

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by
KATHERINE E. WONE,
as Personal Representative,

Plaintiff,

v.

JOSEPH R. PRICE, VICTOR J.
ZABORSKY,
and DYLAN M. WARD,

Defendants.

Civil Action No. 008315-08

The Honorable Brook Hedge

Next Court Event: December 8, 2010
Status Hearing

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

Pursuant to Rule 37 of the D.C. Superior Court Rules of Civil Procedure, Plaintiff Estate of Robert E. Wone, through its attorneys, hereby moves this Court for an order to compel Defendant Ward either to provide deposition testimony, or to personally invoke his Fifth Amendment right not to provide a substantive response, rather than silently refusing to verbalize any response to all relevant deposition questions. The grounds for this motion are set forth in the attached Memorandum of Points and Authorities.

Rule 12-I(a) certification: Defendant Ward, through counsel, would not consent to this motion.

Respectfully submitted,

/s/ Benjamin J. Razi

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November 19, 2010

Counsel for Plaintiff

CERTIFICATE OF CONSULTATION

I hereby certify that, pursuant to Rule 37(a) of the Superior Court Rules of Civil Procedure, counsel for the Plaintiff and counsel for Defendant Ward attempted to resolve their disagreement regarding the subject of this motion prior to telephoning the Court on November 10, 2010. Despite that good faith effort, counsel for the parties were unable to reach agreement.

_____/s/ Benjamin J. Razi

Benjamin Razi

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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ZABORSKY,
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Defendants.

Civil Action No. 008315-08

The Honorable Brook Hedge

Next Event: Status Hearing,
December 8, 2010

**ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL TESTIMONY
OR FIFTH AMENDMENT INVOCATIONS BY DEFENDANT WARD**

This matter coming before the Court on Plaintiff Estate of Robert E. Wone's Motion to Compel Testimony or Fifth Amendment Invocations by Defendant Ward (the "Motion to Compel"), and in consideration of the moving, opposition, and reply papers, as well as the arguments of counsel, it is by the Court this ___ day of December, 2010,

ORDERED THAT:

1. The Motion to Compel is GRANTED.
2. Defendant Ward must either answer the deposition questions or, if he so chooses, he may invoke his Fifth Amendment right against self-incrimination. To do so, he must personally and verbally assert the Fifth Amendment privilege. An instruction from his counsel does not equate to a Fifth Amendment invocation by Defendant Ward.

JUDGE BROOK HEDGE

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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Defendants.

Civil Action No. 008315-08

The Honorable Brook Hedge

Next Court Event: December 8, 2010
Status Conference

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
DEPOSITION TESTIMONY OR FIFTH AMENDMENT INVOCATIONS
BY DEFENDANT WARD**

The narrow question presented by this motion is whether, in order to avoid providing substantive answers at deposition based on the Fifth Amendment, Defendants must actually state that they are asserting the Fifth Amendment privilege. The clear answer to this question is yes, because without Defendants actually saying so themselves, there is no way to determine whether they have in fact chosen to assert their Fifth Amendment rights.

Even if counsel gives an instruction not to answer, sitting there silently in response to deposition questions—as Defendant Ward did at his November 10 deposition—not only fails to invoke the Fifth Amendment privilege but is also improper. Courts across the country repeatedly have held that a deponent must personally invoke the Fifth Amendment's privilege against self-incrimination if he intends to avail himself of the privilege. This Court

should hold the same, and order Defendant Ward to respond—either through testimony or Fifth Amendment invocations—to the questions asked at his resumed deposition.

BACKGROUND

On November 10, Plaintiff's counsel attempted to take a deposition upon oral examination of Defendant Ward pursuant to D.C. Superior Court Rule 30.¹ After several background questions and answers, the deposition quickly ran aground when questions turned to the subject matter of this litigation—Robert Wone and his death in Defendants' home on August 2, 2006. Apparently as a result of counsel's instruction, Defendant Ward would not answer any substantive questions regarding the case. Moreover, Defendant Ward refused to explain why he would not answer any substantive questions or respond verbally in any manner.

The full transcript of the deposition is attached as Exhibit B, but this excerpt is representative of Defendant Ward's approach to the deposition:

Q. When did you first meet Robert Wone?

MR. SPAGNOLETTI: I'm instructing Mr. Ward not to answer that question so as to preserve his Fifth Amendment privilege.

BY MR. RAZI:

Q. Are you going to accept your counsel's instruction?

MR. SPAGNOLETTI: I'm instructing Mr. Ward not to answer that question so as to preserve his Fifth Amendment privilege.

BY MR. RAZI:

Q. Describe your relationship with Robert Wone[.]

MR. SPAGNOLETTI: I'm instructing Mr. Ward not to answer that question so as to preserve his Fifth Amendment privilege.

BY MR. RAZI:

¹ The Notice of Deposition is attached hereto as Exhibit A.

Q. You're going to accept your counsel's instruction?

MR. SPAGNOLETTI: I'm instructing Mr. Ward not to answer that so as to preserve his Fifth Amendment privilege.

BY MR. RAZI:

Q. Are you aware that Robert Wone died in August of 2006?

MR. SPAGNOLETTI: I'm going to instruct Mr. Ward not to answer that question so as to preserve his Fifth Amendment privilege.

