

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

**Estate of ROBERT E. WONE, by
KATHERINE E. WONE,**

Plaintiff,

v.

JOSEPH R. PRICE,

VICTOR ZABORSKY,

and

DYLAN WARD,

Defendants.

CA No. 2008 CA 008315 B

The Honorable Brook Hedge

**Next Event: Motions Hearing
December 8, 2010**

**DEFENDANTS' JOINT OPPOSITION
TO PLAINTIFF'S MOTION TO COMPEL DEPOSITION TESTIMONY
OR FIFTH AMENDMENT INVOCATIONS BY DEFENDANT WARD**

Defendant Dylan Ward, by and through undersigned counsel, hereby opposes Plaintiff's Motion to Compel Deposition Testimony or Fifth Amendment Invocations by him. Although Plaintiff's Motion is brought against Defendant Ward only, Defendants Joseph R. Price and Victor J. Zaborsky join in this Opposition, as the issues that are encompassed by Plaintiff's Motion are expected to arise at their respective depositions as well. Accordingly, the Court's ruling on the present Motion will have a direct impact on Defendants Price and Zaborsky. In support of this Joint Opposition, the Defendants state as follows:

Argument

The narrow issue presented by the Plaintiff's Motion is whether Mr. Ward's attorney can invoke the 5th Amendment privilege on his behalf at the deposition. The authority cited below dictates that the attorney may make such an assertion on his client's behalf. Regardless of who

asserts the 5th Amendment privilege, the key component is that the assertion be apparent under the circumstances in a manner that fairly brings it to the attention of the Court. There can be no doubt that the manner in which Mr. Ward asserted his 5th Amendment rights was unambiguous and apparent on its face, and the manner in which he invoked the privilege was appropriate.

(1) D.C. Rules Permit the Attorney to Instruct Witness not to Answer

Plaintiff's Motion fails to mention D.C.Civ.R. 30(d)(1), which governs counsel's authority to instruct his client not to answer a deposition question, stating:

Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the Court, or to present a motion under Rule 30(d)(4). (emphasis added)

The plain reading of Rule 30(d)(1) permits Mr. Ward's counsel to invoke the 5th Amendment privilege on his behalf. Consistent with the Rule, counsel instructed Mr. Ward not to answer for the express purpose of preserving his 5th Amendment privilege.¹

The wording of Rule 30(d)(1) is significant in at least two respects: First, it allows the attorney to "instruct" his client not to answer, as opposed to "recommending" or "suggesting" that he not answer. The word "instruct" leads to the conclusion that the deponent should not be made to affirmatively accept or deny counsel's words in order for a privilege to be properly preserved. Second, the Rule does not differentiate between types of privileges, but rather permits an attorney to instruct his client not to answer in order to preserve any privilege. Accordingly, the fact that a 5th Amendment privilege may be a personal one is not relevant under Rule 30(d)(1).

¹ See Deposition Transcript of Dylan Ward, attached as Exhibit B to Plaintiff's Motion, p. 11, l. 18-21. All subsequent instructions by counsel were similarly worded.

(2) Courts Have Held that Attorney may Invoke 5th Amendment on Client's Behalf

Contrary to Plaintiff's assertions, courts have held that counsel may invoke the 5th Amendment privilege for his client. In a case adjudicating this very issue, *People v. Apodaca*, 16 Cal. App. 4th 1706, 1714, 21 Cal. Rptr. 2d 14 (CA 1993), the Court expressly held that an attorney may assert the 5th Amendment privilege on behalf of his client, noting that the fact that the privilege is a "personal" one does not bear on the issue.² Declining to accept the argument that the 5th Amendment privilege may only be invoked by the privilege holder, the Court held:

If the lawyer is clearly acting under the authorization of the client, and invokes the client's privilege, there is little point or sense in insisting that the client also personally invoke the privilege.

