify, as in cases of written interrogatories."

[26] 116 Tex. Crim. Rep. 127, 34 S. W. 2d 277, 278 (1930).

[27] 9 TEX. JUR., *Contempt*, § 22.

[28] 54 Tex. Crim. Rep. 113, 111 S. W. 743 (1908).

[29] "Whenever any commission for the taking of the deposition of any witness or party to any civil suit pending in any of the courts of Texas shall have been regularly and legally issued and placed in the hands of a person legally designated and qualified to take depositions under the laws of this state such officer shall have authority to issue any writ authorized by law to compel the attendance of a witness in court, and upon disobedience of such writ by any such witness he may be punished as for contempt either by the court out of which such commission issued, or by the Judge of any District Court of the County in which such witness resides."

notary public to compel attendance at the taking of a deposition. In such cases the district judge of the county of residence of the witness, or the court out of which the commission was issued, may punish the witness for contempt. Article 3769b does not supersede Articles 3748 and 3757 but provides an alternative. And a clear distinction exists in that it applies only to compelling attendance and not the compelling of answers.

If a notary exercises his powers under the statutes, review of his action must be by way of a habeas corpus proceeding. There is no provision for a direct appeal to the district judge. However, if it can be shown that the notary public is completely without jurisdiction, there is a likelihood that a temporary restraining order and injunction may be obtained. In a case where the commissioners' court was acting without jurisdiction in questioning a witness, a restraining order and injunction were successfully sought.[30] Only a few cases reviewing such action of a notary have arisen.[31] All of these were habeas corpus proceedings. In *Harbison v. McMurray*[32] the Texas Supreme Court held that the appeal in a habeas corpus proceeding arising from a civil suit was a civil case within the meaning of Article V, Section 6, of the Constitution and Article 2249 of *Texas Revised Civil Statutes (Vernon, 1948)*. The hearing on habeas corpus of necessity will involve whether or not the question originally asked where privileged. The court of civil appeals in a later proceeding in the *Harbison* case said:

> The legality of the commitment depends on whether the notary had the power or jurisdiction to ask the questions and compel the appellant to answer them.[33]

The record must affirmatively show facts on which the court can determine that the notary had such power.[34]

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[30] Harris County v. Bassett, 139 S. W. 2d 180 (Tex. Civ. App. 1940) *er. ref.*

[31] Cases cited notes 26 and 28 *supra;* Harbison v. McMurray, 132 S. W. 2d 916, *rev'd and remanded,* 138 Tex. 192, 158 S. W. 2d 284 (1942), *later proceedings,* 163 S. W. 2d 680 (Tex. Civ. App. 1942).

[32] 138 Tex. 192, 158 S. W. 2d 284 (1942).

[33] 163 S. W. 2d 680, 681 (Tex. Civ. App. 1942).

[34] *Ibid.*

It is suggested that the examining attorney should not attempt to invoke this second method of compelling a witness to answer, since there is the practical difficulty of getting the notary to exercise powers which in themselves are questionable. This consideration, together with the severity of the penalty on the deponent and the necessity for strict compliance with the statutes in order to imprison for contempt, suggests that the procedure should be invoked only in cases of extreme urgency.

Conclusion. This Comment has attempted to point up some of the current problems and practices involved in oral deposition proceedings in Texas today where the witness refuses to answer on the basis of privilege. There is little to be found on the subject in the Texas Rules of Civil Procedure. It is believed that the adoption of some provisions of the Federal Rules of Civil Procedure would prove beneficial. For example, Federal Rule 26(b) expressly sets out that the deponent may not be examined about privileged matters. Beyond this, the Federal Rules provide safeguards which aid both examining attorney and counsel for deponent in making certain that privileged matter will not be violated, yet provide effective means of ascertaining what is privileged.[35] While Texas has many of the same procedures, it is respectfully suggested that a clear-cut procedure covering the problems of privilege in deposition practice should be spelled out in the Texas Rules.

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[35] Rules 30(d), 31(d), 37. But see Comment, 59 Yale L. J. 117 (1949) for a critical discussion of these rules.