BY MR. RAZI:

Q. Are you going to accept your counsel's instruction?

MR. SPAGNOLETTI: I instruct Mr. Ward not to answer that question so as to preserve his Fifth Amendment privilege.

BY MR. RAZI:

Q. Prior to the night of Robert Wone's death, when had you last seen him?

MR. SPAGNOLETTI: I'm going to instruct Mr. Ward not to answer that question so as to preserve his Fifth Amendment privilege.

BY MR. RAZI:

Q. Are you going to accept your counsel's instruction?

MR. SPAGNOLETTI: I'm going to instruct Mr. Ward not to answer that question so as to preserve his Fifth Amendment privilege.

See Exhibit B, Transcript of November 10, 2010, Deposition of Dylan Ward, at 15:6-17:7. This lengthy representative passage contains not a single utterance from Defendant Ward, who had been "instruct[ed]" not to say anything by his counsel.

As a result of Defendant Ward's non-answers, it is not clear whether Defendant Ward was trying to invoke his Fifth Amendment privilege through his counsel's statements or whether he was choosing for other reasons to ignore counsel's questions. Plaintiff's counsel

recessed the deposition in an effort to resolve the dispute over Defendant Ward's non-responsiveness. After counsel were unable to resolve the disagreement among themselves, the parties contacted the Court by telephone in order to seek guidance. *See* Exhibit B at 20:8-31:6 (conference with Court). During that conference, counsel and the Court agreed on an expedited briefing schedule for this issue and set a hearing date of December 8.

ARGUMENT

I. IF DEFENDANT WARD INTENDS TO INVOKE HIS FIFTH AMENDMENT RIGHT IN THIS CASE, HE MUST DO SO PERSONALLY.

The "Fifth Amendment is a personal privilege." *Couch v. United States*, 409 U.S. 322, 328 (1973) (emphasis in original). It belongs only to "a person who shall be compelled in any criminal case to be a witness against himself." *Fisher v. United States*, 425 U.S. 391, 398 (1976) (emphasis in original). Using that Supreme Court precedent as a starting point, courts have held consistently that the privilege may only be invoked in a civil deposition by a witness himself, rather than counsel.

As the United States Court of Appeals for the Tenth Circuit, for instance, has explained: "Only the [deponents], not their counsel, are the proper parties to interpose a claim of privilege personal to themselves to prevent compelled disclosures that appellants 'reasonably believe[] could be used [against them] in a criminal prosecution or could lead to other evidence that might be so used.'" *United States v. Schmidt*, 816 F.2d 1477, 1481 n.3 (10th Cir. 1987) (quoting *Kastigar v. United States*, 406 U.S. 441, 445 (1972)) (emphasis added).² Similarly, the United States District Court for the Eastern District of New York recently called it a "substantial

² See also *United States v. A&P Arora, Ltd.*, 46 F.3d 1152, 1995 WL 18276, at *3 (10th Cir. 1995) (table) ("[A] statement of counsel's 'advice' is obviously not the equivalent of a party's personal and affirmative invocation of the privilege.").

flaw” to attempt to invoke the Fifth Amendment privilege through counsel. *Textron Fin. Corp. v. Eddy’s Trailer Sales, Inc.*, No. CV 08-2289(JFB)(AKT), 2010 WL 1270182, at *3 (E.D.N.Y. Mar. 31, 2010) (granting in part motion to compel). The United States District Court for the Southern District of New York has reached the same conclusion. “[I]f a truthful answer would tend to incriminate [the deponent], she must invoke her Fifth Amendment right herself; counsel is not entitled to instruct her not to answer on that ground.” *Pal v. N.Y. Univ.*, No. 06 Civ. 5892 (PAC)(FM), 2007 WL 4358463, at *10 (S.D.N.Y. Dec. 10, 2007) (granting motion to compel) (emphasis added).

The reason that the Fifth Amendment must be asserted by the witness is because the privilege is the witness’s. And, if not asserted by the witness, there is no way to know whether the witness has elected to follow his counsel’s advice to invoke the Fifth Amendment.

As a New Jersey appellate court explained in the grand jury context:

An attorney cannot claim the privilege for his client, because, among other reasons, one can never tell when a witness may decide to answer questions, even one who has indicated a contrary intent to his counsel or the court, and the court should always keep the door open for a decision by the witness to testify rather than discourage it.

In re Grand Jury Subpoenas Served on Farber, 574 A.2d 449, 457 (N.J. Super. Ct. App. Div. 1989) (internal quotation marks omitted); Exhibit B, Transcript of November 10, 2010 Court Conference at 22:22-23:2 (“JUDGE HEDGE [via telephone]: I think he has to actually state that he is invoking his Fifth Amendment privilege because it’s . . . personal to him.”). *Cf. United States v. Bowe*, 698 F.2d 560, 565 (2d Cir. 1983) (“[T]he witness herself must assert the claim

that answers to questions might reasonably implicate her in a crime or provide evidence leading to proof of criminal behavior.”).³

II. PERSONAL INVOCATION IS REQUIRED FOR MRS. WONE TO CHALLENGE DEFENDANTS’ REFUSAL TO ANSWER DEPOSITION QUESTIONS.

Defendant Ward’s silence tactic apparently is aimed at preventing Mrs. Wone from challenging the applicability of the Fifth Amendment privilege and/or seeking other relief from the Court, including adverse inference jury instructions, as a result of any Fifth Amendment invocations. The Court should not permit this.