The same holds here, Waples (the witness) was fully advised of her rights, especially her privilege against self-incrimination, and counsel was appointed for her for the very purpose of protecting that right. She consulted privately with counsel, presumably on that subject. She was present in court, sworn and on the stand when her counsel expressly invoked the privilege on her behalf. Waples made no gesture, remark or other indication of disapproval or disagreement. There can be no doubt that the attorney was authorized to make the statement. It would be a wasteful exercise to insist that Waples repeat the invocation out of her own mouth under these circumstances, simply for the sake of formality.

Id. at 1715 (internal citations omitted). Other courts have similarly stated that an attorney may invoke the 5th Amendment privilege on behalf of his/her client. *See e.g., U.S. v. Mayes*, 512 F.2d 637, 649 (6th Cir. 1975) ("[I]t is within the discretion of the trial judge to permit counsel for the witness to invoke the (5th Amendment) privilege on his behalf...")³; *Doe ex rel. Rudy-Glazner v. Glazner*, 232 F.3d 1258, 1263-64 (9th Cir. 2000); *U.S. v. Pritchard*, 1970 U.S. Dist. LEXIS 12917, 5 (N.D. Ala. 1970); *U.S. v. Colyer*, 571 F.2d 941, 945-946 (5th Cir. 1978) (citing *Mayes*,

² Similarly, it has been held that other privileges can be invoked directly by the attorney on behalf of the client, *See e.g., Fischer v. United States*, 425 U.S. 391 (1976) (attorney-client privilege), which is consistent with how D.C.Civ.R. 30(d)(1) does not distinguish between different types of privilege. Plaintiff's Motion has not presented authority that would support the argument that the 5th Amendment privilege should be treated any differently than other privileges in terms of how it is asserted.

³ Citing, 8 Wigmore, Evidence, §2270 (1961).

and noting that a witness's silence can be interpreted as an invocation of the 5th Amendment privilege); *Clifton v. Granger*, 86 Iowa 573, 575, 53 N.W. 316 (IA 1892).

In *United States v. Johnson*, 752 F.2d 206, 210-211 (6th Cir. 1985), noting an analogy with permitting an attorney to assert a 5th Amendment privilege for his client, the Court held that a witness' counsel could assert, on behalf of his client, the client's refusal to testify, noting that the attorney-client relationship is embedded in the agency doctrine.⁴ The fact that the attorney is the client's agent is significant. When an agent has actual or implied authority to act on behalf of his or her principal, the law generally recognizes the agent's actions as being binding on the principal.

In the present case, Mr. Ward was present at his deposition, was sworn and answered all questions, except for those questions to which he was instructed by counsel not to answer. Counsel's instruction expressly stated the purpose was to preserve Mr. Ward's 5th Amendment privilege. Mr. Ward, by his subsequent silence upon receiving counsel's instruction, clearly indicated his desire to invoke his 5th Amendment privilege. During the conference call with this Court, counsel again plainly asserted that Mr. Ward was invoking his 5th Amendment privilege.⁵ Mr. Ward has clearly and unambiguously asserted his 5th Amendment privilege through counsel.

(3) Cases Cited by Plaintiff are Distinguishable and not Persuasive

Most of the cases cited in Plaintiff's Motion reference only general 5th Amendment privilege concepts and make no mention of whether an attorney can assert the privilege on the

⁴ The Court stated: "Ordinarily, agency doctrine is applied in determining whether a party will be held to the statements of his or her attorney...Statements of an attorney that are directly related to the litigation at hand have been held to be within the attorney's scope of authority and binding on the client." *Id.* at 210-211 (internal citations omitted).