Any challenge to a Fifth Amendment assertion by Defendant Ward “requires that all questions to which answers are sought be put to the witness and the witness be forced to either answer the question or assert the privilege.” *Femia v. McLaughlin*, 126 F.R.D. 426, 431 (D. Mass. 1989); *see also* Exhibit B, Transcript of November 10, 2010 Court Conference at 21:21-22 (“JUDGE HEDGE [via telephone]: It’s got to be question by question.”). Only then will Mrs. Wone be able to file a motion to compel answers where she contends that a Fifth Amendment invocation was inappropriate. But because Defendant Ward has not answered any of the substantive questions put to him—not even the question whether he is asserting the Fifth Amendment privilege—there is no invocation of the privilege to be challenged. *Cf. In re J.W.*, 837 A.2d 40, 48 (D.C. 2003) (explaining that the Fifth Amendment privilege is not “self-

³ It is well-recognized that a witness in a civil deposition must personally assert his Fifth Amendment privilege. *See, e.g.,* Mark W. Williams, *Pleading the Fifth in Civil Cases*, *Litigation Magazine* at 33 (Spring 1994) (“I advise clients to provide this response: ‘Pursuant to the privileges afforded to me by the Fifth Amendment . . . I respectfully decline and refuse to answer or respond . . . on the grounds that my answer and response thereto . . . may tend to incriminate me.’ . . . Where testimony is involved, give the client a three-by-five card with this on it to read when needed.”); Richard L. Scheff, Scott A. Coffina, and Jill Baisinger, *Taking The Fifth In Civil Litigation*, *Litigation Magazine* at 4 (Fall 2002) (“[T]he party must . . . claim the privilege as to the specific questions that create a risk of self-incrimination.”) (emphasis added).

executing,” that it must be invoked in response to specific questions, and that there was no evidence in this particular instance that the Fifth Amendment privilege had been invoked).

Moreover, without an answer from Defendant Ward on the record, Mrs. Wone will be unable to ask the jury to draw an adverse inference from counsel’s “instruction” that Defendant Ward remain silent. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (“[T]he prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”). “[S]tatements of counsel are not evidence.” *In re Estate of Bonham*, 817 A.2d 192, 195 n.5 (D.C. 2003) (citing Standardized Civil Jury Instructions for the District of Columbia, No. 2-5 (1998)). Currently, however, all the record contains are statements of counsel. In order for Mrs. Wone to be able to seek the adverse inferences and other relief to which she will be entitled under Rule 37, Defendant Ward himself has to invoke the privilege.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff’s Motion to Compel. Specifically, the Court should order Defendant Ward to either answer deposition questions or, if he so chooses, he may personally and verbally assert the Fifth Amendment privilege.

Respectfully submitted,

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	(202) 662-6000

Dated: November 19, 2010

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, I caused a copy of Plaintiff's Motion to Compel Testimony or Fifth Amendment Invocations by Defendant Ward and the accompanying Memorandum in Support to be served via CaseFileXpress on the following counsel:

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Counsel for Defendant Joseph Price

/s/ Benjamin J. Razi
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Exhibit A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by
KATHERINE E. WONE,
as Personal Representative,

Plaintiff,

v.

JOSEPH R. PRICE,
VICTOR J. ZABORSKY,
and DYLAN M. WARD,

Defendants.

Civil Action No. 008315-08

The Honorable Brook Hedge

Next Court Event: February 14, 2011
Deadline for Discovery Requests

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, at 9:30 a.m., on Wednesday, November 10, at the offices of Covington & Burling LLP, 1201 Pennsylvania Avenue NW, Washington, DC, 20004, Plaintiff Estate of Robert E. Wone, by and through its attorneys, will take the deposition upon oral examination of Defendant Dylan M. Ward before a notary public or other officer authorized by law to administer oaths. The oral examination will be recorded by stenographer and videotape.

You are invited to attend and cross-examine.

Respectfully submitted,

/s/ Benjamin J. Razi

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Stephen W. Rodger (srodger@cov.com)

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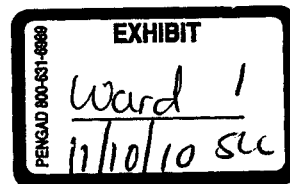
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October 5, 2010

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2010, I caused a copy of the foregoing Notice of Deposition to be served via e-mail and first class mail on the following counsel:

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Counsel for Defendant Victor Zaborsky

/s/ Brett C. Reynolds

Brett C. Reynolds

Exhibit B

1 APPEARANCES:

2
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5 BRETT C. REYNOLDS, ESQ.

6 CHARLES KITCHER, ESQ.

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11 -and-

12 PATRICK M. REGAN, ESQ.

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15 410-783-6341

16 On behalf of the Defendant Zaborsky:

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22 410-584-9443

1 APPEARANCES CONTINUED:

2 ALSO PRESENT:

3 Sal Napolitano, Videographer

4 Katherine E. Wone, Plaintiff

5 Kathrin Graham

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C O N T E N T S

WITNESS EXAMINATION BY COUNSEL FOR
DYLAN M. WARD PLAINTIFF

By Mr. Razi

7

E X H I B I T S

WARD EXHIBIT NO.	PAGE NO.
Exhibit Ward 001	Notice of Deposition Dylan M. Ward 6
Exhibit Ward 002	Defendant Dylan Ward's Answers to Plaintiff's First Set of Interrogatories 6

* * *

P R O C E E D I N G S

(Exhibit Ward 001 and Exhibit Ward 002
was marked for identification.)

THE VIDEOGRAPHER: This marks the
beginning of tape number one in the deposition of
Dylan M. Ward in the matter of the Estate of Robert
E. Wone, by Katherine E. Wone, as Personal
Representative, plaintiff, versus Joseph R. Price,
Victor J. Zaborsky, and Dylan M. Ward, defendants, in
Civil Action Number 008315-08 filed in the Superior
Court of the District of Columbia, Civil Division,
and held in the offices of Covington & Burling, 1201
Pennsylvania Avenue, Northwest, Washington, D.C. on
Wednesday, November 10, 2010 at the time indicated on
the video screen, currently 9:33.

The court reporter is Susan Ciminelli.
The videographer is Sal Napolitano, both on behalf of
the Henderson Legal Services. Will the attorneys
introduce themselves, and then the reporter will
swear in the witness.

MR. RAZI: Benjamin Razi from Covington &

1 Burling, for the plaintiff.

2 MR. REYNOLDS: Brett Reynolds from
3 Covington & Burling, for the plaintiff.

4 MR. REGAN: Patrick Regan, also for the
5 plaintiff, and also present is Kathrin Graham.

6 MR. KITCHER: Also present, Charles
7 Kitcher, plaintiff.

8 MR. SPAGNOLETTI: Robert Spagnoletti for
9 Mr. Dylan Ward.

10 MR. ROSWELL: Craig Roswell for Joseph
11 Price.

12 MR. EDWARDS: Sean Edwards for Victor
13 Zaborsky.
14 Whereupon,

15 DYLAN M. WARD,
16 was called as a witness by counsel for Plaintiff, and
17 having been duly sworn by the Notary Public, was
18 examined and testified as follows:

19

20 EXAMINATION BY COUNSEL FOR PLAINTIFF

21

22 BY MR. RAZI:

1 Q. Would you please state your name for the
2 record, sir.

3 A. Dylan, D-Y-L-A-N, Ward, W-A-R-D.

4 Q. What's your current home address?

5 A. [REDACTED]
6 [REDACTED]

7 Q. Are you currently employed?

8 A. No.

9 Q. Do you -- do you work in any capacity
10 currently?

11 A. No.

12 Q. What's your current occupation?

13 A. I am a writer and message therapist,
14 currently unemployed.

15 Q. Are you performing message therapy
16 services on a part-time basis currently?

17 A. Very part-time.

18 Q. What kind of writer are you?

19 A. Educational materials.

20 Q. What type of educational materials?

21 A. For English as a foreign language.

22 Q. I'm going to show you what's been marked

1 as Ward Exhibit 1, and we'll provide a copy to your
2 counsel as well. For the record, Ward Exhibit 1 is a
3 Notice of Deposition in this case. Mr. Ward, have
4 you seen Exhibit 1 before?

5 A. I'm seeing it now.

6 Q. This is the first time?

7 A. Yes.

8 Q. Do you understand that you're here today
9 to give a deposition in the Estate of Robert Wone
10 versus Joseph Price, et al., a civil lawsuit?

11 A. Yes.

12 Q. Have you ever given a deposition before?

13 A. No.

14 Q. Have you ever testified under oath before?

15 A. Yes.

16 Q. On how many occasions?

17 A. One.

18 Q. And that was in the, the suppression
19 hearing in the criminal case last summer, is that
20 right?

21 A. Yes.

22 Q. But apart from that, you've never

1 testified under oath?

2 A. No. I'm sorry.

3 Q. What did you do to prepare for your
4 deposition today?

5 A. I spoke with my attorney.

6 Q. Mr. Spagnoletti?

7 A. Yes.

8 Q. Did you, did you review any documents?

9 A. No.

10 Q. I'm going to hand you what's been marked
11 as Ward Deposition Exhibit 2. This is a document
12 provided to us by your counsel in August 2010, and
13 it's captioned Defendant Dylan Ward's Answers to
14 Plaintiff's First Set of Interrogatories. Please
15 take a moment to review Exhibit 2, and let me know
16 when you've done so.

17 A. Okay.

18 Q. Do you recognize Exhibit 2?

19 A. Yes.

20 Q. What is it?

21 A. Defendant Dylan Ward's Answers to
22 Plaintiff's First Set of Interrogatories.

1 Q. And you signed this document on page 10,
2 correct?

3 A. Yes.

4 Q. And you, did you review Exhibit 2 prior to
5 signing it?

6 A. Yes.

7 Q. And you swore and affirmed in Exhibit 2
8 that the answers contained in it were true and
9 correct to the best of your knowledge, understanding
10 and belief?