⁵ See Deposition Transcript of Dylan Ward, p. 22, l. 8-15; p. 23, l. 11 – p. 24, l. 3.

client's behalf.⁶ Of the few cases that do make mention that an attorney cannot invoke the 5th Amendment privilege for his client, none of the references represent a holding of the court. Rather, the statements made by the court are ancillary to the issues that were briefed by the litigants.⁷ This distinction is important, particularly when compared with the *Apodaca* case and others cited *supra*, in which the issue of whether the attorney can assert the 5th Amendment privilege for his client was a central issue in the disposition of the case, meaning that it would have been briefed by the litigants, and the court would have considered both sides of the argument before rendering a decision. Indeed, the flaw in reasoning found in the cases cited by Plaintiff becomes apparent when one traces the ultimate original source to support the proposition, *Kastigar v. U.S.*, 406 U.S. 441, 92 S.Ct. 1653 (1972).⁸ *Kastigar* does not even involve a situation where a witness attempted to invoke a privilege through counsel, and there is absolutely no mention of whether an attorney could assert the 5th amendment on behalf of his client, even in passing. In effect, the statements in the line of cases relied upon by Plaintiff largely arose from whole cloth. The more consistently-held and well-reasoned conclusion among the courts is to permit counsel to assert a 5th Amendment privilege on behalf of his or her client, thus allowing the client to exercise his or her "right to remain silent," when doing so would not create an ambiguity as to whether the privilege is being asserted.

⁶ See e.g., *In Re J.W. V.W.*, 837 A.2d 40 (D.C. App. 2003).

⁷ See e.g., *Textron Financial Corp. v. Goldbury*, 2010 U.S. Dist. LEXIS 32067, 8-9 (E.D.N.Y. 2010).

⁸ *Kastigar* is cited in a footnote unrelated to the holding in *U.S. v. Schmidt*, 816 F.2d 1477, 1481 n. 3 (10th Cir. 1987). In turn, the *Schmidt* footnote is relied upon by *Pal v. NYU*, 2007 U.S. Dist. LEXIS 91051, 27-28 (S.D.N.Y. 2007) and *Textron* at 8-9.

Conclusion

Plaintiff's stated purpose for bringing its Motion is to make it clear that Defendant Ward is invoking the 5th amendment privilege. To the extent that this stated concern is Plaintiff's true motive for bringing this Motion, the concern is without merit. The record clearly demonstrates that there was no ambiguity that Mr. Ward was invoking his 5th Amendment privilege.⁹ In addition to the record, Defendant Ward makes clear again that he did and will accept all recommendations of his counsel with respect to invoking the 5th Amendment privilege and that his counsel has authority to invoke the privilege on his behalf. Defendants Price and Zaborsky will also accept the advice of their respective counsel and allow them to invoke the privilege on their behalf.

D.C. Rule 30(d)(1) permits Defendants' counsel to instruct them not to answer a deposition question on the basis of a privilege, and multiple courts have expressly held that counsel may invoke the 5th Amendment privilege on behalf of their client, so long as it is apparent that the client does not disagree with the invocation. Defendant Ward appeared for his deposition and was present for each question in which his counsel invoked the 5th Amendment privilege. He was and is capable of expressing his disagreement with his counsel's instruction if he so chooses as to each and every question that will be asked. Absent his stated disagreement, his acceptance of his counsel's advice is apparent. Under these circumstances, counsel's invocation of Mr. Ward's 5th Amendment privilege on his behalf is permissible and appropriate.

⁹ Plaintiff's Motion alleges that counsel's motive in instructing Mr. Ward not to answer questions was to create an ambiguity in whether the 5th Amendment privilege had been asserted at all and, thus, prevent Plaintiff from obtaining an adverse inference from the Court. This is simply not the case and there is no reason for Plaintiff to maintain such a belief. The issue of whether Plaintiff will be entitled to an adverse inference as to any Defendant's invocation of the 5th Amendment privilege is not presently before this Court. If and when that issue arise, Defendants have already made clear that the 5th Amendment has been asserted, and they will not later argue to the contrary, but will assert any other arguments that may be available to them.

WHEREFORE, Defendants respectfully request that this Honorable Court deny Plaintiff's Motion to Compel, and grant Defendants such other and further relief as is deemed appropriate.