11 A. Yes.

12 Q. In response to a number of the
13 interrogatories in Exhibit 2, you answered "upon
14 advice of counsel, at this time Defendant Ward
15 exercises his right under the Fifth Amendment to the
16 Constitution of the United States to decline to
17 answer this interrogatory." Is that right?

18 MR. SPAGNOLETTI: I'm instructing Mr. Ward
19 not to answer that question so as to preserve his
20 Fifth Amendment privilege.

21 BY MR. RAZI:

22 Q. Let me try it this way. Are you prepared

1 to testify today about Robert Wone's death?

2 MR. SPAGNOLETTI: I'm instructing Mr. Ward
3 not to answer that question so as to preserve his
4 Fifth Amendment privilege.

5 BY MR. RAZI:

6 Q. Are you going to follow your counsel's
7 instruction?

8 MR. SPAGNOLETTI: I'm instructing Mr. Ward
9 not to answer that question so as to preserve his
10 Fifth Amendment privilege.

11 BY MR. RAZI:

12 Q. Who do you live with in [REDACTED]
13 [REDACTED]?

14 MR. SPAGNOLETTI: I'm instructing Mr. Ward
15 not to answer that question so as to preserve his
16 Fifth Amendment privilege.

17 BY MR. RAZI:

18 Q. Does anyone else live with you in your
19 home in [REDACTED]?

20 MR. SPAGNOLETTI: I'm instructing Mr. Ward
21 not to answer that question so as to preserve his
22 Fifth Amendment privilege.

1 MR. RAZI: You think there is a Fifth
2 Amendment issue potentially about who he lives with?

3 MR. SPAGNOLETTI: Do you have another
4 question for Mr. Ward?

5 MR. RAZI: I've got a lot. I'm going to
6 ask all of them. I'd like to hear from him at some
7 point.

8 BY MR. RAZI:

9 Q. Did you attend college, sir?

10 A. Yes.

11 Q. Where?

12 A. Georgetown University.

13 Q. Did you graduate?

14 A. Yes.

15 Q. When?

16 A. 1992.

17 Q. Have you obtained any postgraduate
18 degrees?

19 A. Yes.

20 Q. In what?

21 A. Children's literature.

22 Q. Is that a Masters?

1 A. Yes.

2 Q. How about -- you mentioned that you're a
3 message therapist. Have you been trained as a
4 message therapist?

5 A. Yes.

6 Q. Where?

7 A. Potomac Message Training Institute.

8 Q. Anywhere else?

9 A. Thai Message School of Chiang Mai.

10 Q. When did you receive training at the
11 Potomac Message Training Institute?

12 A. 2000 -- I believe I began in 2005, and I
13 believe I finished in 2007.

14 Q. And what was the second school that you
15 identified?

16 A. Thai Message School of Chiang Mai.

17 Q. How do you spell the last word?

18 A. M-A-I.

19 Q. How about the second to last word?

20 A. C-H-I-A-N-G.

21 Q. That's in Thailand?

22 A. Yes.

1 Q. When did you study at the Thai Message
2 School of Chiang Mai?

3 A. I believe April to June of 2007.

4 Q. What did you study there?

5 A. Thai message.

6 Q. When did you first meet Robert Wone?

7 MR. SPAGNOLETTI: I'm instructing Mr. Ward
8 not to answer that question so as to preserve his
9 Fifth Amendment privilege.

10 BY MR. RAZI:

11 Q. Are you going to accept your counsel's
12 instruction?

13 MR. SPAGNOLETTI: I'm instructing Mr. Ward
14 not to answer that question so as to preserve his
15 Fifth Amendment privilege.

16 BY MR. RAZI:

17 Q. Describe your relationship with
18 Robert Wone?

19 MR. SPAGNOLETTI: I'm instructing Mr. Ward
20 not to answer that question so as to preserve his
21 Fifth Amendment privilege.

22 BY MR. RAZI:

1 Q. You're going to accept your counsel's
2 instruction?

3 MR. SPAGNOLETTI: I'm instructing Mr. Ward
4 not to answer that so as to preserve his Fifth
5 Amendment privilege.

6 BY MR. RAZI:

7 Q. Are you aware that Robert Wone died in
8 August of 2006?

9 MR. SPAGNOLETTI: I'm going to instruct
10 Mr. Ward not to answer that question so as to
11 preserve his Fifth Amendment privilege.

12 BY MR. RAZI:

13 Q. Are you going to accept your counsel's
14 instruction?

15 MR. SPAGNOLETTI: I instruct Mr. Ward not
16 to answer that question so as to preserve his Fifth
17 Amendment privilege.

18 BY MR. RAZI:

19 Q. Prior to the night of Robert Wone's death,
20 when had you last seen him?

21 MR. SPAGNOLETTI: I'm going to instruct
22 Mr. Ward not to answer that question so as to

1 preserve his Fifth Amendment privilege.

2 BY MR. RAZI:

3 Q. Are you going to accept your counsel's
4 instruction?

5 MR. SPAGNOLETTI: I'm going to instruct
6 Mr. Ward not to answer that question so as to
7 preserve his Fifth Amendment privilege.

8 BY MR. RAZI:

9 Q. Between the night of Robert Wone's death
10 and the present, how many times have you seen or
11 spoken with Kathy Wone?

12 MR. SPAGNOLETTI: I'm going to instruct
13 Mr. Ward not to answer that question so as to
14 preserve his Fifth Amendment privilege.

15 BY MR. RAZI:

16 Q. In fact, you met with her in the basement
17 of her house in Oakton just a couple of days after
18 the murder, right?

19 MR. SPAGNOLETTI: I'm going to instruct
20 Mr. Ward not to answer that question so as to
21 preserve his Fifth Amendment privilege.

22 BY MR. RAZI:

1 Q. And during that conversation, Mr. Price
2 told Mrs. Wone that neither he nor you nor Victor
3 Zaborsky witnessed Robert's stabbing, correct?

4 MR. ROSWELL: Objection.

5 MR. EDWARDS: Objection.

6 MR. SPAGNOLETTI: I'm going to instruct
7 Mr. Ward not to answer that question so as to
8 preserve his Fifth Amendment privilege.

9 BY MR. RAZI:

10 Q. Mr. Price also said to Mrs. Wone during
11 that meeting in August 2006 at her house that neither
12 you nor he nor Victor Zaborsky knew who stabbed
13 Robert Wone, is that correct?

14 MR. ROSWELL: Objection.

15 MR. EDWARDS: Objection.

16 MR. SPAGNOLETTI: I'm going to instruct
17 Mr. Ward not to answer that question so as to
18 preserve his Fifth Amendment privilege.

19 BY MR. RAZI:

20 Q. And you were present when you heard
21 Mr. Price relay this information to Mrs. Wone,
22 correct?

1 MR. ROSWELL: Objection.

2 MR. EDWARDS: Objection.

3 MR. SPAGNOLETTI: I'm going to instruct

4 Mr. Ward not to answer that question so as to

5 preserve his Fifth Amendment privilege.

6 BY MR. RAZI:

7 Q. Did you make any statement to Mrs. Wone at

8 all during that meeting?

9 MR. SPAGNOLETTI: I'm going to instruct

10 Mr. Ward not to answer that question so as to

11 preserve his Fifth Amendment privilege.

12 BY MR. RAZI:

13 Q. In fact, you didn't share with her during

14 that meeting in August 2006 all that you knew about

15 Robert Wone's murder, correct?

16 MR. SPAGNOLETTI: I'm going to instruct

17 Mr. Ward not to answer that question so as to

18 preserve his Fifth Amendment privilege.

19 BY MR. RAZI:

20 Q. And neither did Mr. Price or Mr. Zaborsky?

21 MR. ROSWELL: Objection.

22 MR. EDWARDS: Objection.

1 MR. SPAGNOLETTI: I'm going to instruct
2 Mr. Ward not to answer that question so as to
3 preserve his Fifth Amendment privilege.

4 MR. RAZI: Let's take a five-minute break.

5 THE VIDEOGRAPHER: We are going off the
6 record at 9:48.

7 (Recess.)

8 (The following is a telephone conference
9 with The Honorable Brook Hedge held off the video
10 camera, commencing at 10:25 a.m.)

11 JUDGE HEDGE: Good morning.

12 MR. SPAGNOLETTI: Good morning, Judge.

13 MR. RAZI: Good morning.

14 MR. REGAN: Good morning, Judge Hedge.

15 JUDGE HEDGE: I take it all counsel are
16 there?

17 MR. RAZI: Yes, Your Honor.

18 JUDGE HEDGE: I don't think it's wise or
19 appropriate for me to make a ruling on any Fifth
20 Amendment issue without having the benefit of what it
21 is, the context and some briefing on it. I mean, I
22 suppose you can tell me what the issue is, but I

1 really am disinclined. What I'm inclined to do is
2 say you can ask the questions, preserve what may be
3 appropriate, as opposed to spending any time arguing
4 over it, and then you can submit short briefs to me
5 and then I can put you on the calendar either next
6 week or the first week of December, and even the
7 30th, I could probably do it, and then
8 landlord-tenant the Thanksgiving week, but -- and I
9 will be sitting most of December, so I'd be happy to
10 hear it that way. But I think I'd be more
11 comfortable hearing the context of this Fifth
12 Amendment issue because I suspect it's going to
13 control a number of things.

14 MR. RAZI: Well, Judge, maybe I can just,
15 I think it might be simpler than that. This is Ben
16 Razi, counsel for the plaintiff. The issue that we
17 have here is not whether it's appropriate to invoke
18 the Fifth Amendment, but instead whether the witness
19 has to in fact invoke the Fifth Amendment in order
20 for it to be effectively invoked or if instead --

21 JUDGE HEDGE: It's got to be question by
22 question.

1 MR. RAZI: Right. That's our
2 understanding as well, Your Honor, that it has to be
3 question by question and moreover, that the witness
4 himself has to invoke it, as opposed to having
5 counsel.

6 JUDGE HEDGE: Right. As opposed to
7 counsel.

8 MR. SPAGNOLETTI: Well, Your Honor this is
9 Bob Spagnoletti here. I'm relying on Rule ^ 30 D 1
10 which says that a person may instruct a deponent not
11 to answer when necessary to preserve a privilege.
12 And so the manner in which we've been proceeding, the
13 question has been asked. We, I have as counsel for
14 the deponent instructing him not to answer in order
15 to preserve the privilege. And I believe --

16 JUDGE HEDGE: Well, I think a follow-up
17 question, though, can be asked do you accept your
18 counsel's advice on the privilege, and assert it.