Date: November 24, 2010

/s/ Robert Spagnoletti
ROBERT SPAGNOLETTI (DC Bar # 446462)
SCHERTLER & ONORATO LLP
601 Pennsylvania Ave., N.W.
North Building, 9th Floor
Washington, D.C. 20004
Telephone: (202) 628-4199
rspagnoletti@schertlerlaw.com
Counsel for Defendant Dylan M. Ward

/s/ Ralph C. Spooner
RALPH C. SPOONER¹⁰
SPOONER & MUCH, P.C.
530 Center St. NE.
Suite 722
Salem, OR 97301
Telephone: (503) 378-7777
rspoone@smapc.com
Counsel for Defendant Dylan M. Ward

/s/ Craig D. Roswell
CRAIG D. ROSWELL (DC Bar # 433406)

/s/ Brett A. Buckwalter
BRETT A. BUCKWALTER (DC Bar # 478382)
Niles Barton & Wilmer LLP
111 South Calvert Street, Suite 1400
Baltimore, Maryland 21202-6185
Telephone: (410) 783-6300
cdroswell@nilesbarton.com
babuckwalter@nilesbarton.com
Counsel for Defendant Joseph R. Price

¹⁰ Admitted pro hac vice pursuant to Court's 10/18/10 Order.

/s/ Larissa N. Byers
LARISSA N. BYERS (DC Bar # 472431)

/s/ Frank F. Daily
FRANK F. DAILY¹¹

/s/ Sean Edwards
SEAN EDWARDS¹²
The Law Offices of Frank F. Daily, P.A.
11350 McCormick Road
Executive Plaza III, Suite 704
Hunt Valley, MD 21031
Telephone: (410) 584-9443
lbyers@frankdailylaw.com
info@frankdailylaw.com
sedwards@frankdailylaw.com
Counsel for Defendant Victor Zaborsky

¹¹ Admitted pro hac vice pursuant to Court's 2/26/10 Order.

¹² Admitted pro hac vice pursuant to Court's 8/2/10 Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2010, copies of the foregoing Opposition and proposed Order were served via e-filing to:

Benjamin J. Razi (brazi@cov.com)
Stephen W. Rodger (srodger@cov.com)
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004
Counsel for Plaintiff

A non-write protected copy of the proposed Order is also being e-mailed to judgehedgeeserve@dcsc.gov .

/s/ Robert Spagnoletti

ROBERT SPAGNOLETTI

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

**Estate of ROBERT E. WONE, by
KATHERINE E. WONE,**

Plaintiff,

v.

JOSEPH R. PRICE,

VICTOR ZABORSKY,

and

DYLAN WARD,

Defendants

CA No. 2008 CA 008315 B

The Honorable Brook Hedge

**Next Event: Motions Hearing
December 8, 2010**

ORDER

UPON CONSIDERATION OF Plaintiff's Motion to Compel Deposition Testimony or Fifth Amendment Invocations by Defendant Ward, and the Defendants' Joint Opposition thereto, it is on this ____ day of December, 2010, by the Superior Court for the District of Columbia, hereby:

ORDERED, that the Motion be and is DENIED.

The Honorable Brook Hedge, Judge
Superior Court for the District of Columbia

CC: All counsel (via electronic service):

Benjamin J. Razi, Esquire
Stephen W. Rodger, Esquire
Counsel for Plaintiff

Patrick M. Regan, Esquire
Counsel for Plaintiff

David Schertler, Esquire
Robert Spagnoletti, Esquire
Ralph Spooner, Esquire, admitted *pro hac vice*
Counsel for Defendant Dylan M. Ward

Larissa N. Byers, Esquire
Frank F. Daily, Esquire, admitted *pro hac vice*
Sean Edwards, Esquire, admitted *pro hac vice*
Counsel for Defendant Victor Zaborsky

Brett A. Buckwalter, Esquire
Craig D. Roswell, Esquire
Counsel for Defendant Joseph Price