19 MR. RAZI: Exactly, Your Honor. We've
20 been asking those questions, and so far, the witness
21 has been sitting there not audibilizing any response.

22 JUDGE HEDGE: I think he has to actually

1 state that he is invoking his Fifth Amendment
2 privilege because it's his personal to him. I
3 recognize attorney-client as to it, but it's a
4 different type of privilege.

5 MR. RAZI: And that was our understanding
6 as well, and for the record, we have no problem with
7 Mr. Spagnoletti's instructions. Those are entirely
8 appropriate. But the question is is the witness
9 going to accept that instruction or is he instead
10 going to not accept it and decide to testify.

11 MR. SPAGNOLETTI: Your Honor, if I just
12 may be heard for one second on this. It does sort of
13 undermine the whole idea of the rule because the rule
14 is not specific to any particular privilege, and
15 there is certainly plenty of circumstances where the
16 witness may not necessarily want to, but is certainly
17 compelled to by the fact that the privilege is held
18 by somebody else. Now, here the privilege is his,
19 but he shouldn't be forced to respond when the rule
20 clearly makes it an option for someone to be telling
21 him not to answer the question, and the basis of the
22 privilege. As long as my instruction makes clear the

1 basis of the privilege, I don't, to be candid I don't
2 see where the rule requires him thereafter to say
3 anything.

4 JUDGE HEDGE: Well, and I understand your
5 subtle distinction, and that's why I think it may be
6 better, I'd like to see some cases on it, because I
7 can't believe this hasn't come up, and the
8 recollection of mine when I had this come up was a
9 long time ago when the witness had to be the one to
10 assert it after the counsel said so, but I understand
11 the subtleties of this and that there is a, a
12 difference in kind or measure of texture or
13 otherwise. If counsel is advising the client not to
14 do it because of the Fifth and the client actually
15 saying I take the Fifth and I understand the
16 defense's concern, and I think this is something that
17 he has to invoke as his constitutional right, but in
18 order to be safe, I think you could ask the question.
19 If he declines to answer plaintiff's questions with
20 respect to whether or not he is accepting his
21 counsel's advice, then it's preserved and you can
22 come to me and if I order that he has to specifically

1 state on the record whether he is going to accept his
2 client's advice, take the Fifth Amendment or not,
3 that it can be then reopened for that purpose.

4 MR. REGAN: Judge, this is Pat Regan.
5 Would you consider, it's probably going to be a three
6 or four-hour question by question. Would you
7 consider ruling on this in the next few weeks and
8 then we just resume the deposition based on your
9 ruling, as opposed to going through it and then
10 having to go through it a second time?

11 JUDGE HEDGE: I would certainly be willing
12 to do that. I just, I was trying to make it more
13 efficient for you, because if he is then asked to,
14 whether on the record whether he accepts his
15 attorney's advice or not, I would assume -- maybe I'm
16 assuming incorrectly that his answer would be yes. I
17 invoke the Fifth.

18 MR. RAZI: I'm assuming that's going to be
19 his answer.

20 JUDGE HEDGE: I just thought that way you
21 would know immediately what the field, was and it
22 just speeds it along, because he could well just

1 adopt and say as to questions on pages 100 to 550, I
2 accept my client's advice and I assert my Fifth
3 Amendment privilege to each of those questions, and
4 then you don't have to go back and re-ask every one
5 if that's an acceptable solution.

6 MR. REGAN: Well, Your Honor, because --
7 it's Pat Regan, again. Because it's on video, I
8 think we are going to have to, if we can agree to a
9 briefing schedule now I think it's probably going to
10 be more efficient to --

11 JUDGE HEDGE: To reopen it.

12 MR. REGAN: Yes.

13 JUDGE HEDGE: That's fine. I have no
14 problem with that. You don't need, the more you
15 brief fine. I don't need lengthy briefs. What I
16 need is the case citations, a couple of sentences or
17 paragraphs. I can read the cases and then I can have
18 you in for arguments. It can be bullets. It can be
19 short. I'm not asking to you belabor it, because I'm
20 obviously going to go ahead and read the materials
21 and have you in, and I could do it, you know,
22 whatever time is good for you, either the 30th or

1 the, I'm open the following week like around December
2 7th, but probably that week might almost be better.

3 MR. RAZI: For the plaintiff, we can make
4 those dates work.

5 MR. SPAGNOLETTI: As can we. It's
6 probably -- the other thing, we do have two other
7 depositions coming up, and the possibility of this
8 issue repeating itself is --

9 JUDGE HEDGE: It's the same.

10 MR. SPAGNOLETTI: It's the same. Just so
11 we are clear in the room, the issue that we are
12 briefing here is not the substance of the Fifth
13 Amendment privilege, but just the question of whether
14 or not having been instructed not to answer based on
15 Rule 30 D 1 ^ , the witness thereafter is required to
16 then either accept his attorney's advice or
17 personally assert the privilege, is that my
18 understanding?

19 JUDGE HEDGE: At this point it's that
20 narrow issue. You don't know what he is actually
21 going to assert or not, and that's the problem. So I
22 would say it's just that narrow issue of is the

1 attorney asserting it for purposes of Rule 30 and
2 civil practice, or does the client actually have to
3 state, I accept my attorney's, in response to the
4 question, do you accept your attorney's advice, and
5 he says yes, I'm invoking the Fifth.

6 MR. SPAGNOLETTI: Absolutely. We are fine
7 with that.

8 JUDGE HEDGE: I think probably it would be
9 better for my schedule if it's okay, when do the
10 other depositions conclude?

11 MR. RAZI: There is one next week, Your
12 Honor, and the two are on the 17th and 23rd, but they
13 involve the other party defendants as well, so I
14 think what we would do -- all the counsel are shaking
15 their heads -- we would put those off until we've
16 cleared up this issue.

17 JUDGE HEDGE: How soon can you submit
18 something to me?

19 MR. RAZI: We can do it very soon for the
20 plaintiff. Today is Wednesday. You know by close of
21 business Friday. I mean, I'm thinking, five pages
22 each, simultaneous submissions.

1 MR. SPAGNOLETTI: With all due respect,
2 Your Honor, this is really the defendants' request
3 for position. I think that we should see what they
4 have to say, and their basis before we respond.

5 JUDGE HEDGE: What I'd like to have you do
6 is do simultaneous and do simultaneous replies. Is
7 that -- or you can --

8 MR. SPAGNOLETTI: But we can do it
9 quickly, though. I mean, I'm not looking for a long
10 time.

11 JUDGE HEDGE: I'm in landlord tenant the
12 first three days of the 22nd to the 24th, so you know
13 frankly you know how landlord-tenant is. I'm not
14 going to see light of day. And then it is
15 Thanksgiving, and I do have some cooking to do.

16 MR. SPAGNOLETTI: As do I, Your Honor.

17 JUDGE HEDGE: I'm sure we have other
18 commitments. So if you want to just have the
19 plaintiffs file their brief first by the 19th, that's
20 fine, and the defense can then file their reply by
21 what time?

22 MR. SPAGNOLETTI: That's Friday. How

1 about Wednesday the 24th before the holiday.

2 JUDGE HEDGE: That's fine. And then does
3 the plaintiff want any reply by the 30th or not?

4 MR. RAZI: Yes. Please.

5 JUDGE HEDGE: Okay. By the 30th. Why
6 don't we set this down for December 7th. Is that a
7 good time?

8 MR. RAZI: That's fine, Your Honor.

9 MR. EDWARDS: That's fine, Your Honor.

10 JUDGE HEDGE: And let's say 10 o'clock on
11 December 7, and if something changes I'll let you
12 know, but I think that date is probably fine.

13 MR. SPAGNOLETTI: Excellent.

14 JUDGE HEDGE: Is the 8th just as good?

15 MR. RAZI: Just as good for the plaintiff,
16 I think.

17 MR. EDWARDS: Hold on.

18 MR. SPAGNOLETTI: It's fine for Mr. Ward.

19 MR. ROSWELL: It's fine for Mr. Price.

20 MR. EDWARDS: In fact, the 8th might be
21 better.

22 JUDGE HEDGE: Okay. That would be great.

1 If we can do it December 8th at 10 a.m. in courtroom
2 517.

3 MR. RAZI: Thank you very much, Your
4 Honor, for your time.

5 JUDGE HEDGE: We'll just issue a short
6 order. Have a good holiday. Good-bye.

7 MR. SPAGNOLETTI: Do you want to just
8 bring Mr. Ward back in just to adjourn?

9 MR. RAZI: Why don't we bring him back.
10 I'll make a brief statement on the record, and you
11 can correct everything.

12 (The telephone conference concluded at
13 10:36 a.m.)

14 (Discussion off the record.)

15 THE VIDEOGRAPHER: We are on the record at
16 10:37.

17 MR. RAZI: This is Ben Razi again. I just
18 want to explain for the record what's been going on,
19 so the record is clear. We've been off the record
20 for sometime as a result of a disagreement among
21 counsel as to the proper means of the witness
22 asserting the privilege.

1 It's our position that the witness himself
2 needs to assert the privilege, and not, and that it
3 cannot only be done through an instruction from
4 counsel, and indeed we think that the witness has to
5 verbally accept his counsel's instruction on the
6 record.

7 Mr. Ward's counsel disagrees with that and
8 we've had a conference, brief conference on the phone
9 with Judge Hedge and agreed on an accelerated
10 briefing schedule to resolve the disagreement, and I
11 believe all the parties are agreed to adjourn the
12 deposition for the day, and resume it on a mutually
13 agreeable date after Judge Hedge has clarified this
14 procedural issue. Is that correct?

15 MR. SPAGNOLETTI: Yes.

16 MR. EDWARDS: Yes.

17 MR. ROSWELL: Yes.

18 JUDGE HEDGE: I thank everybody for
19 coming, and we'll see you again soon.

20 THE VIDEOGRAPHER: This ends tape number
21 one, and we are off the record at 10:39.

22 (The deposition adjourned at 10:39 a.m.,

1 to be continued at a later date.)

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ACKNOWLEDGMENT OF DEPONENT

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